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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

ANTOINE JONES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional provision involved 2
Statement 2
Reasons for granting the petition 11
A. The court of appeals' decision conflicts with prior decisions of this Court 13
B. The court of appeals' decision creates a conflict among the Circuits 20
C. The question presented is of substantial and recurring importance 23
Conclusion 28
Appendix A – Court of appeals opinion (Aug. 6, 2010) 1a
Appendix B – Order (Nov. 19, 2010) 43a
Appendix C – Memorandum opinion (Aug. 10, 2006) 53a

TABLE OF AUTHORITIES

Cases:

Berger v. *New York*, 388 U.S. 41(1967) 15
Bond v. *United States*, 529 U.S. 334 (2000) 16, 17
California v. *Ciraolo*, 476 U.S. 207 (1986) 18
California v. *Greenwood*, 486 U.S. 35 (1988) 16, 17, 25
Cardwell v. *Lewis*, 417 U.S. 583 (1974) 8
Commonwealth v. *Connolly*, 913 N.E.2d 356 (Mass. 2009) 23
Cupp v. *Murphy*, 412 U.S. 291 (1973) 15
Davis v. *Mississippi*, 394 U.S. 721 (1969) 15
Florida v. *Bostick*, 501 U.S. 429 (1991) 15
Florida v. *Riley*, 488 U.S. 445 (1989) 18

Cases—Continued: Page

Foltz v. *Commonwealth*, 698 S.E.2d 281 (2010), aff'd on other grounds, No. 0521-09-4, 2011 WL 1233563 (Va. Ct. App. Apr. 5, 2011) 23

Katz v. *United States*, 389 U.S. 347 (1967) 7, 13, 14

Kyllo v. *United States*, 533 U.S. 27 (2001) 21

Maryland v. *Dyson*, 527 U.S. 465 (1999) 8

Osburn v. *State*, 44 P.3d 523 (Nev. 2002) 23

People v. *Weaver*, 909 N.E.2d 1195 (N.Y. 2009) 23

Smith v. *Maryland*, 442 U.S. 735 (1979) 14, 19, 25

State v. *Campbell*, 759 P.2d 1040 (Or. 1988) 23

State v. *Jackson*, 76 P.3d 217 (Wash. 2003) 23

State v. *Sveum*, 769 N.W.2d 53 (Wis. Ct. App. 2009), cert. denied, 131 S. Ct. 803 (2010) 23

Stone v. *State*, 941 A.2d 1238 (Md. Ct. Spec. App. 2008) 23

United States v. *Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007) 6, 20, 21, 22

United States v. *Karo*:

710 F.2d 1433 (10th Cir. 1983), rev'd, 468 U.S. 705 (1984) 15

468 U.S. 705 (1984) 5, 14, 15, 25

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

United States v. *Lopez*, No. 1:10-cr-00067-GMS (D. Del. Feb. 8, 2011) 27

United States v. *Marquez*, 605 F.3d 604 (8th Cir. 2010) 6, 20, 22

United States v. *Miller*, 425 U.S. 435 (1976) 25

Cases—Continued: Page

United States v. *Oladosu*, No. 1:10-cr-00056-S-DLM (D.R.I. Jan. 21, 2011) 27

United States v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. filed, (U.S. Nov. 10, 2010) (No. 10-7515) 6, 20, 21

United States v. *Santana*, No. 1:09-cr-10315-NG (D. Mass. Nov. 19, 2010) 27

United States v. *Sparks*, No. 10-10067 (D. Mass. Nov. 10, 2010) 26

United States v. *Walker*, No. 2:10-cr-00032, 2011 WL 651414 (W.D. Mich. Feb. 11, 2011) 26

United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 19

Zurcher v. *Stanford Daily*, 436 U.S. 547 (1982) 16

Constitution and statutes:

U.S. Const. Amend. IV . . . . *passim*

Freedom of Information Act, 5 U.S.C. 552 *et seq.* 19

21 U.S.C. 841 . . . . 2, 5

21 U.S.C. 843 (b) 5

21 U.S.C. 846 . . . . 2, 5

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 615 F.3d 544. The order of the court of appeals denying rehearing (App., *infra*, 43a), and the opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 44a-52a) are reported at 625 F.3d 766. The opinion of the district court granting in part and denying in part respondent's motion to suppress (App., *infra*, 53a-88a) is published at 451 F. Supp. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2010. A petition for rehearing was denied on November 19, 2010 (App., *infra*, 43a). On February 3, 2011, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including March 18, 2011. On March 8, Chief Justice Roberts further extended the time within which to file a petition for a writ of certiorari to and including April 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of conspiracy to distribute five kilograms or more of cocaine and 50 or more grams of cocaine base, in violation of 21 U.S.C. 841 and 846. The district court sentenced respondent to life imprisonment. Resp. C.A. App. 123-127. The court of appeals reversed respondent's conviction. App., *infra*, 1a-42a.

1. In 2004, a joint Safe Streets Task Force of the Federal Bureau of Investigation and the Metropolitan

Police Department began investigating respondent, who owned and operated a nightclub in the District of Columbia, for narcotics violations. App., *infra*, 2a. The agents used a variety of investigative techniques designed to link respondent to his co-conspirators and to suspected stash locations for illegal drugs. The agents conducted visual surveillance and installed a fixed camera near respondent's nightclub, obtained pen register data showing the phone numbers of people with whom respondent communicated by cellular phone, and secured a Title III wire intercept for respondent's cellular phone. *Id.* at 54a-55a; Gov't C.A. App. 73-74; Resp. C.A. App. 218-222, 227-289.

In addition to those techniques, the agents obtained a warrant from a federal judge in the District of Columbia authorizing them to covertly install and monitor a global positioning system (GPS) tracking device on respondent's Jeep Grand Cherokee. App., *infra*, 15a-16a, 38a-39a; Resp. C.A. App. 827.[1] The warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant and only within the District of Columbia, but the agents did not install the device until 11 days after the warrant was issued, and they installed it while the Jeep was parked in a public parking lot in Maryland. App., *infra*, 38a-39a. Agents also later replaced the device's battery while the Jeep was located in a different public parking lot in Maryland. Resp. C.A. App. 828, 832.

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[1] The Jeep was registered in the name of respondent's wife, but it was used exclusively by respondent. App., *infra*, 16a n.*; Resp. C.A. App. 826. Nevertheless, vehicle tracking devices provide information only about the vehicle's location; they do not reveal who is driving the car, what the driver and occupants are doing, and with whom they may meet at their destinations.

The GPS device communicated with orbital satellites to establish the device's location. Gov't C.A. App. 66. It was battery powered and accurate within 50 to 100 feet, *Id.* at 67, and it generated data only when the Jeep was moving. When the vehicle was not moving, the device was in "sleeping mode" in order to conserve its battery. *Id.* at 68-70. Using the device, agents were able to track respondent's Jeep in the vicinity of a suspected stash house in Fort Washington, Maryland, which confirmed other evidence of respondent driving his Jeep to and from that location. For example, respondent's presence at the Fort Washington stash house was also established by visual surveillance, including videotape and photographs of respondent driving his Jeep to and from that location. *Id.* at 75-76, 145-147; Resp. C.A. App. 844.

Based on intercepted calls between respondent and his suspected suppliers, investigators believed that respondent was expecting a sizeable shipment of cocaine during late October 2005. Gov't C.A. App. 215-218. On October 24, 2005, agents executed search warrants at various locations. They recovered nearly $70,000 from respondent's Jeep, and they recovered wholesale quantities of cocaine, thousands of dollars in cash, firearms, digital scales, and other drug-packaging paraphernalia from respondent's suspected customers. *Id.* at 137A, 222, 230A-F, 248B-N. Agents also recovered from the stash house in Fort Washington, Maryland, approximately 97 kilograms of powder cocaine, almost one kilogram of crack cocaine, approximately $850,000 in cash, and various items used to process and package narcotics. *Id.* at 83-93, 95; App., *infra*, 40a.

2. A federal grand jury sitting in the District of Columbia charged respondent with conspiring to distribute five kilograms or more of cocaine and 50 grams or more

of cocaine base, in violation of 21 U.S.C. 841 and 846; and 29 counts of using a communications facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). App, *infra*, 54a.

Before trial, respondent moved to suppress the data obtained from the GPS tracking device. Resp. C.A. App. 413, 560-567. Relying on *United States* v. *Knotts*, 460 U.S. 276 (1983), and *United States* v. *Karo*, 468 U.S. 705 (1984), the district court granted the motion in part and denied it in part, explaining that data obtained from the GPS device while the Jeep was on public roads was admissible, but that any data obtained while the Jeep was parked inside the garage adjoining respondent's residence must be suppressed. App., *infra*, 83a-85a. As a result, the GPS data introduced at trial related only to the movements of the Jeep on public roads. The jury acquitted respondent on a number of the charges and the district court declared a mistrial after the jury was unable to reach a verdict on the conspiracy charge. Gov't C.A. Br. 2-3.

A grand jury charged respondent in a superseding indictment with a single count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 846. Gov't C.A. App. 321. After a second trial, at which the GPS evidence again related only to the movements of the Jeep on public roads, a jury convicted respondent of the sole count in the indictment. App., *infra*, 3a. The district court sentenced respondent to life imprisonment and ordered him to forfeit $1,000,000 in proceeds from drug trafficking. Resp. C.A. App. 122-127.

3. The court of appeals reversed respondent's conviction. App., *infra*, 1a-42a.

a. The court acknowledged this Court's holding in *Knotts* that monitoring the public movements of a vehicle with the assistance of a beeper placed inside a container of chemicals was not a search within the meaning of the Fourth Amendment because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." App., *infra*, 17a (quoting *Knotts*, 460 U.S. at 281). The court concluded, however, that *Knotts* was not controlling because the officers in that case monitored a "discrete journey" of about 100 miles, rather than conducting prolonged monitoring of a vehicle over the course of several weeks. *Id.* at 17a-19a. The court noted that *Knotts* reserved whether a warrant would be required before police could use electronic devices as part of a "dragnet-type law enforcement practice[]," such as "twenty-four hour surveillance." *Id.* at 17a-18a (quoting *Knotts*, 460 U.S. at 283-284).

The court acknowledged that two other courts of appeals have held that prolonged GPS monitoring of a vehicle is not a Fourth Amendment search. App., *infra*, 20a-21a (citing *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515); *United States* v. *Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007)); see also *United States* v. *Marquez*, 605 F.3d 604 (8th Cir. 2010). The court found those cases inapplicable, stating that those defendants had not challenged the application of the holding in *Knotts* to prolonged surveillance. App., *infra*, 21a-22a.

b. After determining that it was not bound by *Knotts*, the court of appeals concluded that respondent had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month be-

cause he had not exposed the totality of those movements to the public. App., *infra*, 22a-31a. The government's use of a GPS device to monitor those movements, the court held, was therefore a search within the meaning of the Fourth Amendment. *Id.* at 22a-35a; see *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

First, the court concluded that respondent's movements while he drove on public roads in his Jeep were not "actually exposed" to the public. App., *infra*, 23a-27a. The court stated that "[i]n considering whether something is 'exposed' to the public as that term was used in *Katz*[,] we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." *Id.* at 23a. Applying that standard, the court concluded that "the whole of a person'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 essentially nil." *Id.* at 26a.

Second, the court rejected the argument that because each of respondent's individual movements was in public view, respondent's movements were "constructively exposed" to the public. App., *infra*, 27a-31a. The court explained that "[w]hen it comes to privacy, * * * the whole may be more revealing than the parts." *Id.* at 27a. Applying a "mosaic" theory, the court reasoned that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble," which can "reveal more about a person than does any individual trip viewed in isolation." *Id.* at 29a. The court concluded that a reasonable person "does not expect anyone to monitor and retain a record of every time he drives his car * * * rather, he

expects each of those movements to remain disconnected and anonymous." *Id.* at 31a.

Noting that seven States have enacted legislation requiring the government to obtain a warrant before it may use GPS tracking technology, App., *infra*, 33a-34a, the court of appeals further concluded that respondent's expectation of privacy in the month-long public movements of his Jeep was one that society was prepared to recognize as reasonable, *id.* at 31a-35a.

c. The court of appeals rejected the government's argument that the court's decision could invalidate the use of prolonged visual surveillance of persons or vehicles located in public places and exposed to public view. App., *infra*, 35a-38a. As a practical matter, the court suggested that police departments could not afford to collect the information generated by a GPS device through visual surveillance, but GPS monitoring, according to the court, "is not similarly constrained." *Id.* at 35a-36a. The court also explained that the constitutionality of prolonged visual surveillance was not necessarily called into question by its decision, because "when it comes to the Fourth Amendment, means do matter." *Id.* at 37a. For example, the court explained, police do not need a warrant to obtain information through an undercover officer, but they need a warrant to wiretap a phone. *Ibid.* The court ultimately decided to "reserve the lawfulness of prolonged visual surveillance" for another day. *Id.* at 37a-38a.

The court of appeals also rejected the government's argument that the search was nonetheless reasonable because, under the "automobile exception" to the Fourth Amendment's warrant requirement, see *Maryland* v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974), the agents could

have repeatedly searched respondent's vehicle based on probable cause without obtaining a warrant. App., *infra*, 38a-39a. The court observed that the government had not raised this argument in the district court, but nevertheless rejected the argument on the merits, stating that "the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate." *Id.* at 39a.

d. Finally, the court concluded that the district court's error in admitting evidence obtained by use of the GPS device was not harmless. App., *infra*, 39a-42a. The court rejected the government's contention that the other evidence linking respondent to the conspiracy was overwhelming and instead found that "the GPS data were essential to the Government's case." *Id.* at 41a. The court therefore reversed respondent's conviction. *Id.* at 1a-2a.

4. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 43a. Chief Judge Sentelle, joined by Judges Henderson, Brown, and Kavanaugh, dissented. *Id.* at 45a-49a. Chief Judge Sentelle explained that the panel's decision was inconsistent not only with the decisions of every other court of appeals to have considered the issue, but also with this Court's decision in *Knotts*. *Id.* at 45a. Chief Judge Sentelle observed that the Court's statement in *Knotts*, that nothing in the Fourth Amendment "prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," was "[c]entral to [its] reasoning." *Id.* at 46a (quoting *Knotts*, 460 U.S. at 282). He therefore concluded that "[e]verything

the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy," because "[t]here is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking [respondent] with a GPS." *Ibid.*

Chief Judge Sentelle found "unconvincing[]" the panel's attempt to distinguish *Knotts* "not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case," noting that "[t]he fact that no particular individual sees * * * all [of a person's public movements over the course of a month] does not make the movements any less public." App., *infra*, 46a-47a. Chief Judge Sentelle also criticized the panel opinion for giving law enforcement officers no guidance about "at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private." *Id.* at 47a. He noted that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem." *Id.* at 48a.

With regard to the panel's holding that respondent acquired a reasonable expectation of privacy in the totality of his movements over the course of a month because "that whole reveals more . . . than does the sum of its parts," Chief Judge Sentelle stated that the panel had failed to explain how the whole/part distinction affects respondent's reasonable expectation of privacy. App., *infra*, 47a-48a. He explained that "[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." *Ibid.* Whatever the whole revealed, Chief Judge Sentelle explained, the test of the reasonable expectation is not "in any way related to the intent of the user of the data obtained by the surveillance or other alleged search." *Id.* at 48a.

Finally, Chief Judge Sentelle noted, "[l]est the importance of this opinion be underestimated," that because the panel found that the privacy invasion was not in the agents' using a GPS device, "but in the aggregation of the information obtained," App., *infra*, 48a, the panel's opinion calls into question "any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel," *ibid.* Chief Judge Sentelle could not "discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented surveillance and a purely visual surveillance of substantial length." *Id.* at 48a-49a.

Judge Kavanaugh also dissented. App., *infra*, 49a-52a. In addition to the reasons set forth by Chief Judge Sentelle, Judge Kavanaugh would have granted rehearing to resolve respondent's alternative claim on appeal that the initial warrantless installation of the GPS device on his car violated the Fourth Amendment because it was "an unauthorized physical encroachment within a constitutionally protected area," which the panel did not address. *Ibid.* (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with this Court's longstanding precedent that a person traveling on public thoroughfares has no reasonable expectation of privacy in his movements from one place to an-

other, even if "scientific enhancements" allow police to observe this public information more efficiently. See *United States* v. *Knotts*, 460 U.S. 276, 282-284 (1983). The decision also creates a square conflict among the courts of appeals. The Seventh and Ninth Circuits have correctly concluded that prolonged GPS monitoring of a vehicle's movements on public roads is not a "search" within the meaning of the Fourth Amendment. The Eighth Circuit, in rejecting a challenge to GPS tracking, stated that a person has no reasonable expectation of privacy in his public movements, and it upheld tracking for a reasonable period based on reasonable suspicion. At a minimum, if GPS tracking were (incorrectly) deemed a search, the tracking in this case was likewise reasonable.

Prompt resolution of this conflict is critically important to law enforcement efforts throughout the United States. The court of appeals' decision seriously impedes the government's use of GPS devices at the beginning stages of an investigation when officers are gathering evidence to establish probable cause and provides no guidance on the circumstances under which officers must obtain a warrant before placing a GPS device on a vehicle. Given the potential application of the court of appeals' "aggregation" theory to other, non-GPS forms of surveillance, this Court's intervention is also necessary to preserve the government's ability to collect public information during criminal investigations without fear that the evidence will later be suppressed because the investigation revealed "too much" about a person's private life. Because the question presented in this case is important, and because the court of appeals' decision is wrong, this Court should intervene to resolve the conflict.

A. The Court Of Appeals' Decision Conflicts With Prior Decisions Of This Court

1. This Court has held that a "search" within the meaning of the Fourth Amendment occurs only where a "legitimate expectation of privacy * * * has been invaded by government action." *Knotts*, 460 U.S. at 280 (internal quotation marks omitted). As a result, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Applying those principles in *Knotts*, the Court held that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281.

In *Knotts*, police officers, without obtaining a warrant, installed an electronic beeper in a container of chemicals that was subsequently transported in a vehicle. 460 U.S. at 277. The police officers used the beeper to supplement their visual surveillance of the vehicle, and the Court stated that "[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." *Id.* at 282.

The court of appeals' decision is in significant tension, if not outright conflict, with *Knotts*. As in *Knotts*, respondent had "no reasonable expectation of privacy in his movements from one place to another" as he traveled on public roads, 460 U.S. at 281, because those movements were all in public view. The enhanced accuracy of GPS technology, compared to the beeper used in *Knotts*, does not change the analysis. See *id.* at 284 ("Insofar as respondent's complaint appears to be * * * that scientific devices such as the beeper enabled the police to be

more effective in detecting crime, it simply has no constitutional foundation."); *Smith* v. *Maryland*, 442 U.S. 735, 744-745 (1979) (noting that petitioner had conceded that he would have no reasonable expectation of privacy in the phone numbers he dialed if he had placed the calls through an operator, and stating that "[w]e are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate"). Electronic tracking of a vehicle as it moves on public roads offends no reasonable expectation of privacy because it reveals only information that any member of the public could have seen, and it is therefore not a search within the meaning of the Fourth Amendment. See *Katz*, 369 U.S. at 351.

2. The court of appeals concluded that it was not bound by *Knotts* because that case involved a "discrete journey" of 100 miles, while this case involves "prolonged" GPS tracking over the course of roughly a month. App., *infra*, 17a-20a. That distinction makes no difference. The Court's decision in *Knotts* was based on the premise that the driver had no reasonable expectation of privacy in movements that were exposed to public view, not on the length of time the beeper was in place. 460 U.S. at 284-285.

Furthermore, even if the holding of *Knotts* was limited to police monitoring of short journeys on public roads with the assistance of electronic surveillance, the Court applied the same Fourth Amendment principles to prolonged electronic tracking in *United States* v. *Karo*, 468 U.S. 705, 715 (1984). In *Karo*, agents placed a tracking device in a can of ether and left the device in place for five months as the can was transported between different locations. *Id.* at 709-710. The Court held that certain transmissions from the beeper during

that prolonged period—*i.e.*, those that revealed information about private spaces—could not be used to establish probable cause in an application for a warrant to search a residence, but the Court's holding on that point did not depend upon the duration of the electronic monitoring. *Id.* at 714-718. Although the court of appeals had distinguished *Knotts* on the ground that "[t]he *Knotts* case involved surveillance over only a few days; monitoring in [this] case took place over five months," *United States* v. *Karo*, 710 F.2d 1433, 1439 (10th Cir. 1983), rev'd, 468 U.S. 705 (1984), the Court concluded that the remaining evidence, including "months-long tracking" of the ether can through "visual and beeper surveillance," established probable cause supporting issuance of the warrant. *Karo*, 468 U.S. at 719-720. The Court expressed no concern about the prolonged monitoring.

The GPS monitoring in this case was not "dragnet" surveillance, which the Court in *Knotts* stated it would leave for another day. 460 U.S. at 284. The Court generally has used the term "dragnet" to refer to high-volume searches that are often conducted without any articulable suspicion. See, *e.g.*, *Florida* v. *Bostick*, 501 U.S. 429, 441 (1991); *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in *Davis* v. *Mississippi*, 394 U.S. 721 (1969)); *Berger* v. *New York*, 388 U.S. 41, 65 (1967). That scenario is not presented here. The agents in this case tracked the movements of a single vehicle driven by an individual reasonably suspected of cocaine trafficking. Even if this were (incorrectly) deemed a Fourth Amendment search, it would be a reasonable one. This record raises no concerns about mass, suspicionless GPS monitoring; "the fact is that the 'reality hardly suggests abuse.'" *Knotts*, 460 U.S. at 283-284 (quoting *Zurcher*

v. *Stanford Daily*, 436 U.S. 547, 566 (1978)). Any constitutional questions about hypothetical programs of mass surveillance can await resolution if they ever occur.

3. Even assuming this case is not squarely controlled by *Knotts*, the court of appeals misapplied this Court's Fourth Amendment cases to hold that respondent had a reasonable expectation of privacy in the totality of his public movements, even if every individual movement was exposed to the public. The court of appeals stated that to determine whether something is "exposed to the public," "we ask not what another person can physically and may lawfully do[,] but rather what a reasonable person expects another might actually do." App., *infra*, 23a. This Court's cases lend no support to the court of appeals' view that public movements can acquire Fourth Amendment protection based on the lack of "likelihood" that anyone will observe them. *Id.* at 26a.

In support of its approach (App., *infra*, 23a, 24a-25a), the court of appeals cited *California* v. *Greenwood*, 486 U.S. 35 (1988), and *Bond* v. *United States*, 529 U.S. 334 (2000), both of which involve tactile observation of items that were not visually exposed to the public. In *Greenwood*, the Court held that the defendant lacked a reasonable expectation of privacy in the contents of trash bags that he placed on the curb in front of his house. 486 U.S. at 41. The Court acknowledged that the defendants may have had a "subjective" expectation of privacy based on the unlikelihood that anyone would inspect their trash after they placed it on the curb "in opaque plastic bags" to be picked up by the garbage collector after a short period of time. *Id.* at 39. But that expectation, the Court held, was not "objectively reasonable." *Id.* at 40. Instead, the Court held that once the

defendants placed the bags on the curb where they were readily accessible to anyone who wanted to look inside, "the police [could not] reasonably be expected to avert their eyes from evidence of criminal activity that *could have been* observed by any member of the public." *Id.* at 41 (emphasis added).

In *Bond*, the Court held that, unlike the opaque trash bags left on the curb in *Greenwood*, a bus passenger who places his opaque duffle bag in an overhead compartment does not "expose" his bag to the public for the type of "physical manipulation" that a border patrol agent engaged in to investigate the bag's contents. *Bond*, 529 U.S. at 338-339. The Court in *Bond* explicitly distinguished "visual, as opposed to tactile, observation" of an item in a public place, noting that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337.

The law enforcement investigations in *Greenwood* and *Bond* went beyond conducting visual surveillance of an item that was placed in public view, but even in *Greenwood*, the Court attached no importance to the subjective expectation that "there was little likelihood" that anyone would inspect the defendants' trash. 486 U.S. at 39. And the Court has never engaged in a "likelihood" analysis for cases involving visual surveillance of public movements like those at issue in this case. In *Knotts*, for example, the Court did not analyze the likelihood that someone would follow a vehicle during a 100-mile trip from Minnesota to Wisconsin. Instead, the Court stated that the use of a beeper to track the vehicle "raise[d] no constitutional issues which visual surveillance would not also raise" because "[a] police car following [the vehicle] at a distance throughout [the] journey *could have* observed [the defendant] leaving the

public highway and arriving at the cabin," *Knotts*, 460 U.S. at 285 (emphasis added), just as respondent's Jeep could have been observed through extensive visual and physical surveillance.

The court of appeals' reliance (App., *infra*, 23a-24a) on this Court's "flyover" cases, see *California* v. *Ciraolo*, 476 U.S. 207 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989), is similarly misplaced. *Ciraolo* and *Riley* involved visual inspections of private areas (the curtilage of homes), not public movements. In both cases, the Court acknowledged that although the defendants had exhibited actual expectations of privacy in their backyards, those expectations were not reasonable "[i]n an age where private and commercial flight in the public airways is routine." *Ciraolo*, 476 U.S. at 215.[2] The Court's likelihood analysis in those cases determined whether something ordinarily private was sufficiently "exposed" to the public to make an expectation of privacy in that area unreasonable. In the case of movements of a vehicle on public highways, that information has clearly already been exposed to the public. See *Knotts*, 460 U.S. at 285.

Finally, this Court has not "implicitly recognized" (App., *infra*, 28a) a distinction between a whole and the sum of its parts in analyzing whether something has been "exposed" to the public for purposes of the Fourth Amendment. In support of this proposition (*id.* at 27a-29a), the court of appeals cited *United States Department of Justice* v. *Reporters Committee for Freedom of*

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[2] As the court of appeals noted (App., *infra*, 24a), Justice O'Connor's concurrence in *Riley* clarifies that she believed that the defendant's backyard had been "exposed" to the public not because it was possible or legal for commercial planes to fly over the area, but because overflight was common. 488 U.S. at 453.

the Press, 489 U.S. 749 (1989), and *Smith*, *supra*, neither of which offers any support for the court of appeals' decision. *Reporters Committee for Freedom of the Press* is a Freedom of Information Act case addressing whether an individual has a privacy interest in his "rap sheet," which compiled "scattered bits" of public information, not "'freely available' * * * either to the officials who have access to the underlying files or to the general public." 489 U.S. at 764, 769. Its analysis does not inform, let alone resolve, the question of whether an individual who exposes his or her movements to the public retains a reasonable expectation of privacy in the sum of those movements.

And in *Smith*, the Court did not consider, as the court of appeals stated (App., *infra*, 28a), "whether [a person] expects all the numbers he dials to be compiled in a list" in determining whether a person has an *objectively* reasonable expectation of privacy in the phone numbers he dials. The Court, instead, noted that a person "see[s] a list of their * * * calls on their monthly bills" in supporting the Court's prior conclusion that individuals would not "in general entertain any actual expectation of privacy in the numbers they dial," and thus would lack a *subjective* expectation of privacy. *Smith*, 442 U.S. at 742. The Court's ultimate conclusion was that any subjective expectation of privacy a person has in the phone numbers he dials is objectively unreasonable, because when a person uses his phone, he "voluntarily convey[s] numerical information to the telephone company," thereby "'expos[ing]' th[e] information" to a third party. *Id.* at 744.

As Chief Judge Sentelle stated in his dissent from the denial of rehearing en banc, "[t]he reasonable expectation of privacy as to a person's movements on the high-

way is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." App., *infra*, 47a-48a. Nothing in this Court's Fourth Amendment cases supports the court of appeals' "aggregation" theory that a person can maintain a reasonable expectation of privacy in the totality of his public movements, each of which is "conveyed to anyone who want[s] to look." *Knotts*, 460 U.S. at 281.

B. The Court of Appeals' Decision Creates A Conflict Among The Circuits

The court of appeals' decision also creates a conflict among the circuits. The Seventh and Ninth Circuits have held that prolonged GPS monitoring of a vehicle's public movements is not a search within the meaning of the Fourth Amendment. See *United States* v. *Garcia*, 474 F.3d 994, 996-998 (7th Cir.), cert. denied, 552 U.S. 883 (2007); *United States* v. *Pineda-Moreno*, 591 F.3d 1212, 1216-1217 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515). In addition, the Eighth Circuit in rejecting a challenge to GPS tracking, has stated that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another." *United States* v. *Marquez*, 605 F.3d 604, 609 (2010). That conflict provides a compelling reason for the Court to intervene.

In *Pineda-Moreno*, after obtaining information that the defendant might be involved in drug trafficking, agents from the Drug Enforcement Administration (DEA) "repeatedly monitored [his] Jeep using various types of mobile tracking devices" "[o]ver a four-month period." 591 F.3d at 1213. After a tracking device alerted the agents that Pineda-Moreno was leaving a sus-

pected marijuana grow site, agents stopped the vehicle and smelled marijuana emanating from the backseat, and they found two large garbage bags of marijuana during a search of Pineda-Moreno's residence. *Id.* at 1214. Although Pineda-Moreno had not raised the argument in the district court, the Ninth Circuit rejected the argument that "the agents' use of mobile tracking devices continuously to monitor the location of his Jeep violated his Fourth Amendment rights." *Id.* at 1216. The court held that the use of a GPS device to track Pineda-Moreno's vehicle was not a Fourth Amendment search because "[t]he only information the agents obtained from the tracking devices was a log of the locations where Pineda-Moreno's car traveled, information the agents could have obtained by following the car." *Ibid.*[3]

In *Garcia*, police officers received information that Garcia was manufacturing methamphetamine, and they placed a GPS device on his car without applying for a warrant. 474 F.3d at 995. When they later retrieved the

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[3] Chief Judge Kozinski, joined by Judges Reinhardt, