NO. 12-2548

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant
v.

HARRY KATZIN, MICHAEL KATZIN, and MARK KATZIN,
Appellees

APPEAL FROM ORDER SUPPRESSING EVIDENCE
IN CRIMINAL NO. 11-226 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ACLU FOUNDATION OF PENNSYLVANIA, ELECTRONIC FRONTIER FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation, ACLU Foundation of Pennsylvania, Electronic Frontier Foundation and National Association of Criminal Defense Lawyers certify that they are not-for-profit corporations, with no parent corporations or publicly-traded stock.

Undersigned counsel certifies that no persons and entities as described in the fourth sentence of F.R.A.P. 28.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal

STATEMENT OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before the federal courts on numerous

include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the Supreme Court, this Court, and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The ACLU, EFF and NACDL each filed *amicus* briefs in *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945 (2012), the decision that is at the core of the issues raised in this case.

Pursuant to F.R.A.P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money towards the preparation or filing of this brief.

SUMMARY OF ARGUMENT

This appeal raises the question whether law enforcement officers may attach a GPS device to a car to track its movements—conduct that the Supreme Court has unanimously held constitutes a Fourth Amendment search—without first obtaining a warrant based on probable cause. The government, which has long insisted that GPS tracking is not even a search in the first place, now argues that it is the kind of

Relying on a line of cases predicated on the mobility of automobiles, the government argues in the alternative that even if probable cause is required, warrants should not be. But the so-called "automobile exception" was established to prevent contraband from disappearing, not to permit the tracking of an individual. The categorical exigency that the Supreme Court has recognized with respect to mobile contraband simply has no bearing on either the investigatory or privacy interests at stake in GPS tracking. The district court correctly rejected this argument as well.

Finally, the government contends that even if this Court properly concludes that probable cause warrants are required for GPS tracking, it should deny the suppression motion because the FBI agents were acting in "good faith." The Supreme Court, however, has made clear that to invoke good faith, law enforcement officers must rely on binding appellate precedent. No such precedent existed here, as neither this Court nor the Supreme Court had addressed the Fourth Amendment implications of GPS tracking. Instead, the government seeks to rely on out-of-circuit authority, even though that authority was divided at the time of the search in this case. The rule proposed by the government, such as it is, would invite law enforcement to cherry-pick, without consequences, from a grab bag of non-binding authority; erode the privacy protections of the Fourth Amendment; and require vexing and standardless post-hoc judicial determinations in every

case. This danger is particularly acute in an era of rapidly advancing surveillance technologies. A bright-line rule that waives the exclusionary rule only when police rely on binding precedent is not only doctrinally required, but practically beneficial to both law enforcement and the courts.

ARGUMENT

I. TRACKING A CAR BY PHYSICALLY ATTACHING A GPS DEVICE TO IT REQUIRES A WARRANT BASED ON PROBABLE CAUSE.

A. The Fourth Amendment Includes a Strong Presumptive Warrant Requirement, Which Applies to GPS Tracking.

In *United States v. Jones*, 565 U.S. —, 132 S. Ct. 945 (2012), the Supreme Court held that the physical attachment of a GPS tracking device to a vehicle constitutes a search within the meaning of the Fourth Amendment. Based on that holding, the Supreme Court reversed and remanded, without reaching any of the further issues concerning the reasonableness of that search. Because warrantless searches are per se unreasonable, amici urge this Court to hold that such GPS tracking in the absence of a warrant violates the Fourth Amendment unless it fits within a recognized exception to the warrant requirement. As the district correctly held, in this case it does not.

"[E]very case addressing the reasonableness of a warrantless search [should begin] with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the

Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Warrants are presumptively required because they "provide[] the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quoting

by traditional means). Thus, if GPS tracking is not subject to a warrant

search in this case, the searches were for purposes other than law enforcement or involved individuals with reduced expectations of privacy. The government also places much weight on the automobile exception, but that doctrine, developed to allow a search of the contents of vehicles, cannot be stretched so far as to support GPS tracking of people who are criminal suspects.

1) GPS Searches by Law Enforcement Do Not Fall Within a "Special Need."

