

No. 10-1259

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTOINE JONES,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

**BRIEF OF AMICUS CURIAE THE COUNCIL
ON AMERICAN-ISLAMIC RELATIONS
IN SUPPORT OF THE RESPONDENT**

NADHIRA AL-KHALILI, *Counsel of Record*
MUNIA JABBAR, *Staff Attorney*
COUNCIL ON AMERICAN-ISLAMIC RELATIONS
453 New Jersey Avenue, SE
Washington, D.C. 20003
(202) 646-6034
nalkhalili@cair.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE AMICUS CURIAE.....	1
BACKGROUND.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
Warrantless Prolonged GPS Surveillance Disproportionately Harms American Muslims and Curtails Their First Amendment Rights	4
A. Unchecked and overly intrusive government surveillance of minority communities was pervasive throughout the 20th century.....	5
B. Law enforcement has conducted indiscriminate surveillance of innocent American Muslims for the last decade.....	8
C. Unchecked GPS surveillance against innocent American Muslims is increasing	10
D. Unrestricted GPS tracking contributes to the curtailment of American Muslims' First Amendment rights.....	13
CONCLUSION.....	20

TABLE OF AUTHORITIES

Page

CASES

<i>Boim v. Quranic Literacy Inst.</i> , 291 F.3d 1000 (7th Cir. 2002)	18
<i>Church of Lukumi Babalu Aye v. City of Hiale-</i> <i>ah</i> , 508 U.S. 520 (1993).....	19
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	14
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....	14, 15
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	17
<i>State v. Jackson</i> , 76 P.3d 217 (Wash. 2003)	15
<i>United States v. Knotts</i> , 460 U.S. 276 (1983).....	6
<i>United States v. Maynard</i> , 615 F.3d 544 (D.C. Cir. 2010)	2, 3, 15
<i>United States v. U.S. District Court</i> , 407 U.S. 297 (1972).....	5, 6

OTHER AUTHORITIES

<i>Afifi v. Holder, et al.</i> , No. 1:11-cv-00460 (D.D.C. filed Mar. 2, 2011)	1, 11, 12, 17
Akhil Reed Amar, <i>Fourth Amendment First</i> <i>Principles</i> , 107 HARV. L. REV. 757 (1994).....	20
AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERROR- ISM FINANCING” (2009)	9, 16, 17, 18, 20

TABLE OF AUTHORITIES – Continued

	Page
Daniel J. Solove, <i>Conceptualizing Privacy</i> , 90 CAL. L. REV. 1087 (2002).....	16
FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RE- SPECT TO INTELLIGENCE ACTIVITIES (1976)	6, 7, 8
George C. Harris, Book Review, <i>Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security</i> , 36 CORNELL INT’L L.J. 135, 137-38 (2003).....	6, 18
Joshua A. Engel, <i>Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices</i> , 41 U. MEM. L. REV. 233 (2010)	15
Joyce W. Luk, Note, <i>Identifying Terrorists: Privacy Rights in the United States and United Kingdom</i> , 25 HASTINGS INT’L & COMP. L. REV. 223 (2002)	14
Kaitlyn A. Kerrane, Note, <i>Keeping Up With Officer Jones</i> , 79 FORDHAM L. REV. 1695 (2011).....	11
Katherine J. Strandburg, <i>Freedom of Associa- tion in a Networked World: First Amendment Regulation of Relational Surveillance</i> , 49 B.C. L. REV. 741 (2008).....	15, 16

TABLE OF AUTHORITIES – Continued

	Page
Kathryn A. Ruff, Note, <i>Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors</i> , 9 NYU J. LEGIS. & PUB. POLICY 447 (2005).....	18, 20
Kelly Thornton, <i>Local Muslims Feel Eyes of FBI; Fear of Being Watched, of Talking Freely Is Rampant</i> , SAN DIEGO UNION-TRIB., Sept. 10, 2002	16
Linda E. Fisher, <i>Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups</i> , 46 ARIZ. L. REV. 621 (2004).....	<i>passim</i>
Matt Appuzzo & Adam Goldman, Associated Press, <i>NYPD eyed 250-plus mosques, student groups</i> , Sept. 6, 2011, http://www.salon.com/news/feature/2011/09/06/us_nypd_intelligence	9
Matt Appuzzo, Eileen Sullivan & Adam Goldman, Associated Press, <i>AP Impact: NYPD ethnic tracking included citizens</i> , SEATTLE TIMES (Online), Sept. 22, 2011, http://seattletimes.nwsourc.com/html/politics/2016284447_apus_nypdintelligence.html	9
Robert S. Mueller III, <i>The F.B.I.'s New Mission: Preventing Terrorist Attacks While Protecting Civil Liberties</i> , 39 STAN. J. INT'L L. 117 (2003).....	13
Tom Lininger, <i>Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups</i> , 89 IOWA L. REV. 1201 (2004)	9, 14, 17, 19, 20

INTEREST OF THE AMICUS CURIAE

The Council on American-Islamic Relations (CAIR) is a national nonprofit civil rights and advocacy group dedicated to protecting the civil rights and liberties of American Muslims. CAIR employs government relations, media relations, educational campaigns, litigation, and grassroots advocacy to protect American Muslims from religious discrimination and infringements of their legal rights. CAIR is concerned particularly by extensive and unjustified intrusion upon the constitutional rights of law-abiding members of the American Muslim community.¹

This case presents legal issues that directly affect the rights and liberties of American Muslims, as members of the community have been increasingly subject to prolonged warrantless GPS surveillance. CAIR is also litigating a case on behalf of an American Muslim plaintiff, *Afifi v. Holder, et al.*, No. 1:11-cv-00460 (D.D.C. filed Mar. 2, 2011), that presents identical legal issues as those here. The Court's holding in this case is very likely to be dispositive of *Afifi*. *Afifi* has been stayed pending the resolution of

¹ Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, CAIR states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than CAIR, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

the instant matter. CAIR supports the position of the Respondent and requests that the Court uphold the D.C. Circuit's holding that prolonged warrantless use of a GPS tracking device violates the Fourth Amendment. CAIR also requests that the Court find that warrantless attachment of the device on a vehicle violates the Fourth Amendment.



BACKGROUND

During a joint narcotics investigation in 2004, the Federal Bureau of Investigation and the Metropolitan Police Department began investigating Respondent Antoine Jones, owner of “Levels” nightclub. Police covertly installed a GPS tracking device on a vehicle registered to Jones’s wife, which was operated regularly by Jones. Using the information transmitted by the device, law enforcement monitored Jones 24 hours a day for a four-week period. These surveillance activities led to Jones’s indictment on federal narcotics charges. At trial, the District Court denied Jones’s motion to suppress evidence obtained by GPS, and a jury convicted Jones. *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010).

The D.C. Circuit reversed Jones’s conviction, holding that warrantless, continuous GPS tracking of an individual’s location for one month was an unreasonable search in violation of the Fourth Amendment. The tracking violated Jones’s reasonable expectations of privacy as “prolonged surveillance of a person’s

movements may reveal an intimate picture of his life.” *Id.* at 562. The Court also relied on eight state laws proscribing warrantless GPS tracking in various ways as evidence of a “societal understanding” that such tracking violates a reasonable expectation of privacy. *Id.* at 564 (internal quotation omitted). The D.C. Circuit limited its analysis to warrantless GPS tracking and declined to address the constitutionality of the initial installation of the device.



SUMMARY OF ARGUMENT

This Court has commented on the dangers of unchecked government surveillance of political, religious, and ethnic minorities during times of heightened national security concerns. This is a concern rooted in the history of dragnet-type surveillance tactics the government has used against minority populations during wartime. Constant surveillance of minority communities perceived as a security threat persisted during the early 20th century Communism scare, World War II, the Cold War, and the Vietnam War.

The latest version of covert and expansive government surveillance of a minority community is that of the American Muslim community in the aftermath of the September 11 attacks. A wealth of anecdotal evidence shows that innocent Muslims have been under close government watch while both performing mundane everyday tasks and attending religious

gatherings. In the last year, use of warrantless and prolonged GPS tracking of vehicles has arisen as one of the government's many surveillance tactics. CAIR is litigating a case on behalf of a young American Muslim who was subject to this type of tracking because of an internet posting made by one of his friends.

For the reasons set forth in Respondent's brief, warrantless GPS tracking violates the privacy rights of American Muslims. In addition, unchecked GPS surveillance restricts Muslims' First Amendment rights of association, speech, and free exercise of religion. The most significant harms have been a chilling effect on American Muslims' mosque attendance and charitable giving. To mitigate these harms, the Court should hold that prolonged warrantless GPS tracking of a vehicle and warrantless installation of a GPS device on a vehicle both violate the Fourth Amendment.



ARGUMENT

Warrantless Prolonged GPS Surveillance Disproportionately Harms American Muslims and Curtails Their First Amendment Rights.

During the last century, the government's ability to undertake broad surveillance during times of national security concerns have led to dragnets against religious, ethnic, and political minorities. The latest iteration of this trend is an unchecked

surveillance regime focused on American Muslims in the wake of the September 11 attacks. In this context, CAIR has started to see an uptick in prolonged, warrantless GPS surveillance of innocent Muslims. This regime of unchecked surveillance, including GPS tracking, significantly restricts American Muslims' First Amendment association, speech, and free exercise rights.

A. Unchecked and overly intrusive government surveillance of minority communities was pervasive throughout the 20th century.

This Court has articulated an interest in preventing excessive targeted surveillance of disfavored populations. “History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies.” *United States v. U.S. District Court*, 407 U.S. 297, 314 (1972).² “[U]nchecked surveillance” of a minority group, especially one viewed as threatening or dissident, is a “danger” during times of national security fears. *Id.* at 313-14. “Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.” *Id.* at 314. And the Court

² “The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’” *Id.*

warned that the lack of any restriction on the power of the Government to watch its citizens allows the state to “name [its] favorite poison – draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists” as a group to be targeted. *Id.* (quoting floor speech by Senator Philip Hart).

The Court’s opinion in *United States v. U.S. District Court* came in the context of limitless government surveillance of minority groups that were deemed a security threat during the Vietnam War. “[D]ragnet-type law enforcement practices”³ have been imposed on minority communities during every period of heightened domestic security concerns. “Terrorism presents an array of twentieth century exemplars to demonstrate the folly of the FBI’s historical penchant for investigating political or other groups . . . in the absence of any specific evidence of illegal conduct.” George C. Harris, Book Review, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 CORNELL INT’L L.J. 135, 137-38 (2003).

Some examples of these surveillance campaigns⁴ provide bases for comparison with the current use of GPS tracking against American Muslims:

³ *United States v. Knotts*, 460 U.S. 276, 284 (1983).

⁴ This list is not exhaustive. For a detailed overview of 20th century government surveillance abuses, see generally FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES (1976), (Continued on following page)

- During the first third of the 20th century, “RedSquads” surveilled individuals based on affiliations with certain civic, religious, or civil rights groups. Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 632-33 (2004).⁵
- After World War II, the FBI began using informants, physical surveillance, and electronic surveillance to watch civil rights groups like the NAACP. CHURCH COMMITTEE REPORT, BOOK III, at 412-69.
- During the Vietnam War, the Government undertook covert surveillance of citizens “on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a foreign hostile power.” *Id.*, BOOK II, at 5. Intelligence agents had “collected vast amounts of information about the intimate details of citizens’ lives and about their participation in legal and peaceful political activities” through covert

available at http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm (hereinafter “CHURCH COMMITTEE REPORT”). This report was compiled by the precursor to the U.S. Senate Select Committee on Intelligence in the wake of the Watergate scandal.

⁵ The squads would collect minute details about broad networks of associates, and “[i]n many cases, individuals’ beliefs and affiliations were assumed solely based on temporary association with others or with an organization that espoused particular beliefs, with no evidence that the individual subject shared those views.” *Id.*

FBI operations that were “vastly excessive in breadth.” *Id.*, Book II, at 8-13. These tactics, including indiscriminate monitoring of first class mail, interception of cables, warrantless microphone surveillance, and confidential informants, violated persons’ “reasonable expectations of privacy.” *Id.*

B. Law enforcement has conducted indiscriminate surveillance of innocent American Muslims for the last decade.

The latest iteration of the dragnet-style government scrutiny detailed above is the unchecked surveillance that has been focused on the American Muslim community since September 11, 2001. Law enforcement has appeared to treat religion “as a proxy for involvement in terrorism.” Fisher, 46 ARIZ. L. REV. at 659.

It is difficult to quantify the level of surveillance by either the percentage or the total number of the American Muslim population that has been covertly surveilled by law enforcement. The lack of data is attributable in large part to the fact that “most intelligence-gathering and file-keeping is done clandestinely.” *Id.* at 635.⁶ However, anecdotal evidence confirms that covert surveillance of the community – most of which has no connection to terrorism – has

⁶ Because of secretive record-keeping, it is also difficult to know “to what extent investigations are legitimately confined to cases involving potential criminal activity.” *Id.*

been taking place all over the country. *E.g.*, AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERRORISM FINANCING” 75-78, 97-100 (2009), *available at* <http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf> (hereinafter “ACLU CHARITY REPORT”); Fisher, 46 ARIZ. L. REV. at 639 n.165; Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1242 (2004).

In particular, widespread and indiscriminate physical surveillance of mosques has been a fact of life for Muslims. *See* ACLU CHARITY REPORT 75-78. Across the country, undercover law enforcement agents have monitored mosques looking for clues about terrorism but have not limited their information-gathering to people of whom they have any individualized suspicion of wrongdoing. The most recent example to surface is based on reports of a vast operation undertaken by the New York Police Department (NYPD) in which undercover officers have surveilled over 250 mosques in and around New York City without any factual predicate. Matt Appuzzo & Adam Goldman, Associated Press, *NYPD eyed 250-plus mosques, student groups*, Sept. 6, 2011, http://www.salon.com/news/feature/2011/09/06/us_nypd_intelligence. NYPD allegedly collects minute details about members of Muslim communities, notwithstanding a lack of any individualized suspicion. Matt Appuzzo, Eileen Sullivan & Adam Goldman, Associated Press, *AP Impact: NYPD ethnic tracking included citizens*,

SEATTLE TIMES (Online), Sept. 22, 2011, http://seattletimes.nwsourc.com/html/politics/2016284447_apusnypdintelligence.html (discussing NYPD's "Moroccan Initiative" focused on mapping New York's ethnic Moroccan Muslim community).⁷ In addition, NYPD watches Muslim community institutions such as banks, cafes, and shops in order to collect vast stores of information about peoples' daily routines, opinions, and associations. *Id.*⁸

C. Unchecked GPS surveillance against innocent American Muslims is increasing.

In some respects, the unrestricted surveillance of the American Muslim community is comparable to earlier wartime surveillance campaigns: (i) law enforcement undertook all of these campaigns during periods of heightened concerns about national security, (ii) the government deemed the surveilled groups to be direct or indirect threats to security, (iii) surveillance of these groups was on a broad scale, and (iv) law enforcement collected detailed private and mundane information on minority persons without any individualized suspicion of wrongdoing. However, recent technological advances, including the GPS

⁷ "Activities such as haircuts and gym workouts were transformed from mundane daily routines into police data points." *Id.*

⁸ An anonymous official explained that "[a] lot of these locations were innocent. . . . They just happened to be in the community." *Id.*

technology in question here, add an additional dimension to today's surveillance of American Muslims. Law enforcement now has the ability to gather and disseminate private information about individuals with an efficiency that has been unknown in the past. See Kaitlyn A. Kerrane, Note, *Keeping Up With Officer Jones*, 79 *FORDHAM L. REV.* 1695, 1700-02 (2011).

The issues in this case have a direct and specific effect on the American Muslim community. In the last year, CAIR has encountered an increasing trend in reports of American Muslims being tracked using a GPS device planted covertly on their vehicles. To the best of CAIR's knowledge, none of these devices were installed pursuant to a warrant, and the Government had little to no individualized suspicion that any of the subjects of surveillance were preparing to commit any crimes. CAIR is litigating one of these cases in the United States District Court for the District of Columbia in *Afifi v. Holder, et al.*, No. 1:11-cv-00460 (D.D.C. filed Mar. 2, 2011).

The factual background of *Afifi*, as gathered mostly from a declassified FBI report on our client, is typical. Afifi is a 20-year-old American Muslim. In October 2010, a mechanic found a GPS device attached to the underside of Afifi's vehicle during a routine oil change. Afifi had not known about the device, and neither he nor the mechanic could identify it. Pictures of the device were posted on Afifi's best friend's weblog in a post titled "Does this mean the FBI is after us?" Mot. to Dismiss & for Summ. J., *Afifi*

v. Holder, et al., 1:11-cv-00460, June 16, 2011, Decl. of Joel D. Dabisch, Ex. 1 (declassified FBI report), at 1 (hereinafter “Afifi FBI Report”). A reader commented publicly on the blog that the picture depicted a GPS tracking device. *Id.* at 2.

Two days after Afifi discovered the device, FBI agents went to Afifi’s home to question him and retrieve the GPS device. One agent explained to Afifi that if he refused to return the item, he could be subject to larceny, grand larceny, or federal possession of stolen government property charges. *Id.* Afifi eventually agreed to return the device. Afterwards, he mentioned that the device terrified him initially because he thought it was a bomb, and remarked, “How would you feel if you were twenty and found something like that under your car?” *Id.* at 4. When Afifi said that he had considered selling the device online, the agents told him that he would have been subject to state and federal charges for selling stolen property. *Id.*

After Afifi returned the device, one of the agents explained that they were interested in him because of an “anonymous call” that said he may be a national security concern. *Id.* at 5. However, the FBI’s suspicions of Afifi were latent until Afifi’s best friend commented publicly on his weblog about the ease with which a person in plainclothes could blow up a shopping mall. *Id.* at 7. His friend’s comments, which Afifi did not know about, were the catalyst for the FBI’s continuous tracking of Afifi. *Id.* The agents

explained to Afifi that he was “boring,” but they revealed intimate knowledge of personal details about Afifi. *Id.*

Afifi and some of our other clients have been pressured by the FBI to become informants after discovery of a GPS tracking device on their vehicles. *See id.* In addition, CAIR is concerned that law enforcement has trespassed on private property in order to plant these devices; at least one of CAIR’s clients only parks his vehicle in his home’s private driveway.

D. Unrestricted GPS tracking contributes to the curtailment of American Muslims’ First Amendment rights.

Covert surveillance of American Muslims, driven by religious profiling, has led to a litany of social harms suffered disproportionately both by individuals within the community and the community as a whole. For example, indiscriminate surveillance has created the inaccurate stigma of Muslims as terrorists. *See* Robert S. Mueller III, *The F.B.I.’s New Mission: Preventing Terrorist Attacks While Protecting Civil Liberties*, 39 STAN. J. INT’L L. 117, 122 (2003) (“[T]he overwhelming majority of Muslims, whether in this country or overseas, are peaceful, law-abiding citizens.”).

Many of the social harms endured by Muslims also translate into impingements of their constitutional rights. In the Fourth Amendment context, the clearest harms are violations of privacy rights. *See*

generally Joyce W. Luk, Note, *Identifying Terrorists: Privacy Rights in the United States and United Kingdom*, 25 HASTINGS INT'L & COMP. L. REV. 223 (2002) (discussing infringements on constitutional privacy rights based on increased video and facial recognition surveillance after September 11). But pervasive and unrestricted surveillance of a minority community curtails more than just its members' privacy rights. Government action can also restrict First Amendment speech, press, and association rights. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). The Court has acknowledged that a surveillance program can impermissibly chill First Amendment freedoms, even in the absence of a regulation directly prohibiting such rights. *Laird v. Tatum*, 408 U.S. 1, 12 (1972).⁹

The American Muslim community has suffered an abridgement of all three of these interrelated First Amendment rights¹⁰ because of the “chilling effect” caused by increased and unrestricted government surveillance in the last ten years, including unrestricted GPS tracking. If warrantless prolonged use of GPS

⁹ For standing, a plaintiff would need to demonstrate “specific present objective harm or a threat of specific future harm.” *Id.* at 14. For an analysis on the differences between mosque surveillance and the factual situation in *Laird* with respect to standing, see Lininger, 89 IOWA L. REV. at 1242 n.191.

¹⁰ “[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable part of the . . . freedom of speech.” *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

surveillance were to continue, these infringements would be exacerbated.

1. The most significant collateral damage from unrestricted GPS surveillance of American Muslims is the curtailment of First Amendment association rights. Freedom to associate and right to privacy in one's associations have a "vital relationship." *NAACP v. Alabama*, 357 U.S. at 462. "The courts that have been most troubled by the use of warrantless GPS tracking have been concerned that the gathering of detailed data on a person's whereabouts could provide an observer the opportunity to learn about a person's habits and associates." Joshua A. Engel, *Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices*, 41 U. MEM. L. REV. 233, 295 (2010) (citing *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003)); see also *United States v. Maynard*, 615 F.3d 544, 562-63 (D.C. Cir. 2010). Anecdotal evidence verifies that continuous surveillance chills association, "particularly for those who are members of, or associate with members of, religious and political minority groups."¹¹ Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 745-46 (2008). People are also less likely to speak or associate when

¹¹ For Muslims, the chilling effect is exacerbated by fears that one's associations will lead to false application of vague "material support" of a terrorist organization statutes or of placement on a terror watchlist. *Id.* at 745-46.

they know they are being surveilled. *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1130-31 (2002).

Widespread government surveillance has noticeably chilled American Muslims' protected associations following September 11, 2001. Strandburg, 49 B.C. L. REV. at 745; *see also* ACLU CHARITY REPORT 111-15. In particular, anecdotal evidence demonstrates that surveillance of mosque attendance has significantly chilled Muslims' willingness to congregate at their houses of worship. "Muslims fear that if someone praying in the corner is suspected of terrorism, anyone who speaks to or associates with him will likewise become a suspect." Fisher, 46 ARIZ. L. REV. at 647 n.165. Mosques that were vibrant communities before September 11 were boarded up after that date because congregants were afraid of constant government surveillance. *Id.*¹² In San Diego, one member of the community commented that "[San Diego Muslims] are afraid to be in big congregations because they fear Big Brother is watching them. . . . Big Brother is watching, I can tell you that." *Id.* (quoting Kelly Thornton, *Local Muslims Feel Eyes of FBI; Fear of Being Watched, of Talking Freely Is Rampant*, SAN

¹² A congregant at a mosque explained that "[p]eople are afraid to come to the mosque because they don't know who's going to be waiting for them at the mosque. I mean, you come to pray here. I mean, you don't know if the one praying next to you might be somebody who's counting every breath that you have for some made-up reasons." *Id.* (internal quotation and citation omitted).

DIEGO UNION-TRIB., Sept. 10, 2002, at A1 (internal quotations omitted)).”¹³

The potential for unchecked GPS tracking to contribute to this chilling effect is boundless. As explained by one American Muslim:

The impact is not only on the individual level, but also on the social level. There are people who stopped coming to the mosque because of fear that the government is tagging the cars of people going to the mosque.

ACLU CHARITY REPORT 112. Muslims could also refrain from visiting other Muslims or banks, barber-shops, and groceries catering to the Muslim community. In effect, warrantless GPS tracking allows people to be judged “guilty by association.”¹⁴ As demonstrated by the story of our client in *Afifi*, Muslims are being targeted for unrestricted GPS surveillance based on their friendships with other Muslims who write opinionated blogs. This “guilt by association” method of using GPS technology against Muslims exacerbates the chilling effect of association rights.

¹³ “The Justice Department’s present investigations of mosques involve the worst aspects of both *Laird* and *Presbyterian Church* – overbroad targeting in a highly sensitive religious setting.” Lininger, 89 IOWA L. REV. 1201 at 1242.

¹⁴ Guilt by association is “alien to the traditions of a free society.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982).

2. Unchecked GPS surveillance also infringes specifically on Muslims' related right to free speech. Throughout each widespread surveillance campaign in history, law enforcement monitoring has quelled minority speech. The FBI has spent its resources closely surveilling innocent activity, "resulting in a substantial chilling effect on their targets' First Amendment rights of freedom of association and speech and few, if any, prosecutions of actual criminal activity." Harris, 36 CORNELL INT'L L.J. at 138.

The chilling effects of today's general surveillance campaign on American Muslim speech are well-documented. Specifically, Muslim charitable giving¹⁵ has seen a precipitous decline since September 11. See ACLU CHARITY REPORT 89-107. While this decline is attributable in part to non-surveillance law enforcement activity, the knowledge that the government is watching them and can become privy to Muslims' donation activities has contributed significantly to this chill. *Id.* 75-78, 97-100; see also Kathryn A. Ruff, Note, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 NYU J. LEGIS. & PUB. POLICY 447, 471-75 (2005). Unrestrained GPS surveillance only

¹⁵ See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026-27 (7th Cir. 2002) (explaining that charitable donations to Islamic charities implicate First Amendment speech rights).

adds to this climate of fear and therefore contributes to the chilling effect of speech.

3. And unchecked GPS surveillance also contributes to restrictions on American Muslims' rights to freely exercise their religion. This Court has underlined the sanctity of the fundamental right to freely exercise one's religion and the scrutiny due to any impingement of that right. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).¹⁶ "Virtually all commentators have recognized the pernicious effect of a law enforcement presence in a church, synagogue or mosque. Every legal scholar addressing this subject has expressed concern about the 'chilling effect' caused by such infiltration." Lininger, 89 IOWA L. REV. 1201 at 1234; *see also* Fisher, 46 ARIZ. L. REV. at 631-32 (explaining that investigations included surveillance of the religious activities of churches, "leading members to withdraw from attendance.").

As explained above, government surveillance of mosque attendance chills Muslims' attendance of religious services. Lininger, 89 IOWA L. REV. at 1233 & n.152. Muslims fear that conspicuously attending mosques will subject them to government investigation.

¹⁶ "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*

Id. at 1235. In addition, chilling effects on charitable giving also impinge on Muslims' free exercise rights because charity is a main tenet of the Islamic faith. See ACLU CHARITY REPORT at 89-107; Ruff, 9 NYU J. LEGIS. & PUB. POLICY at 483. Unrestricted GPS surveillance, which gives law enforcement information about a subject's mosque attendance, further exacerbates this chilling effect.

4. There is no clear doctrinal method through which First Amendment concerns can be mitigated while performing a Fourth Amendment analysis. Professor Akhil Amar has suggested that the Fourth Amendment reasonableness requirement should incorporate values of "constitutional reasonableness" by accounting for common-sense intuitions about the First Amendment harms inflicted by a given law enforcement action. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 804-05 (1994). What is clear is that unrestricted GPS tracking has First Amendment implications, as demonstrated by the chilling effect of widespread surveillance on American Muslim speech, association, and free exercise rights. These concerns should guide the Court to upholding the D.C. Circuit's holding.



CONCLUSION

Accordingly, for these reasons and the reasons in Respondent's brief, the Court should hold that prolonged and continuous GPS surveillance without a

warrant violates the Fourth Amendment. The Court should also hold that installation of a GPS tracking device on an automobile without a warrant violates the Fourth Amendment.

Respectfully submitted,

NADHIRA AL-KHALILI, *Counsel of Record*
MUNIA JABBAR, Staff Attorney
COUNCIL ON AMERICAN-ISLAMIC RELATIONS
453 New Jersey Avenue, SE
Washington, D.C. 20003
(202) 646-6034
nalkhalili@cair.com