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 FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the warrantless use of a GPS tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment.

2. Whether the government violated respondent's Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 10

ARGUMENT 10

I. THE GOVERNMENT'S INSTALLATION AND USE OF A GPS DEVICE TO GENERATE AND STORE DATA ABOUT JONES'S MOVEMENTS AND LOCATIONS CONSTITUTED A FOURTH AMENDMENT SEARCH 14

A. The Government's Installation And Use Of A GPS Device Constituted A Search Regardless Of The Amount Of Time It Was Used 15

1. The Physical Intrusion Onto And Usurpation Of Jones's Property 16

2. The Unique Dangers Posed By Unrestrained GPS Monitoring 24

3. The Nature Of GPS Data 28

B. The Government's Responses Lack Merit 30

TABLE OF CONTENTS
(continued)

Page

1. The Fourth Amendment Protects Against Uniquely Intrusive Means Of Obtaining Evidence Even If Similar Information Could Have Been Obtained Through Less Intrusive Means 31

2. *Knotts* And *Karo* Did Not Involve The Features That Make GPS Surveillance A Search 35

3. The Court Should Not Disregard The Threat That Warrantless GPS Surveillance Poses To Core Fourth Amendment Interests 39

C. The Government's Installation And Use Of The GPS Device For 24 Hours A Day For Four Weeks Constituted A Search 42

1. Information About A Person's Pattern Of Movements And Locations Is Uniquely Private 43

2. The D.C. Circuit's Decision Is Workable 45

II. THE GOVERNMENT'S INSTALLATION AND USE OF A GPS DEVICE CONSTITUTED FOURTH AMENDMENT SEIZURES 45

A. The Installation Of The GPS Device Onto Jones's Vehicle Constituted A Fourth Amendment Seizure 46

TABLE OF CONTENTS
(continued)

Page

1. The Government Commits A "Seizure" When It Meaningfully Interferes With A Possessory Interest 46

2. The Right To Exclude Others From One's Property Is A Possessory Interest Protected By The Fourth Amendment 47

3. The Government's Installation Of The GPS Device Was A Meaningful Interference With Jones's Possessory Interest In His Vehicle..... 48

B. The Government Engaged In An Additional Fourth Amendment Seizure When It Used The GPS Device To Record Data About Jones's Locations And Movements..... 53

III. THE GOVERNMENT WAS REQUIRED TO OBTAIN A VALID WARRANT 54

CONCLUSION..... 61

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. DOJ,
—F.3d—, 2011 WL 3890837 (D.C. Cir. Sept. 6, 2011) 3

Arizona v. Gant,
129 S. Ct. 1710 (2009).....57

Arizona v. Hicks,
480 U.S. 321 (1987).....45, 54

Arizona v. Johnson,
555 U.S. 323 (2009).....59

Bd. of Educ. v. Earls,
536 U.S. 822 (2002).....59

Bell v. Town of Wells,
557 A.2d 168 (Me. 1989) 48

Berger v. New York,
388 U.S. 41 (1967).....53

Bond v. United States,
529 U.S. 334 (2000).....18, 34, 43, 44

Boyd v. United States,
116 U.S. 616 (1886).....28

Brigham City, Utah v. Stuart,
547 U.S. 398 (2006).....59

Brinegar v. United States,
338 U.S. 160 (1949).....60

Brower v. County of Inyo,
489 U.S. 593 (1989).....46, 52

TABLE OF AUTHORITIES
(continued)

Page(s)

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387 U.S. 523 (1967).....27

City of Ontario v. Quon,
130 S. Ct. 2619 (2010).....22, 23

Coolidge v. New Hampshire,
403 U.S. 443 (1971).....39, 57

County of Riverside v. McLaughlin,
500 U.S. 44 (1991).....45

Delaware v. Prouse,
440 U.S. 648 (1979).....23, 33, 34

DOJ v. Nat'l Reporters Committee, 489 U.S.
749, 764 (1989) 43

Entick v. Carrington,
19 How. St. Tr. 1029, 95 Eng. Rep. 807
(K.B. 1765) 47

Florida v. Riley,
488 U.S. 445 (1989).....33

Georgia v. Randolph,
547 U.S. 103 (2006).....15, 29, 57

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888 N.E.2d 875 (Ind. Ct. App. June 12,
2008).....20

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385 U.S. 293 (1966).....21

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547 U.S. 586 (2006).....53

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Page(s)

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540 U.S. 419 (2004).....26, 37, 38

Johnson v. United States,
333 U.S. 10 (1948).....40, 57

Kaiser Aetna v. United States,
444 U.S. 164 (1979).....47

Katz v. United States,
389 U.S. 347 (1967).....passim

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533 U.S. 27 (2001).....passim

L.A.V.H. v. R.J.V.H.,
2011 WL 3477016 (N.J. Super. Ct. Aug. 10, 2011).....20

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982).....47, 48

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2010 WL 1200329 (Del. Family Ct. Jan. 12, 2010).....20

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130 S. Ct. 1213 (2010).....45

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496 U.S. 444 (1990) . No.....59

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525 U.S. 83 (1998).....18, 33

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495 U.S. 91 (1990).....15, 17

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371 U.S. 415 (1963).....27

New York v. Burger,
482 U.S. 691 (1987).....59

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480 U.S. 709 (1987).....15

Oliver v. United States,
466 U.S. 170 (1984).....22

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277 U.S. 438 (1928).....42

Opinion of the Justices,
313 N.E.2d 561 (Mass. 1974).....48

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649 A.2d 604 (N.H. 1994) 48

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53 P.3d 1181 (Colo. Ct. App. 2002) 20

People v. Weaver,
882 N.Y.S.2d 357 (N.Y. 2009).....21, 24, 29

Rakas v. Illinois,
439 U.S. 128 (1978).....17, 19, 47

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356 F.3d 393 (2d Cir. 2004) 50

Samson v. California,
547 U.S. 843 (2006).....59

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(continued)

Page(s)

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365 U.S. 505 ..... passim

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251 U.S. 385 (1920) 32

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131 S. Ct. 1289 (2011) 55

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442 U.S. 735 (1979) 15

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506 U.S. 56 (1992) 17, 46, 47

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2003 (en banc) 23

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433 U.S. 1 (1977) 23, 33

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640 F.3d 272 (7th Cir. 2011) 24, 27, 39

United States v. Dunn,
480 U.S. 294 (1987) 33, 35

United States v. Flores-Montano,
541 U.S. 149 (2004) 59

United States v. Jacobsen,
466 U.S. 109 (1984) 47

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468 U.S. 705 (1984) ..... passim

United States v. Knights,
534 U.S. 112 (2001) 55, 57

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Page(s)

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646 F.3d 1107 (8th Cir. 2011).....32

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617 F.3d 1120 (9th Cir. 2010).....11,24, 25

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401 U.S. 745 (1971).....27, 29

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447 U.S. 649 (1980).....32, 34

Wolf v. Colorado,
338 U.S. 25 (1949).....28

Wong Sun v. United States,
371 U.S. 471 (1963).....52

CONSTITUTION AND STATUTES

21 U.S.C. § 843.....5

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2005 Ut. ALS 75 (2005).....22

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(continued)

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STATEMENT OF THE CASE

I. A. In 1978, the U.S. Department of Defense launched the Navigational Satellite Timing and Ranging Global Positioning System, or GPS, for the U.S. military's use. *See* Renée M. Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. Rev. 409, 414 (2007) (citing Def. Sci. Bd. Task Force, Dep't of Def., *The Future of the Global Position System* 4, 25-26 (2005)) (hereinafter Hutchins). The system operates through 25 government-owned satellites orbiting the earth, each of which "continuously transmits the position and orbital velocity of every satellite in the system." *Id.* at 415. A GPS device "'listens' to the transmissions of the four closest satellites," and, through a process known as trilateration, "determines its precise location on earth." *Id.* at 415-17.

GPS devices produce an accurate, continuous, and three-dimensional digital record of their position and velocity over any period of time—as well as that of any person or object carrying them. *See* Muhammad U. Iqbal & Samsung Lim, *Privacy Implications of Automated GPS Tracking and Profiling*, IEEE Tech. & Soc'y Magazine (2010), *available at* http://www.gmat.unsw.edu.au/snap/publications/usman&lim2007c.pdf. These data can be communicated to a remote computer through a cellphone connection and translated onto an interactive map." *Id.* Even without the application of additional software, a GPS device is "accurate within 50 to 100 feet." Pet. Br. 3-4. With additional software, the FBI can identify the most likely exact longitude, latitude, and address "on the mapping system," JA 80-81, with accurate "posi-

tioning to within a few centimeters" or even "millimeter[s]," *see* "GPS Accuracy," http://www.gps.gov/systems/gps/performance/accuracy (last visited Sept. 25, 2011). And the technology is rapidly improving. *See* Hutchins, *supra*, at 421.

B. Through the first two decades of the system's existence, only the military could access accurate encrypted GPS signals; unencrypted civilian signals were "intentionally riddled with random errors" to "reduce the accuracy of the information transmitted for civilian purposes." *Id.* at 415. In 2000, however, the government decided to make accurate transmissions available for civilian use. *Id.* (citing Statement by the President Regarding the United States' Decision to Stop Degrading Global Positioning System Accuracy, 1 Pub. Papers 803 (May 1, 2000)).

This decision led to the development of civilian GPS applications, "including cellular telephones and onboard navigation systems in automobiles," which individuals voluntarily use for their own private purposes. *Id.* at 414. These applications have occasionally been misused. Private individuals have violated anti-stalking laws by using GPS devices against others without their consent. *See* Katrina Baum et al., Bureau of Justice Statistics: Stalking Victimization in the United States, at 5 (Jan. 2009) (use of GPS devices "comprised about a tenth of the electronic monitoring of stalking victims"), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svus.pdf. In addition, private companies have been severely criticized for appearing to store GPS data beyond customers' informed consent. *See* Ki Mae Huessner, *Apple Responds to iPhone Tracking Controversy*,

ABC News (Apr. 27, 2011); John R. Quain, *Changes to OnStar's Privacy Terms Rile Some Users*, N.Y. Times Wheels Blog (Sept. 22, 2011).

The decision to make unencrypted civilian signals available has also led to law enforcement efforts to use GPS surveillance devices in investigations. Accurate information about the ways in which federal and state agents use GPS technology is not available, and the federal government has not been forthcoming. *See* Pet. 24 (asserting it now "frequently use[s] tracking devices early in investigations," but with no elaboration); *ACLU v. DOJ*, —F.3d—, 2011 WL 3890837, at *2 (D.C. Cir. Sept. 6, 2011) (refusing, on privacy grounds, to release docket information about cases in which GPS data were already produced to a court). But there is evidence that, like private individuals, the government has at least sometimes abused the technology. *See, e.g.*, Kim Zetter, *Battle Brews Over FBI's Warrantless GPS Tracking*, Wired.com (Mar. 9, 2011) (describing GPS surveillance of animal rights activist); Bob Egelko, *San Jose Arab American Sues FBI Over GPS*, S.F. Chronicle (Mar. 3, 2011) (GPS tracking of college student); Jennifer Valentino-DeVries, *Senators Ask Intelligence Agencies About Location Tracking of Americans*, Wall St. Journal Digits Blog (July 14, 2011).

II. A. In September of 2005, law enforcement agents approached respondent Antoine Jones's Jeep Grand Cherokee while it was parked in a public lot in Maryland, and affixed a GPS surveillance device to the undercarriage of the vehicle without Jones's knowledge or consent. Once attached, the device au-

tomatically recorded transmissions from orbital satellites and calculated the vehicle's precise location in relation to those satellites in ten-second intervals. The device then automatically conveyed the GPS data to the government using the device's mobile transmitter. JA 81-82, 85. Although the GPS data were transmitted to remote law enforcement computers in real time, the data were also stored automatically and required no real-time monitoring. *Id*.

For the following four weeks, the GPS device calculated every movement and identified every stop Jones made in his vehicle every ten seconds of every day. Whenever the vehicle moved, the device generated location and velocity data; whenever the car was not moving, the device went into sleep mode and sent no data, thus informing law enforcement that the vehicle and device remained in place. *Id.* at 82, 84, 86-87. Over the course of a month of virtually seamless GPS surveillance, the government obtained satellite-generated data not just about Jones's discrete journeys and stops, but also patterns of movement and location. Pet. App. 33a, 36a n.*. The government had no intention to stop or minimize the GPS device's indiscriminate tracking of the jeep in the event that Mrs. Jones (in whose name the jeep was registered, *see* Br. in Opp. 3 n.1), the Joneses' college-age son, or someone other than Jones were to use the vehicle. And it made no effort to prevent the device from transmitting data on the various occasions when Jones's vehicle was parked in his family's enclosed garage. JA 181; Pet. App. 84a-85a. The government ultimately collected more than 2,000 pages worth of GPS data. *See* JA 109-110, 128.

Law enforcement agents originally obtained a warrant to install the GPS device, but they failed to comply with its terms. The warrant was valid for only ten days and authorized the installation of the GPS device within the District of Columbia; the agents installed the device onto Jones's vehicle on the eleventh day, while the vehicle was in a public parking lot in Maryland. Pet. App. 38a-39a n.*, 66a-74a, 83a. The agents thus installed and used the device without a valid warrant.

B. The government ultimately discovered large amounts of narcotics at a suspected stash house in Fort Washington, Maryland. It concluded that the GPS data showed that Jones had a habit of visiting that address. *Id.* at 30a. n.*. But the government found no narcotics or drug paraphernalia on Jones, and it had no direct evidence that Jones was responsible for the drugs in Fort Washington. *Id.* at 40a-42a. Instead, the government contended that Jones was tied to a narcotics conspiracy because of his pattern of trips to the suspected stash house, his facially innocuous (but allegedly coded) conversations with suspected customers, and the approximately $70,000 that Jones—who was the proprietor of a night club—kept in his car. *Id.* at 30a n.*, 40a-41a; JA 182.

A federal grand jury indicted Jones for conspiracy to distribute five kilograms or more of cocaine, and use of telecommunications facilities in furtherance of narcotics trafficking, in violation of 21 U.S.C. §§ 843(b) and 846. Prior to trial, Jones moved to suppress the GPS evidence. The district court denied relief, with the exception of GPS evidence obtained while the jeep was parked in Jones's garage. Those

data, the trial judge reasoned, came from inside a private residence where Jones had a reasonable expectation of privacy. Pet. App. 54a, 83a-85a.

Jones was acquitted of all unlawful telecommunications charges at his first trial, but the jury hung on the conspiracy charge. At his second trial, the GPS logs proved essential to the prosecution's case, as the government used them to link Jones to the claimed stash house. Jones was convicted of the conspiracy charge. *Id.* at 2a, 30a n.*, 39a-41a.

III. On appeal, Jones argued that both the installation of the GPS device and the resulting GPS surveillance violated his Fourth Amendment rights. The court of appeals did not address the installation claim, however, because it agreed that the use of a GPS device for 24 hours a day for a month constituted an unconstitutional search. *Id.* at 15a-42a.

The court of appeals began with *United States v. Knotts*, 460 U.S. 276 (1983), in which this Court held that there is no reasonable expectation of privacy against visual observation of a single journey on public thoroughfares, even when the observation is aided by a beeper technology that transmits radio signals and informs police whether a vehicle is getting closer or further away. The court assumed, without deciding, that *Knotts*'s holding would equally apply to GPS monitoring. *See* Pet. App. 37a (making the assumption but cautioning that "'[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment'" (quoting *Kyllo v. United States*, 533 U.S. 27, 35 n.2

(2001)). Even with that assumption, the court found *Knotts* inapplicable, because law enforcement in this case "used the GPS device not to track Jones's 'movements from one place to another,' *Knotts*, 460 U.S. at 281, but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place to place." *Id.* at 21a-22a.

The court of appeals therefore considered whether the government's four-week 24-hour GPS surveillance constituted a search. Applying the two-step framework of *Katz v. United States*, 389 U.S. 347 (1967), the court first asked whether Jones had a subjective expectation of privacy. Pet. App. 16a, 22a-31a. It held that he did. Unlike "movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *Id.* at 22a-23a. Indeed, the government pointed to no "single actual example of visual surveillance" as intrusive as the GPS tracking in this case, *id.* at 35a, and "[n]o doubt the reason is that practical considerations prevent visual surveillance from lasting very long," *id.* at 36a.

In addition, "the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts." *Id.* at 22a-23a. "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." *Id.* at 30a.

The court next asked whether Jones's privacy expectation was reasonable, *id.* at 32a-35a, and found that it was, because "prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse." *Id.* at 33a. In fact, prolonged GPS monitorring is more intrusive than "every police practice the Supreme Court has deemed a search under *Katz*." *Id.*

IV. The D.C. Circuit denied the government's petition for rehearing *en banc*. *Id.* at 43a-52a.

A. In an opinion concurring in the denial of rehearing en banc, Judges Ginsburg, Tatel, and Griffith explained that "because the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful." *Id.* at 44a. The government's only argument was based on the automobile exception to the warrant requirement, and that exception did not apply. *Id.*

B. Chief Judge Sentelle, joined by three others, wrote a dissenting opinion. He thought "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." *Id.* at 47a-48a.

Judge Kavanaugh separately dissented. Although he expressed agreement with Chief Judge Sentelle's opinion, he clarified that "[t]hat is not to say, however, that I think the Government necessarily would prevail in this case." *Id.* at 49a. Judge Kavanaugh would have reviewed whether Jones's Fourth Amendment rights were violated "by the police's initial installation of the GPS device on his car without a warrant." *Id.* After noting that this "property-based argument" might find support in "the Court's unanimous 1961 decision in *Silverman v. United States*, 365 U.S. 505," he concluded that it presented "an important and close question." Pet. App. 52a.

SUMMARY OF ARGUMENT

The government surreptitiously installed a GPS device onto Jones's vehicle, without his knowledge or consent. Once affixed, the GPS device automatically communicated with satellites orbiting the earth to generate and store precise longitudinal and latitudinal calculations of Jones's every move, and transmitted those data to a remote government computer. The warrantless installation and use of this device constituted unreasonable searches and seizures in violation of Jones's Fourth Amendment rights.

I. The government's installation and use of the GPS device constituted a Fourth Amendment search.

A. The government's installation and use of the device was a search, regardless of how long the device was used. Under *Katz v. United States*, 389 U.S. 347 (1967), Jones had a reasonable expectation of privacy that a satellite-based GPS device would not be affixed to his vehicle and used to generate and permanently store GPS data about his movements and locations. Three features of the government's GPS surveillance support this conclusion.

1. First, the government surreptitiously installed the GPS device onto Jones's vehicle—and thus physically intruded onto Jones's private property without his knowledge or consent. The fact that the government violated Jones's property rights to obtain these data supports the conclusion that Jones's expectation of privacy was reasonable. *Silverman v. United States*, 365 U.S. 505 (1961).

2. Second, warrantless government GPS surveillance is a grave and novel threat to the personal pri-

vacy and security of individuals. As Judge Kozinksi warned, "[t]here is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (dissenting from denial of rehearing en banc).

GPS technology empowers the government to engage in indiscriminate and perpetual monitoring of any individual's movements. It enables seamless monitoring of entire networks of individuals, political associations, even entire communities. And "the marginal cost of an additional day—or week, or month—of GPS monitoring is effectively zero." Pet. App. 36a. Unrestrained GPS monitoring is therefore a grave threat to expressive and political association, as well as to the personal privacy and security of every individual in the country.

3. Third, the government's GPS device generated and stored a unique form and quality of data that was not exposed to the naked eye. Although a person traveling on public thoroughfares knowingly exposes himself to visual observation, he does not knowingly offer GPS data to public viewing. The government can obtain GPS data only by using a GPS device.

B. The government's responses are meritless. The government first argues that obtaining evidence about Jones's movements on public streets could *never* be a search because only "technological intrusions into *private places* can infringe a legitimate ex-

pectation of privacy." Pet. Br. 22 (emphasis added). But this Court's cases establish that privacy is not an all-or-nothing concept, that privacy can flourish in public areas, and that the "fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001)).

The government also relies on *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), but those cases are not controlling. They involved visual surveillance with the aid of a now-antiquated beeper technology. They did not involve any of the three features that make GPS monitoring a Fourth Amendment search, much less all three.

C. Even if GPS surveillance is not always a search, the D.C. Circuit correctly held that it is at minimum a search when the government uses the technology for a prolonged period of time.

Prolonged use of GPS technology enables the government to generate and store patterns of movement and location that could not feasibly be obtained through visual surveillance. Although the government argues that the D.C. Circuit's decision creates an unworkable standard, this Court has full authority to adopt a bright-line rule—for instance, that GPS becomes a search when conducted for longer than a day.

II. The government's installation and use of the GPS device also constituted Fourth Amendment seizures.

A. First, the government's installation of the device meaningfully interfered in Jones's possessory right to exclude others from using his vehicle for their own ends. There is no historical or socially accepted practice of installing GPS devices onto others' cars; indeed, a private individual's surreptitious use of a GPS device against another would constitute trespass to chattels and possibly even criminal conduct. This interference was meaningful.

B. Second, the government committed a seizure when it stored GPS data about Jones's movements and locations. Because the government created the data by usurping Jones's property without his consent, Jones had a Fourth Amendment interest in that intangible data. And because the GPS device not only generated but also permanently stored the data for the government's use, the data were seized.

III. The government alternatively argues that if its GPS monitoring was a search or seizure, it should be required only to show that reasonable suspicion supported its use of the technology.

The government failed to preserve this argument in the lower courts, and should not be allowed to advance it for the first time here. The argument is also meritless. This Court's cases have departed from the warrant requirement and probable-cause standard only when special circumstances, distinct from the general interest in law enforcement, justify the departure. None are present.

ARGUMENT

I. THE GOVERNMENT'S INSTALLATION AND USE OF A GPS DEVICE TO GENERATE AND STORE DATA ABOUT JONES'S MOVEMENTS AND LOCATIONS CONSTITUTED A FOURTH AMENDMENT SEARCH

For four weeks in 2005, law enforcement agents used a GPS surveillance device to obtain satellite-generated data about every movement Jones and his wife made in their vehicle for 24 hours of every day. In order to obtain this evidence, the government first installed the GPS device onto Jones's vehicle without his knowledge or consent. Once installed, the device automatically communicated with orbital satellites to calculate its longitude and latitude at ten-second increments, and transmitted these data to a remote government computer. It ultimately generated and stored over 2,000 pages of data about Jones's movements and locations over the four-week period.

The government's installation and use of the GPS device constituted a Fourth Amendment search for two reasons. First, GPS surveillance is a search when conducted for any amount of time, because it involves a uniquely intrusive technology that operates by converting an individual's vehicle into a satellite-data transceiver at the government's service. Second, as the D.C. Circuit correctly held, GPS surveillance is a search at least when the government generates and stores data for a prolonged period of time.

None of this is to deny that GPS devices are a

valuable law enforcement tool. And none of this precludes the government from using GPS technology zealously in its investigations. But the government must obtain the authorization of a neutral magistrate—or qualify for a valid exception to the warrant requirement—before doing so.

A. The Government's Installation And Use Of A GPS Device Constituted A Search Regardless Of The Amount Of Time It Was Used

Under *Katz v. United States*, 389 U.S. 347 (1967), and post-*Katz* cases, the government engages in a Fourth Amendment search whenever it intrudes on a subjective expectation of privacy that society is prepared to accept as reasonable. *See id.* at 360 (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979). An expectation of privacy is "reasonable" when it is consistent with "widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). There is no "talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable," *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality op.), but the Court has in the past measured the reasonableness of privacy expectations against "the everyday expectations of privacy that we all share," *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

In this case, Jones held a subjective expectation of privacy against the government's GPS surveillance. He had no knowledge of any socially accepted practice of installing GPS devices onto others' vehicles without their consent, and the government does

not suggest that such a practice exists. Jones therefore had no reason to believe that his movements and locations would be subjected to GPS surveillance without *his* consent.

Jones's expectation of privacy, moreover, is "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Three features of the government's GPS surveillance support this conclusion. First, GPS devices generate and store data about a person's movements and locations only if they are physically affixed to a person's private property; they operate by converting that property into a satellite-data transceiver at the government's service. And in this case, the government surreptitiously installed the device onto Jones's vehicle without his authorization. Second, warrantless GPS surveillance poses harrowing threats to personal privacy and security—threats that have until now existed only in dystopian novels. Third, GPS devices generate and store a unique form and quality of evidence that is not deliberately exposed to public view.

1. *The Physical Intrusion Onto And Usurpation Of Jones's Property*

The government installed the GPS device onto Jones's vehicle surreptitiously, without his knowledge or consent. The fact that an unauthorized physical intrusion onto, and usurpation of, Jones's property was a necessary feature of the government's GPS surveillance supports the conclusion

that his privacy expectations were reasonable.[1]

a. The Fourth Amendment protects "property as well as privacy." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). Its protections take account of property law concepts not only because they aid in determining whether the government has committed a seizure, *see infra* II.A., but also because they are an important and sometimes dispositive consideration in determining whether a subjective expectation of privacy is one that society is prepared to accept as reasonable. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (an "expectation is reasonable" if it "has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society'" (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978))).

Because "[o]ne of the main rights attaching to property is the right to exclude others," this Court has recognized that "one who owns or lawfully possesses or controls property will, in all likelihood, have a legitimate expectation of privacy by virtue of

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[1] The vehicle was registered in his wife's name, *see supra* p.4, but "[e]xcept with respect to his [wife], Jones had complete dominion and control over the [vehicle], and could exclude others from it." *Rakas v. Illinois*, 439 U.S. 128, 149 (1978). For Fourth Amendment purposes, the vehicle belonged to him. *See Minnesota v. Carter*, 525 U.S. 83, 95 (1998) (Scalia, J., concurring) ("People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free—*so long as they actually live there*.").

this right to exclude." *Rakas*, 439 U.S. at 143 n.12 (citing W. Blackstone, Commentaries, Book 2, ch. 1); *see also Bond v. United States*, 529 U.S. 334, 337 (2000) ("Physically invasive inspection is simply more intrusive than purely visual inspection."). As Judge Kavanaugh observed, "[i]f a person owns property or has a close relationship to the owner, access to that property usually violates his reasonable expectation of privacy." Pet. App. 52a (citation, alteration and internal quotation marks omitted)).

The Court recognized these principles in its unanimous decision in *Silverman v. United States*, 365 U.S. 505 (1961). There, the government recorded conversations using a "spike mike" that "usurp[ed] part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent." *Id.* at 506-07. The Court held that this usurpation of private property was a search, even though (as the government pointed out) then-valid precedent authorized the government to use sensitive microphone technology to record the same conversations without a physical trespass. The use of the spike mike was a search because it worked by "ma[king] contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound." *Id.* Because the officers overheard the conversations "only by usurping part of the petitioners'" property, *id.* at 511, their conduct amounted to a search, even though the physical intrusion was no more than "a fraction of an inch," *id.* at 512.

b. *Silverman* is controlling here. The government secretly installed a GPS device onto the underbody of Jones's car, where he was exceedingly unlikely to detect the intrusion onto, and continuing use of, his property for the government's own surveillance ends. By "mak[ing] contact" with Jones's vehicle, the government "usurp[ed]" Jones's property and "convert[ed] th[e] entire" car into a satellite-data transceiver at the government's service. *Id.* at 506-07. And it was this unauthorized physical intrusion that made it possible for the GPS device to generate data about Jones's every stop and move. Although the government asserts that its four-week intrusion was "ephemeral," Pet. Br. 47 n.6, it was far less "ephemeral" than the three-day contact in *Silverman*, *see* 365 U.S. at 506. Accordingly, under *Silverman*, Jones had a reasonable privacy expectation that his vehicle was available solely for his use, and could not lawfully be simultaneously used by the government—or any other entity—to closely monitor his daily life and routine without his consent.[2]

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[2] The government contends that *Silverman* has been overruled by *Katz*. Pet. Br. 46 n.6. That is incorrect. *Katz* overruled decisions holding that the government can *only* commit a search by committing a physical trespass; it did not overrule *Silverman*'s recognition that if the government usurps property to obtain evidence, its conduct is more likely to be a search. *See* Pet. App. 51a (Kavanaugh, J., dissenting from denial of rehearing en banc) (seeing "no indication" that *Silverman* is not "still good law"); *see also id.* at 50a (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (explaining that *Silverman* remains good law after *Katz*)).

The reasonableness of Jones's privacy expectations is confirmed by the fact that no private individual could lawfully engage in similar conduct. A private individual's surreptitious installation of a GPS tracker onto the property of another to monitor the owner's movements is not only a trespass to chattels, *see* Restatement (Second) of Torts § 217(b) & cmt. e (1965), but can form the basis for criminal liability under the laws of various states.[3] And the police would certainly not expect that anyone could permissibly affix GPS devices onto city patrol cars to secretly track police movement. For these reasons, the government cannot plausibly argue that by installing the GPS device onto Jones's vehicle, it was merely doing what any member of the public could do to any other. No one has the right to affix a GPS device onto another person's vehicle without her consent. And Jones reasonably expected that no one—not private individuals and certainly not the government acting without a warrant—would usurp his property in order to generate and record GPS data about his movements and locations. *See* William J.

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

Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo. Wash. L. Rev. 1265, 1268 (1999) (because the government "can easily condition the citizenry to expect little or no privacy," "Fourth Amendment privacy protection must be tied to something other than what people expect from the police," and "[t]he law's solution is to tie its protection to what people expect from one another.").

Nor is there any historical tradition or socially accepted practice of installing GPS devices onto others' property which would cut against the reasonableness of Jones's privacy expectations. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966) (finding no reasonable privacy expectation against government informers because "[c]ourts have countenanced the use of informers from time immemorial" (citation and internal quotation marks omitted)). Although photography and video camera recordings are now arguably ubiquitous and accepted activities in the public sphere, the same cannot be said about surreptitious GPS monitoring of others. Civilian GPS applications are popular, to be sure, but they are used by individuals who voluntarily choose to employ them for their own private purposes. And "the great popularity of GPS technology for its many useful applications may not be taken simply as a massive, undifferentiated concession of personal privacy to agents of the state," *People v. Weaver*, 882 N.Y.S.2d 357, 362 (N.Y. 2009), just as the great popularity of inviting guests to dinner may not be taken as a massive, undifferentiated concession of personal privacy

to government trespassers.[4]

c. *Oliver v. United States*, 466 U.S. 170 (1984), on which the government relies, does not diminish the significance of property interests under the Fourth Amendment. The Court there held that the government does not commit a search when it trespasses onto open fields—and it further held that individuals have no privacy interests against being visually observed while they or government agents are in open fields. *Id.* But the Court reached this conclusion on the grounds that the "explicit language" of Fourth Amendment protects only "persons, houses, papers, and effects," and that open fields are neither "houses" nor "effects." *Id.* at 176-77 & n.7. In this case, the government did not trespass upon Jones's unprotected open fields; it trespassed upon his vehicle, which is undoubtedly an "effect" protected by the Fourth Amendment. *See* Pet. App. 52 (Kavanaugh,

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[4] Indeed, three state legislatures have even directly barred their law enforcement officials from engaging in warrantless GPS surveillance, *see* Minn. Stat. Ann. § 626A.35 (2009); Haw. Rev. Stat. Ann. § 803-44.7 (2007); Utah Code Ann. § 77-23a-15.5(8) (2005) (clarifying that it is only appropriate to install GPS devices on one's own car); 2005 Ut. ALS 75 (2005) (explaining that "individuals other than law enforcement officers may attach mobile tracking devices to their own property"), and a fourth has explicitly recognized a reasonable expectation of privacy against GPS surveillance, *see* Cal. Penal Code § 637.7, Stats. 1998 c. 449 § 2. *See generally City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (state statutes regulating a means of obtaining information can support a finding that expectations of privacy are reasonable).

J., dissenting from denial of rehearing en banc) (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). And here, the government did not just trespass on Jones's car; it usurped his car for its own monitoring purposes in a way that would expose private persons to criminal liability in several states.

Vehicles are not only "effects," but particularly important ones in modern society. *Cf. Katz*, 389 U.S. at 352 (considering "the vital role that the public telephone has come to play in private communication"); *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (pervasiveness of mobile devices "might strengthen the case for an expectation of privacy"). Automobiles are a "basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities." *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979). "As the symbol of 'freedom,' motor vehicles play an essential role in the modern American lifestyle." Yihua Liao, *Vehicle Ownership Patterns of American Households* (2002), *available at* http://www.utc.uic.edu/~fta/Information%20Briefs/vehicles3.pdf. And "'[i]n this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles.'" 1 Wayne R. LaFave, Search & Seizure § 2.7(e) (4th ed. 2010) (quoting *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003 (en banc)) (hereinafter LaFave). Allowing the government to install GPS surveillance devices onto individuals' private automobiles without any suspicion or judicial oversight—or any Fourth Amendment constraint at all—would be inconsistent with widely held expectations of privacy and security.

And a ruling in the government's favor would sweep more broadly than vehicles, because if GPS surveillance were not a search, the government would be free to install devices onto *all* effects carried in public—briefcases, books, and even clothing—and to do so indiscriminately without any justification at all. This will be made even easier by future forms of the technology; "GPS products are in development that will be small enough to implant under the human skin." Hutchins, *supra*, at 421.

2. *The Unique Dangers Posed By Unrestrained GPS Monitoring*

The second feature of GPS technology that supports the reasonableness of Jones's privacy expectations is that it poses a substantial threat to the privacy and personal security the Fourth Amendment is designed to protect. As Judge Cudahy observed, GPS is "a technology surely capable of abuses fit for a dystopian novel." *United States v. Cuevas-Perez*, 640 F.3d 272, 276 (7th Cir. 2011). Or as Judge Kozinski put it: "There is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (dissenting from denial of rehearing en banc).

GPS technology presents these dangers because it enables the government to capture, at vanishingly low costs, "[t]he whole of a person's progress through the world, into both public and private spatial spheres … over lengthy periods possibly limited only

by the need to change the transmitting unit's batteries." *Weaver*, 882 N.Y.S.2d at 361. As the D.C. Circuit explained, "[c]ontinuous human surveillance for a week would require all the time and expense of several police officers," and "comparable photographic surveillance would require a net of video cameras so dense and so widespread as to catch a person's every movement, plus the manpower to piece the photographs together." Pet. App. 36a; *see also id.* at 36a n.* (quoting testimony of the former Chief of the Los Angeles Police Department that "constant and close" visual surveillance "is not only more costly than any police department can afford, but in the vast majority of cases it is impossible" (citation and internal quotation marks omitted). Indiscriminate GPS monitoring "is not similarly constrained." *Id.* at 36a. "On the contrary, the marginal cost of an additional day—or week, or month—of GPS monitoring is effectively zero." *Id.*; *see also Pineda-Moreno*, 617 F.3d at 1124 (Kozinski, J., dissenting from denial of rehearing en banc) ("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.").

The concern is of course not that GPS technology will aid the government in detecting crime. Rather, it is that if law enforcement agents are permitted to use GPS technology without first obtaining a warrant, they will use it to capture broad swaths of innocent information. That is precisely what the government did here: it tracked Jones for 24 hours of

every day, and recorded all of his movements, regardless of whether he was traveling to the suspected stash house or not, regardless whether he or his wife was driving the vehicle, and regardless of whether he was on public streets or within his enclosed garage. *See supra* p.4. And it is what the technology generally does: once a GPS device is placed on a car, it indiscriminately generates and stores GPS data about all of a person's movements for as long as the device is left in place.

The threat of indiscriminate monitoring is heightened because surreptitious GPS tracking requires no human involvement beyond installing the device and changing its batteries. Law enforcement therefore can use the technology to expand dramatically the scope of its surveillance activities without being subject to public scrutiny or being held accountable for abuses. *See Illinois v. Lidster*, 540 U.S. 419, 423-27 (2004) (Fourth Amendment protections are less urgent when police practice is conducted in full view—*e.g.*, vehicle roadblocks—and is thus constrained not only by "limited police resources" but also "community hostility"); *see also* David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 Minn. L. Rev. 563, 573 (1990) ("police accountability" "is absent when the community never learns of unjustified or errant police searches, as in the case of secret sense-enhanced searches," and police may therefore be "far less hesitant to engage in questionable, arbitrary, or inappropriate sense-enhanced searches"). Moreover, the technology could be capriciously used by *any* government official—not just by trained law enforcement officers. Warrantless GPS

tracking thus threatens to "alter the relationship between citizen and government in a way that is inimical to democratic society." *Cuevas-Perez*, 640 F.3d at 285 (Flaum, J., concurring in the judgment).

Indeed, unless constrained by the Fourth Amendment, the low cost and ready availability of GPS devices will encourage federal, state, and local governments to engage not only in seamless, prolonged GPS monitoring of individuals, but also mass, suspicionless GPS monitoring of networks of individuals and even entire neighborhoods, towns, or cities. *See* Pet. Br. 29 (arguing that "'the reasonable expectation of privacy as to a person's movements on the highway is … zero,'" and "'[t]he sum of an infinite number of zero-value parts is also zero'" (quoting Pet. App. 47a-48a)). With little effort, government employees could install GPS devices onto the cars of all of their political rivals, of every person attending a political rally, or of every customer of a bookstore or barbershop. Unrestrained GPS surveillance would thus be a grave threat to political and expressive association—both of which often depend on privacy to survive. *See NAACP v. Button*, 371 U.S. 415 (1963); *cf. United States v. White*, 401 U.S. 745, 762 (1971) (Douglas, J., dissenting) ("Monitoring, if prevalent … kills free discourse").

These concerns strike at the very heart of what the Fourth Amendment is designed to protect. The "basic purpose" of the Amendment, "as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *see also*

Wolf v. Colorado, 338 U.S. 25, 27 (1949) (Frankfurter, J.) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."). The Amendment therefore protects against "invasion of [an individual's] indefeasible right of personal security, personal liberty, and private property." *Boyd v. United States*, 116 U.S. 616, 630 (1886). But security cannot long reside in a people whose movements and locations are perpetually subject to warrantless GPS monitoring by their government.

3. *The Nature Of GPS Data*

The third feature of GPS technology that confirms the reasonableness of Jones's privacy expectations is the fact that GPS produces distinctive evidence—including precise longitudinal and latitudinal positions calculated by the device's distance from orbital satellites—which are different in both form and quality from the evidence that can be obtained through visual surveillance.

An officer who engages in visual surveillance records what she sees as a personal recollection. The same is true when she engages in visual surveillance with the aid of a beeper device. And if she takes notes or photographs, she "merely preserves the human observation in a fixed form" in order to "avoid forgetting what [she] ha[s] learned." Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700, 714-15 (2010) (hereinafter Kerr).

By contrast, GPS devices not only supplant human observation, but also generate a form and qual-

ity of evidence that visual observation could not produce. The device's automated tracking process generates a moment-by-moment calculation of the distance of a vehicle from multiple satellites in orbit above the earth, after which the calculations are transmitted to a government computer in the form of seamless location data onto an interactive map. *Id.* These location and velocity calculations are materially different from what the human eye observes. GPS data may be useful for some of the same purposes as the fruits of visual observation—and in a general sense, both GPS surveillance and visual surveillance produce "location information," Pet. Br. 22—but GPS data are nonetheless unique in form and quality.

Accordingly, "GPS is not a mere enhancement of human sensory capacity[;] it facilitates a new technological perception of the world," one that is not exposed to visual observation. *Weaver*, 882 N.Y.S2d at 361. A person traveling on public thoroughfares knowingly exposes himself to visual observation, but he does not knowingly offer satellite-calculated GPS data to public viewing. GPS data can be obtained only through the use of a GPS device.[5]

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[5] The plurality opinion in *White*, 401 U.S. at 751, is consistent with this analysis. It concluded that voluntary conversations with an undercover agent are not protected by the Fourth Amendment, even if the agent is secretly recording the conversation. *Id.* But it reached this conclusion because of the consensual interaction; "government monitoring with the confidant's consent is reasonable under the Fourth Amendment." *Randolph*, 547 U.S. at 131 (Roberts, C.J., dissenting) (citing *White*, 401 U.S.

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GPS devices require a physical intrusion onto, and usurpation of, an individual's private property; they are uniquely threatening to the privacy and security of individuals; and they capture evidence in a form and of a quality not obtainable through visual surveillance. For these reasons, Jones's subjective expectation of privacy against GPS surveillance was one that society is prepared to accept as reasonable. The government's use of GPS technology against Jones constituted a Fourth Amendment search.

B. The Government's Responses Lack Merit

The government offers three responses. First, it argues that when information is exposed to public viewing of any sort, it does not matter what means the government uses to obtain the information. Second, it argues that *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), establish that GPS surveillance is not a search. Third, it argues that GPS technology has not yet been misused and the Court should disregard the potential for abuse. These arguments fail.

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at 752). And there is no comparable consensual interaction here. Jones did not lend his vehicle to anyone; no third party (other than his wife) had the legal authority to install a GPS device. Nor did Jones make any deliberate disclosure of GPS data to a third party. He did not even create his own GPS data, much less voluntarily convey them to a third-party service provider. To the extent the government relies on third-party disclosure cases, *see* Pet. Br. 31-32, its reliance is misplaced.

1. *The Fourth Amendment Protects Against Uniquely Intrusive Means Of Obtaining Evidence Even If Similar Information Could Have Been Obtained Through Less Intrusive Means*

The government's first argument is, in essence, that the means do not matter. According to the government, there is a bright line between matters exposed to public view and matters that are private, and "a person has no reasonable expectation of privacy in information that is exposed to public view." Pet. Br. 18. It therefore argues that obtaining evidence about movements on public streets could *never* be a search; only "technological intrusions into *private places* can infringe a legitimate expectation of privacy." *Id.* at 22 (emphasis added).

This analysis is flawed. The Fourth Amendment protects against uniquely intrusive means of obtaining evidence—such as the government's physically intrusive, privacy-threatening, and satellite-data-generating GPS device in this case—even if the government could obtain similar information through other means, and even if the intrusive means is used in a public space.

a. This Court's precedents establish that privacy is not an all-or-nothing concept. Although it is often impossible or too costly for an individual to protect his actions or information from *all* conceivable types of viewing, a privacy expectation against *some* types of viewing can still be reasonable if consistent with widely shared social expectations. "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of

means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at 35 n.2; *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Fourth Amendment rights "are to be protected even if the same result might have been achieved in a lawful way"). Thus, the government's use of thermal imaging devices is a search, even though the government may be able to obtain information about heat emanating from the home by observing snow melting on the exterior of house walls, *Kyllo*, 533 U.S. at 35 n.2, or by obtaining the utility power records that are shared with third parties, *see, e.g.*, *United States v. McIntyre*, 646 F.3d 1107, 1111-12 (8th Cir. 2011).

The Court made this clear in *Silverman*: it found that the use of a physically intrusive spike mike was a search, even though, under then-existing law, the government could have used sensitive microphone technology to capture the same information. *See supra* I.A.1. Other decisions have reached similar results. In *Walter v. United States*, 447 U.S. 649 (1980), the Court held that even though FBI agents were free to observe the exterior packaging of contraband motion pictures, and the packaging "clearly revealed the nature of their contents," *id.* at 663 (Blackmun, J., dissenting), it was nonetheless an independent intrusion—and a search—to project the films to confirm their content, *see id.* at 654 (opinion of Stevens, J.); *id.* at 660 (opinion of White, J.). And in *Katz*, this Court found a reasonable expectation of privacy against the bugging of a public telephone booth, even though the government could have acquired the same information from the recipient of the call, or a lip reader, or a passerby who overheard

the conversation. 389 U.S. at 352.

To be sure, the Court has recognized that an individual may lack a reasonable expectation of privacy when she fails to take ordinary precautions to keep her information private. But these cases are not based on the mere fact that an individual is in public. Instead, they are based on the principle that if a person could have, but did not, take ordinary steps to prevent public observation, she cannot legitimately expect government agents to avert their eyes from what any member of the public could see—regardless of where she happens to be. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445 (1989); *Carter*, 525 U.S. at 104 (Breyer, J., concurring in the judgment).

And this Court has repeatedly affirmed that expectations of privacy may thrive in public places. In *Chadwick*, 433 U.S. at 7, the Court rejected the proposition that the Fourth Amendment "protects only dwellings and other specifically designated locales," and it reaffirmed that the Amendment "'protects people, not places,'" *id.* at 7 (quoting *Katz*, 389 U.S. at 351)). In *United States v. Dunn*, 480 U.S. 294 (1987), the Court recognized that the Fourth Amendment protects not just the home, but also the curtilage that surrounds the exterior of a home, *see id.* at 300. In *Kyllo*, it rejected a "mechanical interpretation of the Fourth Amendment" that would strip protection from any evidence radiating from a private area and into a public space. 533 U.S. at 25. In *Prouse*, it observed that "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks" or "when they step from the sidewalks into their auto-

mobiles." 440 U.S. at 663. And in *Bond*, the Court found reasonable privacy expectations against tactile examinations of carry-on luggage, even when luggage is in a public bus and the passenger "clearly expects that his bag may be handled." 529 U.S. at 337-38.

b. Together these cases confirm that, even if information is exposed in many ways, an individual may still reasonably expect that a unique form of evidence *about* that information will not be captured through a means that offends widely shared social expectations. And they show that the government errs in attempting to create a dichotomy between information in public places and information in private places—and between things that are completely exposed and things not exposed at all.

Tellingly, the government's proposed dichotomy is founded upon an inaccurate quotation of *Katz*. The government relies on *Katz*'s statement that "'[w]hat a person knowingly exposes to the public … is not a subject of Fourth Amendment protection.'" Pet. Br. 17-18 (quoting *Katz*, 389 U.S. at 351). But the government uses an ellipsis to obscure the fact that *Katz*'s "knowingly exposes" language was not focused on public places at all. *See Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, *even in his own home or office*, is not a subject of Fourth Amendment protection." (emphasis added)). Indeed, the next sentence in *Katz*, which the government fails to mention, explains that what an individual "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Id.* (emphasis added).

As the complete and unaltered quotation from *Katz* shows, this Court has not drawn a categorical, *a priori* line between public and private places. The question is always whether people have a reasonable privacy expectation against the specific method of obtaining evidence that the government has chosen to employ. It would not be a search to sneak up behind a person having a whispered cell phone conversation in a public park—but it would be a search to bug the person's phone. "When it comes to the Fourth Amendment, the means do matter." Pet. App. 37a.

2. Knotts *And* Karo *Did Not Involve The Features That Make GPS Surveillance A Search*

In support of its argument that GPS surveillance is not a search, the government relies on this Court's decisions in *Knotts* and *Karo*, in which the Court upheld the use of a now-antiquated beeper technology to facilitate visual surveillance. But neither case involved any of the three features that make GPS monitoring a search: there was no unauthorized usurpation of property for government use; the beeper technology did not realistically raise the specter of perpetual surveillance; and the beeper technology did not generate a unique form of evidence.

a. The beeper technology, as used in *Knotts* and *Karo*, did not involve an unauthorized physical intrusion onto personal property. In both cases, the beepers were installed into cans that the respondents later placed into their cars. But in both cases, the beepers were installed with the consent of the cans' owners.

In *Knotts*, government agents obtained the consent of the company that owned and sold chloroform cans to place a beeper into one of them. 460 U.S. at 279. The company then delivered the can to one of the respondent's associates, who mistakenly relied on the company in accepting the can and placing it in his vehicle. *Id.* Given that the government had not committed any unauthorized physical intrusion, the respondent expressly declined to raise an argument based on *Silverman*—and even confessed that "he did not believe he had standing to make such a challenge." *Id.* at 279 n. *; *see* Pet. App. 50a (Kavanaugh, J., dissenting from denial of rehearing en banc).

The facts of *Karo* were analogous. The beeper device in *Karo* was inserted, not into the private property of an unsuspecting individual, but into an ether can that belonged to the Drug Enforcement Agency. *Id.* at 708, 711. With the consent of a store clerk who had received a shipment of ether cans, the "agents substituted their own can containing a beeper for one of the cans in the shipment, and then had all 10 cans painted to give them a uniform appearance." *Id.* *Karo* thus did not raise a *Silverman* issue; there was no government intrusion onto private property without an owner's knowledge or consent. The respondents in *Karo* were left having to challenge the fact that the beeper was in the can at the moment the store owner transferred them—and the Court rejected *that* argument. *Id.* at 712 ("The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest.").

b. Furthermore, the beeper technology used in

Knotts and *Karo* did not raise realistic concerns about perpetual 24-hour surveillance. Instead, the Court compared the beeper device to a "searchlight" because it merely made visual surveillance more effective. *Id.* This enhancement of visual surveillance did not eliminate the need for direct human involvement. It therefore did not eliminate the marginal costs of prolonged and mass surveillance of an individual or networks of individuals, and did not significantly reduce the likelihood that excessive police presence would be met with "community hostility." *Lidster*, 540 U.S. at 426. Any concerns were further undermined by the fact that visual surveillance—which beeper technology merely facilitated—is an ancient practice that "was unquestionably lawful" at common law. *Kyllo*, 533 U.S. at 31-32 (quoting *Boyd*, 116 U.S. at 628).

Notably, the Court did not hold that sensory-supplanting technology *never* raises constitutional concerns; it merely held that the beeper technology of that day raised none. As the Court explained, "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them *in this case*." *Knotts*, 460 U.S. at 282 (emphasis added); *see also id.* at 285 ("[S]cientific enhancement *of this sort* raises no constitutional issues which visual surveillance would not also raise." (emphasis added)); *see also* 468 U.S. at 713-14 (same).

c. Finally, the beeper technology used in *Knotts* and *Karo* did not generate or store a unique form or quality of data. Indeed, it generated no evidence on

its own. It merely emitted a radio signal that a law enforcement officer could receive and use as a guide for his own visual surveillance. As the beeper got closer, the radio signal got louder; as the beeper got further away, the radio signal dimmed. *Knotts*, 460 U.S. at 277. Therefore, as noted, the Court found that beeper technology was akin to a "searchlight," which facilitates visual surveillance but does not generate any evidence on its own. *Id.*

* * * *

To be sure, *Knotts* states that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. But the Court "must read this and related general language in [*Knotts* and *Karo*] as [it] often read[s] general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Lidster*, 540 U.S. at 424. *Knotts*'s general language should be understood as applying to visual surveillance augmented by technology that did not involve (i) a challenged, unauthorized physical intrusion onto and usurpation of another's property, (ii) the realistic threat of mass and unending monitoring, or (iii) the acquisition of unique satellite-generated digital data. But if the Court were to conclude, contrary to its customary manner of reading prior decisions, that *Knotts* and *Karo* establish a more general principle that governs this case, then they should be confined to their specific facts and otherwise overruled. General language written

thirty years ago—and at a time when the seamless, perpetual surveillance that GPS makes possible was merely "science fiction," *Cuevas-Perez*, 640 F.3d at 279 (Flaum, J., concurring in the judgment)—should not be stretched beyond the facts on which they were based.

3. *The Court Should Not Disregard The Threat That Warrantless GPS Surveillance Poses To Core Fourth Amendment Interests*

The government's final response is that the Court "should not depart from its established reasonable-expectation-of-privacy framework to account for hypothetical misuse of technology that does not occur in reality." Pet. Br. 37. But the question is not whether some hypothetical future technology might make indiscriminate, perpetual, and mass surveillance possible; GPS presents those dangers now. And this Court has never afforded the government free reign to use privacy-threatening methods merely because of government promises that the power will not be abused. To the contrary, the Court has recognized that "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise that must rightly engage their single-minded attention." *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968)). Reasonable expectations of privacy must be protected by more than executive grace.

The government counters that "[t]he court of appeals pointed to no evidence that law enforcement

officers engage in GPS monitoring of vehicles without any suspicion of criminal activity." Pet. Br. 35. It does not *deny* that misuse of GPS technology is occurring; it merely notes the absence of evidence in the court of appeals's opinion. *Id.* And some evidence of abuse exists. *See supra* p.3. More might be available if the government were more forthcoming in disclosing the scope and nature of its use of GPS, which it acknowledges has been increasing. *Id.* In any event, the Fourth Amendment should be enforced even if the approximately 765,000 sworn state and local law enforcement agents and 105,000 sworn federal agents across the nation—and the innumerable non-law-enforcement employees at all levels of government—have not yet begun to abuse GPS technology.[6] The Fourth Amendment must be applied to "prevent stealthy encroachment upon or gradual depreciation of the rights secured by [it], by imperceptible practice of courts or by well-intentioned, but mistakenly over-zealous, executive officers." *Johnson v. United States*, 333 U.S. 10, 16 n.8 (1948) (citation and internal quotation marks omitted). That is why the Court in *Kyllo* did not ask for evidence that thermal imaging technology was being abused—or that future versions of the technology would be. 533 U.S. at 36.

The government seeks to allay concerns of abuse by asserting that "general [GPS] monitoring would

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[6] *See* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, Cato Supreme Court Review 256 n.83 (10th ed. 2011) (citing sources).

ordinarily prove to be an extraordinarily inefficient and unproductive use of law enforcement resources," because officers "would have to sift through and analyze voluminous lists of geographic coordinates … hoping to find some indication of criminal activity." Pet. Br. 35. This assertion elides the fact that the government could easily generate and store GPS data without analyzing it immediately. It also ignores the fact that GPS technology is fast-improving, *see* Hutchins, *supra*, at 420, and that computer software will increasingly automate even the parsing and analysis of satellite-generated data. Even if "the technology used in the present case was relatively crude, the rule [the Court] adopt[s] must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36.

The government also notes that privacy-protective statutes could be enacted. *See* Pet. Br. 35-37. But this Court has never held that because legislatures could protect privacy, the Fourth Amendment ought not. And when it reaffirmed the application of the Amendment to wiretaps implicating domestic national security in *United States v. United States Dist. Court*, 407 U.S. 297, 320 (1972), the Court rejected the government's argument that "internal security matters are too subtle and complex for judicial evaluation," and observed that "[i]f the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance," *id.* at 320. At the same time, it recognized that "Congress may wish to consider protective standards" of its own, which "may be com-

patible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." *Id.* at 322-23. Congress took up the suggestion six years later, enacting the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801 *et seq*. The Court should thus enforce the Fourth Amendment, even if legislation is desirable. Legislative action will become more likely if this Court first recognizes that reasonable privacy expectations exist and must be protected.[7]

C. The Government's Installation And Use Of The GPS Device For 24 Hours A Day For Four Weeks Constituted A Search

Even if GPS surveillance were not always a search, the government's conduct in this case would still be a search. As the D.C. Circuit correctly held, GPS surveillance is at least a search when conducted for prolonged periods. Contrary to the government's position, the Fourth Amendment does not allow it to engage in indiscriminate, month-long GPS monitor-

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[7] The Court did leave privacy protection to the legislatures in one notable case: *Olmstead v. United States*, 277 U.S. 438 (1928), which freed wiretapping from all Fourth Amendment restraints. In the decades following the decision, the FBI recorded hundreds of thousands of personal communications, not only of civil rights leaders but also of attorneys and their clients and even of sitting Supreme Court justices. *See* Alexander Charns, Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court 17-18, 24-31, 52 (1992). *Olmstead* should not be this Court's guide.

ing of a person without any justification at all.

1. *Information About A Person's Pattern Of Movements And Locations Is Uniquely Private*

Prolonged GPS surveillance enables the government to record information about a person's pattern of movement to a degree not feasible through visual surveillance. Although an individual's discrete travels on public roads may be observable by the naked eye, the same cannot be said of an individual's pattern of minute-by-minute movements and stops. Unlike a person's "movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil." Pet. App. 26a; *see also id.* at 36a & n.*. Because prolonged surveillance is exceedingly unlikely—and is practically impossible unless the government is willing to violate a person's property rights by installing a GPS device—expectations of privacy against the practice are reasonable. *See Bond*, 529 U.S. at 339 (bus passenger "expects that his bag may be handled," but he reasonably "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner").

Furthermore, information about a person's pattern of movements and locations is uniquely private. *See* Pet. App. 27a-28a (individuals can have "a privacy interest in the aggregated 'whole' distinct from their interest in the 'bits of information' of which it was composed" (quoting *DOJ v. Nat'l Reporters Committee*, 489 U.S. 749, 764 (1989)); *see also* Daniel

J. Solove, Understanding Privacy 106-16 (2008). For that reason, *Knotts* warned that the Fourth Amendment might not tolerate a future technology that enabled "twenty-four hour surveillance of any citizen of this country." *Knotts*, 460 U.S. at 283 (citation and internal quotation marks omitted). The advent of GPS technology has made *Knotts*'s hypothetical concern a present danger.[8]

Accordingly, GPS monitoring is a search at least when conducted for prolonged periods of time. This is not to say that obtaining pattern data is *always* a search. The prolonged use of GPS devices is a search because it both makes it possible to capture pattern information *and* is a uniquely intrusive means of doing so. *See supra* I.A; *see also* Pet. App. 37a ("When it comes to the Fourth Amendment, the means do matter."). And prolonged GPS monitoring is a search even if it does not ultimately produce pattern

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[8] The government rejoins that *Knotts* reserved only the question whether *mass* surveillance—which the government makes little effort to define—raises concerns. It draws that conclusion from *Knotts*'s reference to "dragnet" surveillance, which the government says can only refer to surveillance of multiple individuals. This argument is irrelevant. GPS surveillance of even a single individual for a month—or a year, or his entire lifetime—poses a grave concern. The argument is also incorrect: *Knotts*'s "dragnet" reference was made in response to an argument about 24-hour surveillance "of any citizen." Pet. App. 17a-18a. And "dragnet" can refer to "any system for catching a person, esp. a fugitive criminal." The Living Webster Encyclopedic Dictionary of the English Language 300 (1975).

data in a given case, just as lifting a turntable in a home is a search even if no intimate details are uncovered. "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

2. *The D.C. Circuit's Decision Is Workable*

The government criticizes the D.C. Circuit's holding as creating an unworkable standard. To the extent the Court wishes to adopt the D.C. Circuit's narrower rule, however, administrability concerns are no barrier to its adoption.

This Court has full authority to give concrete doctrinal content to what constitutes prolonged GPS monitoring, just as it has done in other areas. *See, e.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (adopting rule that judicial determinations of probable cause for detention are sufficiently prompt if provided within 48 hours of arrest); *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) (adopting 14-day rule for reinitiation of custody). It would be reasonable, for example, to hold that monitoring for longer than a day is a search. But if the Court concludes it does not wish to undertake such line-drawing, the answer is not to unleash unchecked government GPS monitoring and recording. The answer is to hold that any GPS monitoring is a search.

II. THE GOVERNMENT'S INSTALLATION AND USE OF A GPS DEVICE CONSTITUTED FOURTH AMENDMENT SEIZURES

The D.C. Circuit correctly held that the government engaged in a search. But the government vio-

lated Jones's Fourth Amendment rights for another reason: the installation and use of the GPS device were seizures. The installation was a seizure because it meaningfully interfered with Jones's possessory interest in excluding others from exploiting or usurping his vehicle. The use of the device was a further seizure because it generated and stored GPS data that the government sought to use against Jones.

A. The Installation Of The GPS Device Onto Jones's Vehicle Constituted A Fourth Amendment Seizure

1. *The Government Commits A "Seizure" When It Meaningfully Interferes With A Possessory Interest*

"The great end, for which men entered into society, was to secure their property." *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765); *see also* 1 The Records of the Federal Convention of 1787, at 534 (Max Farrand ed. 1937) ("One great objt. of Govt. is personal protection and the security of Property." (Alexander Hamilton)); 6 The Works of John Adams, at 280 (Charles Francis Adams ed. 1851) ("Property must be secured or liberty cannot exist." (John Adams)); *see also* James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights, at 13 (2d ed. 1998) ("[C]olonial leaders viewed the security of property as the principal function of government.").

The Fourth Amendment serves that end. *See Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992) ("[T]he Amendment protects property as well as pri-

vacy."). Although this Court's seizure cases have principally involved seizures of persons, *see, e.g.*, *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Fourth Amendment also explicitly protects against unreasonable seizures of a person's "houses, papers, and effects," U.S. Const. amdt. 4. A seizure of property occurs when "there is some meaningful interference with an individual's possessory interests"—"however brief" the interference may be. *United States v. Jacobsen*, 466 U.S. 109, 113 & n.5 (1984). The standard turns not on privacy, but on the possessory interests of the person in lawful possession or control of the property. Government conduct that does not "compromise any privacy interest" may nonetheless be "deemed an unlawful seizure." *Soldal*, 506 U.S. at 63.

2. *The Right To Exclude Others From One's Property Is A Possessory Interest Protected By The Fourth Amendment*

As noted, *supra* I.A.1., "[o]ne of the main rights" that belong to a person who "lawfully possesses or controls property" is "the right to exclude others." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (citing W. Blackstone, Commentaries, Book 2, ch. 1). Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *accord Kaiser Aetna v. United States*, 444 U.S. 164, 180 n.11 (1979) ("An essential element of individual property is the legal right to exclude others from enjoying it." (citation and internal quotation

marks omitted)). It is perhaps the "*sine qua non*" of property: "Deny someone the exclusion right and they do not have property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998).

Moreover, this Court has recognized that the right to exclude is a possessory interest. *See Loretto*, 458 U.S. at 435 (the "power to exclude" and the "right to possess" are two sides of the same general right of possession). The ordinary meaning of the phrase "possessory interests" is "[t]he present right to control property, *including the right to exclude others*." Black's Law Dictionary 1284 (9th ed. 2009) (emphasis added); *accord* Restatement (First) of Property Div. V, Pt. I, Introductory Note (1944) ("The presence or absence of the privilege of exclusive occupation marks the dividing line between possessory and nonpossessory interests."). Several state high courts have so recognized. *See, e.g.*, *Bell v. Town of Wells*, 557 A.2d 168, 178 (Me. 1989) ("'If a possessory interest in real property has any meaning at all it must include the general right to exclude others.'" (quoting *Opinion of the Justices*, 313 N.E.2d 561, 690 (Mass. 1974))); *Opinion of the Justices*, 649 A.2d 604, 611 (N.H. 1994) (same).

3. *The Government's Installation Of The GPS Device Was A Meaningful Interference With Jones's Possessory Interest In His Vehicle*

By installing a GPS device onto Jones's vehicle without his knowledge or consent, the government committed a seizure.

a. The government's physical intrusion upon Jones's vehicle interfered with his possessory interest in his property. Jones had a possessory right not only to use the vehicle for his own purposes, but also to exclude all others from using it. Unless the police have complied with the Fourth Amendment's requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Kleinfeld, J., concurring in the judgment).

This interference with Jones's right to exclude was meaningful. As explained *supra* I.A.1., there is no historical or socially accepted practice of installing GPS devices onto others' cars; indeed, a private individual's surreptitious use of a GPS device against another would constitute trespass to chattels and possibly even criminal conduct. Jones therefore had no reason to believe that law enforcement officers would surreptitiously install such a device onto his vehicle. He used his property in the reasonable assumption that his right to exclude would *not* be infringed in that manner. The installation was therefore fundamentally different from other types of minor trespasses that occasionally occur and that are widely accepted as insignificant—*e.g.*, resting a hand on someone else's car, or placing a flyer or pamphlet on the car's windshield. The installation was meaningful because "the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free." *Karo*, 468 U.S. at 729 (Stevens, J., concurring in part and dissenting in part).

b. The government responds that its installation was not a seizure because the vehicle was not damaged or destroyed. But it is possible to meaningfully interfere with possessory interests without damaging or destroying property; the government could, for instance, meaningfully interfere by affixing an odious political bumper sticker, an unwelcome religious symbol, or a commercial advertisement. And modern electronic, computer-based, and space-age technologies enable the government to meaningfully interfere with an individual's possessory right to exclude in additional, unprecedented ways. For instance, the government could easily attach bugging technology to a person's vehicle—or briefcase, purse, or even clothing—in order to record a person's conversations throughout the day. Modern cyber-surveillance technologies make it possible to access a person's computer without any "physical" intrusion at all. *See Register.com v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (finding a trespass to chattels in light of defendant's "use of search robots, consisting of software programs performing multiple automated successive queries"). In these and many other ways, the government's ability to interfere with possessory interests has dramatically expanded with the development of modern technologies.

In applying the Fourth Amendment's protections against searches, the Court has "take[n] the long view, from the original meaning of the Fourth Amendment forward." *Kyllo*, 533 U.S. at 40. That approach is no less appropriate when applying the Fourth Amendment's protections against seizures.

And that approach requires a finding that the government committed a seizure in this case.

c. The government warns that if the installation of a GPS device is a seizure, then marking a chalk "X" on the wheel of a vehicle to assist with the administration of parking laws must also be a seizure. *See* Pet. Br. 44. This warning rings hollow. Although chalk markings would constitute a technical trespass to chattels, they would not be a *meaningful* interference with the right to exclude. They appear in plain sight and are easily erased. And they are indistinguishable from the kinds of physical intrusions that a property owner regularly encounters; any child playing hopscotch can leave chalk marks behind. For these reasons, chalk marks are simply not comparable to the installation of a GPS device. Indeed, given the power and dangers of satellite-based GPS technology—and the government's repeated assurances that it will make responsible use of the technology if freed from all Fourth Amendment constraints—it is deeply troubling that the government compares the technology to a marking of chalk.

Nor would other run-of-the-mill physical contact amount to Fourth Amendment seizures if the Court holds that installation of a GPS tracker is a seizure. An interference with a possessory interest must be not only meaningful, but also purposeful; "the Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct." *See Brower*, 489 U.S. at 596 (citation and internal quotation marks omitted). This limitation ensures that the Fourth Amendment's safeguards

apply only to meaningful, purposeful interferences with the right to exclude.

Moreover, even when the government has committed a seizure, exclusion of evidence is an appropriate remedy only if "the evidence to which instant objection is made has been come at by exploitation of that illegality," rather than "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (citation and internal quotation marks omitted). For example, a police officer who steals binoculars to watch their owner commit a crime has seized the binoculars, but the evidence of the crime should not be excluded. The fact that the binoculars belonged to the assailant, and not to someone else or even the government, was mere happenstance, and the government's observations are "sufficiently distinguishable to be purged of the primary taint." *Id.*; *see also Hudson v. Michigan*, 547 U.S. 586 (2006) (exclusion is not appropriate "when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained"). In this case, by contrast, exclusion is appropriate and necessary because the seizure of Jones's vehicle was an integral feature of the government's chosen means of obtaining evidence; the government affixed the device to Jones's vehicle precisely because no other vehicle would have allowed it to capture and store satellite-generated movement and location data about Jones.

B. The Government Engaged In An Additional Fourth Amendment Seizure When It Used The GPS Device To Record Data About Jones's Locations And Movements

The government committed a Fourth Amendment seizure not only when it attached the GPS device to Jones's car, *see supra* II.A., but also when it later used the device to generate and store a permanent record of GPS data about Jones's movements and locations over the course of four weeks.

1. "[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording" of intangible items, including "oral statements, overheard without any technical trespass under … local property law." *Katz*, 389 U.S. at 353 (citation and internal quotation marks omitted); *see also Berger v. New York*, 388 U.S. 41, 52 (1967).

In this case, the government was able to collect over 2,000 pages worth of intangible data only by usurping Jones's private vehicle and converting it into a GPS transmitter at the government's service. As a consequence, Jones possessed a Fourth Amendment interest in the GPS data his vehicle produced, and the use of sophisticated technology to surreptitiously record that data was a seizure. "From the standpoint of regulating the government's power to collect and use evidence, generating an electronic copy [of computer data] is not substantially different from controlling access to a house or making an arrest. Each of these seizures ensures that the government has control over the person, place, or thing that it suspects has evidentiary val-

ue." Kerr, *supra*, at 709. That is what happened here. The government usurped Jones's vehicle to generate GPS data about his pattern of movements and then took control of—and thus seized—that data.

2. *Arizona v. Hicks*, 480 U.S. 321 (1987), does not require a different result. The Court there established that "[w]riting down information or taking a photograph [that] merely preserves the human observation in a fixed form" is not a seizure. Kerr, *supra*, at 714 (citing *Hicks*, 480 U.S. at 324). But electronic recording of non-observable data is different. Although writing down notes—or making an audiotape of a confession—is used to "minimize loss" and "avoid forgetting," the electronic recording of non-observable data "adds to [the evidence] the government controls … [and] thus provides the opportunity for the government to use its search powers to collect evidence and then use it against a suspect." *Id.* at 715; *see also* LaFave, *supra*, at § 26(f) (endorsing this analysis). Here, the government's creation and storage of GPS data "add[ed] to the information in the government's possession by copying that which the government ha[d] not observed." The data were seized.

III. THE GOVERNMENT WAS REQUIRED TO OBTAIN A VALID WARRANT

As an alternative argument, the government contends that if its conduct constituted a Fourth Amendment search or seizure, it should not have to obtain a valid warrant or show probable cause.

A. The government makes this argument for the first time in this Court. It failed to stake out an evidentiary basis for this argument in the lower courts—indeed, it failed even to raise the argument, and simply conceded that the GPS warrant was invalid—and the D.C. Circuit had no occasion to consider it. *See* Pet. App. 44a; Pet. Br. 48 n.7 (acknowledging that "the government did not raise this argument below"). Although the government now suggests that its *ex parte* warrant applications might provide sufficient evidence, this fact-bound argument has not been tested in the lower courts. It should not be considered for the first time now. *See Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) ("[W]e are a court of review, not of first view." (citation and internal quotation marks omitted)).

Nor does the government gain any support from this Court's decision in *United States v. Knights*, 534 U.S. 112, 118-121 (2001). It is true that *Knights* "upheld the search of a probationer's house on grounds of reasonable suspicion, even though the court of appeals had not addressed a reasonable-suspicion argument." Pet. Br. 48 n.7. But that is only because the district court found that reasonable suspicion existed, and the respondent in *Knights* explicitly *conceded* that the finding was correct. 534 U.S. at 122. In this case, a district judge initially approved the government's warrant application, but he did so *ex parte* and outside the record of this criminal proceeding. The district judge who presided over Jones's trial herself made no finding that the installation of the GPS device was supported by reasonable suspicion or probable cause. *See* Pet. App.

83a-84a (noting, but not resolving, Jones's argument that the government "lacked probable cause to believe that his vehicle was in any manner being used for criminal activity," because the government the warrant was invalid and "contend[ed] that the placement of the GPS device was proper" without a warrant (citation and internal quotation marks omitted)). And Jones has not conceded that it was.

B. If the Court nonetheless decides to consider whether a reasonable-suspicion standard is the appropriate one, it should conclude that it is not.

1. The government's argument for a generalized exception to the warrant requirement is "based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant." *Karo*, 468 U.S. at 717. But far from an antiquated burden on effective police work, the warrant requirement is a separation-of-powers device that is essential to the Fourth Amendment's implementation. "Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States Dist. Court*, 407 U.S. at 318. It "accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *Id.* at 317. As Justice Jackson explained, "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence"; rather, its "protection consists in requiring that those inferences be drawn by

a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

This Court has not created exceptions to the warrant requirement lightly. And it has not done so through simple "balancing test[s]," such as the one proposed by the government. Pet. Br. 50. To the contrary, it has recognized that a "generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006). "The warrant requirement … is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge*, 403 U.S. at 481. Although there exist well-established exceptions for cases implicating safety or evidentiary concerns, *see Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009), exceptions have been "few in number and carefully delineated," *United States Dist. Court*, 407 U.S. at 318. The government does not argue that it qualifies for an exception here.[9]

2. a. The government argues not only for a generalized exception from the warrant requirement for GPS searches and seizures, but also an exception from the probable-cause standard. According to the government, a reasonable-suspicion standard would be more appropriate. But there is no basis for an exception to the warrant requirement in this case, and therefore the text of the Fourth Amendment pre-

[9] It attempted to rely on the automobile exception in the court of appeals, *see* Pet. App. 44a; *see also supra* p.9, but has not argued for that exception in this Court.

cludes a reasonable-suspicion standard. *See* U.S. Const. amdt. 4 ("No warrant shall issue except on probable cause.").

The government's argument for a reasonable-suspicion standard is also premised on two mistaken assumptions. First, the government assumes that if GPS monitoring is a search or seizure, it is a minor one. Pet. Br. 49-50. This assumption is wrong. As discussed, surreptitious GPS monitoring violates core property rights, and resembles conduct that is not only unlawful but potentially criminal if performed by private individuals. The technology can easily generate "an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse." Pet. App. 33a. And use of the technology without a warrant and probable cause raises the specter of perpetual surveillance of an individual for the entirety of her lifetime, and even mass surveillance of entire political associations or communities.

Second, the government wrongly assumes that a reasonable-suspicion standard is justified by its mere assertion that GPS tracking would increase law enforcement efficiency. Pet. Br. 50-51. But the government exaggerates the likely efficiency gains. As the government acknowledged in *Karo*, "for all practical purposes [it] will be forced to obtain warrants in every case …, because [it] have no way of knowing in advance whether the [GPS device] will [generate data] from inside private premises." 468 U.S. at 718. This case proves the point: the GPS device generated data while in Jones's garage, *see supra* p.5, and the government presumably applied for a warrant in anticipation of this very problem.

The government's efficiency argument also overlooks that this Court's cases have departed from the warrant requirement and probable-cause standard only when special circumstances, distinct from the general interest in law enforcement, justify the departure. Thus, the Court has allowed warrantless searches and seizures on less than probable cause in "special needs" cases involving parolees, *Samson v. California*, 547 U.S. 843 (2006), border searches, *United States v. Flores-Montano*, 541 U.S. 149 (2004), schools, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002), and administrative inspections in closely regulated industries, *New York v. Burger*, 482 U.S. 691 (1987); cases raising imminent safety concerns, *Arizona v. Johnson*, 555 U.S. 323 (2009); *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); and cases involving programmatic searches designed to further an objective distinct from law enforcement, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (checkpoint designed to remove inebriated drivers from the road). No special circumstances distinct from general law enforcement interests are present in this case; the government seeks a categorical exception from the warrant requirement merely to facilitate law enforcement.[10]

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[10] In particular, the government argues that it sometimes needs GPS to establish probable cause. Pet. Br. 50. But the same could be said of all investigative tools, including wiretaps, thermal imaging devices, and searches of homes. "The argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement." *Karo*, 468 U.S. at 718.

Furthermore, the government cites no case in which a reasonable-suspicion standard was ever applied to prolonged and surreptitious searches or seizures. The Court should not do so here. "[T]he right to be secure against searches and seizures is one of the most difficult to protect." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). It would be all the more difficult to protect if the government were free to engage in surreptitious GPS monitoring without first persuading a neutral magistrate that a search or seizure is justified. And a reasonable-suspicion standard would be particularly unworkable here because the government is not currently required to preserve a contemporary record of its reasons for warrantless GPS monitoring. Even if a record were preserved, innocent targets of GPS surveillance might never learn that their Fourth Amendment rights were violated. And the 765,000 state and local law enforcement officers and 105,000 federal officers across the nation—and innumerable non-law-enforcement employees—will occasionally err. Moreover, "the authority which [this Court] concede[s] to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible." *Id.*

* * * *

The government's GPS monitoring was a search and seizure. And it was unreasonable without a warrant. Even when the warrant requirement imposes an "added burden" on the government, "this inconvenience is justified in a free society to protect constitutional values." *U.S. Dist. Ct.*, 407 U.S. at

321. "By no means of least importance will be the reassurance of the public generally that indiscriminate [GPS surveillance] of law-abiding citizens cannot occur." *Id.*

CONCLUSION

For the foregoing reasons, the court of appeals's judgment should be affirmed.

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