The Supreme Court has recognized that certain searches outside the scope of traditional law enforcement, or aimed at categories of people under circumstances where they enjoy reduced expectations of privacy, may not require probable cause warrants. While the government cites to these precedents in insisting that GPS tracking should be exempted from the warrant requirement, Gov't Br. 23-24, a review of these exceptions and their underlying justifications makes it plain that they are inapplicable.

Exemption from the warrant requirement under the special needs exception is justified "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)); *see also Ferguson v. City of*

indiscriminately for over a month—is simultaneously more intrusive than a *Terry* stop-and-frisk and less justified by a need to dispel suspicion about 'rapidly unfolding and often dangerous situations on city streets.'" *United States v. Ortiz*, — F. Supp. 2d —, Criminal Action No. 11–251–08, 2012 WL 2951391, at *16 (E.D. Pa. July 20, 2012), appeal pending, No. 12-3225 (3d Cir.)[1] (citing *Terry*, 392 U.S. at 10). The Fourth Amendment interest at stake in GPS tracking—the privacy of one's location at all times over a period of days or weeks—is significantly more substantial than the minimal interests identified in *Terry* and progeny. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 413–15 (1997) (finding that passengers in a vehicle already stopped by police may be ordered out of the car because "the additional intrusion on the passenger is minimal"); *United States v. Place*, 462 U.S. 696, 706 (1983) (finding "some brief detentions of personal effects [at an airport to be] minimally intrusive of Fourth Amendment interests"). GPS tracking does not facilitate a brief and contemporaneous investigation of suspected criminal activity that is presently 'afoot', like a *Terry* stop; rather, it is an ongoing and open-ended investigation of future activity. The balance weighs in favor of requiring a warrant based on probable cause.

[1] The government's motion to stay briefing of its appeal in *Ortiz*, pending disposition of the instant appeal, is pending before a motions panel of this Court as of this writing.

Nor can GPS searches be categorically exempted from the warrant requirement on the ground that the subjects of the searches have reduced expectations of privacy. The Supreme Court has upheld warrantless searches of parolees and probationers on a "reasonable suspicion" standard because, inter alia, those individuals are still subject to state controls. *See United States v. Knights*, 534 U.S. 112, 119-21 (2001) (upholding the warrantless search of a probationer); *Samson v. California*, 547 U.S. 843, 850 (2006) (same, for parolees, because "parolees have [even] fewer expectations of privacy than probationers"). While those precedents might plausibly be read to permit GPS tracking of parolees and probationers on a reasonable suspicion standard, they in no way support the government's contention that GPS searches are categorically exempt from the warrant requirement or probable cause standard.[2]

GPS searches of the kind at issue here are wholly unrelated to either of the special needs rationales recognized by the Supreme Court. Their purpose is to arrest and convict criminals, not to deter dangerous conduct. And they are directed not at discrete groups with reduced privacy expectations, but at any person

[2] The government also cites to cases involving warrantless searches of public school students. These cases are distinguishable from GPS searches on *both* of the grounds discussed above: School safety is a legitimate need beyond traditional law enforcement, and school children have a reduced expectation of privacy. *See, e.g., T.L.O.*, 469 U.S. at 340

suspected of a crime

the inherent mobility of cars; it recognizes "the exigent circumstances that exist in connection with movable vehicles." *Cardwell v. Lewis*

monitoring, the very antithesis of exigency. To be sure, in cases of actual exigency, for example, where police have both probable cause to believe that a vehicle contains contraband or evidence of criminal activity and good reason to believe that the vehicle might disappear before a warrant can be obtained, no warrant will be required for the initial attachment. *See*, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) (holding that a warrantless search is permissible where "the exigencies of the situation" make the search "objectively reasonable"). Even then, however, no exigency would prevent law enforcement officials from promptly applying for a warrant to continue tracking.

The Supreme Court has recognized a second rationale justifying warrantless searches of motor vehicles that is equally inapplicable to GPS searches. The Court has explained that people have reduced expectations of privacy in their cars because of "pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 392 (1985) (citing *Cady v.*

violate reasonable expectations of privacy. *See Jones*, 132 S.Ct. at 957, 964 (Alito, J., concurring in the judgment) ("Longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *id.* at 955 (Sotomayor, J., concurring).

3) Linking the Warrant Requirement to the Duration of the Tracking Would Be Unworkable.

The government argues that the duration of GPS tracking should be a factor in evaluating whether a warrant based on probable cause is required. Because the GPS tracking in this case lasted "e2(pyyl1() 1 -1 (u) p yon p (lep y(lep y2(p (e) 2 (d) 1 () 1

even longer. A rule that imposes different constitutional restraints based on factors wholly outside of law enforcement's control would be a recipe for chaos. It would require law enforcement to make guesses about the duration of tracking and to link those guesses to their own assessments of reasonable suspicion and probable cause.

persuasive, unsettled law. This unjustified reading would subvert *Davis*'s clear holding, exceed the bounds of the exclusionary rule, and prove unworkable in practice.

In *Davis*, while the defendant's appeal was pending, the Supreme Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), which announced a new rule governing automobile searches incident to arrest. *Gant* held that automobile passenger compartment searches conducted after the handcuffing and securing of a defendant violated the Fourth Amendment. The decision expressly narrowed *New York v. Belton*, 453 U.S. 454 (1981), and thus overruled the Eleventh Circuit decision in *United States v. Gonzalez*, 71 F.3d 819, 822, 824-27 (11th Cir. 1996), which relied on a broad reading of *Belton* in authorizing warrantless searches even after the defendants were secured. *See Gant*, 556 U.S. at 348. Davis conceded on appeal that the police had "fully complied with 'existing Eleventh Circuit precedent,'" namely *Gonzalez*. *Davis*, 131 S. Ct. at 2426. The Court held that

much broader reading of *Davis*, insisting that *Davis* "just happened to involve" binding appellate precedent. Gov't Br.

automobile, the D.C. Circuit had just four months earlier disagreed with other appeals courts on the constitutional question whether GPS tracking is a search. *United States v. Maynard*, 615 F.3d 544, 557-59 (2010). A position that splits the other circuits, and on which the controlling circuit has not ruled, is quintessentially equivocal, so applying the exclusionary rule would permit the impermissible ad hoc approach that *Davis* and *Johnson* forbid. Law enforcement could effectively

help of a beeper that cd performno indendent tracking and that required cose distance to operate). Acepting this arnt wd both contradict the Suprem Court's vie on changing technolog

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In an attempt to avoid this clear result and justify an extension, the government retreats to the broader line of exclusionary rule cases. *Davis* grew out of two other good faith exception cases. *See Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (exempting searches conducted in reliance on later overturned statutes); *United States v. Leon*, 468 U.S. 897 (1984) (doing the same for later invalidated warrants).[5] But these cases share a common element that the government's interpretation of *Davis* cannot sustain: All involve sources of law that "specifically *authorize[]* a police practice." *Davis*, 131 S. Ct. at 2429 (emphasis in original); *Katzin*, 2012 WL 1646894, at *9 ("[The] exceptions generally involve reliance on unequivocally binding legal authority . . . ."). None of the cases cited in the government's brief specifically authorized warrantless physically attached GPS

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contemplating that "police . . . would be forced to wait decades to implement new technology . . . ." 2012 WL 4215868, at *5. The court should have qualified its prediction by acknowledging that such implementation would need to be warrantless. Police face no risk of suppression with a valid warrant. Moreover

C. The Court Should Reach the Fourth Amendment Question Regardless Whether the Exception Applies.

The Court should decide whether a GPS search requires a probable cause warrant irrespective of its decision on the proper scope of *Davis*. When cases present a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates, there is sufficient reason for the Court to decide the violation issue *before* turning to the good-faith question." *Illinois v. Gates*, 462 U.S. 213, 264 & n.18 (1983) (White, J., concurring in the judgment) (emphasis in original) (citing *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (finding a constitutional violation and remanding for consideration of the good faith defense)). This is just such a case. GPS devices have become a favored tool of law enforcement, and their highly intrusive nature cries out for clear judicial regulation. The *Jones* court was unable to rule on the applicability of the presumptive warrant requirement to GPS searches, because the government had forfeited its position on the issue. 132 S. Ct. at 954. The issue is now before this Court, and addressing it would yield much needed clarity in this circuit.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

6. The electronic version of the Brief of *Amici* filed with the Court was virus checked using AVG Antivirus version 10.0.1424 on November 13, 2012, and was found to have no viruses.

DATED: November 13, 2012

By /s/Catherine Crump
Catherine Crump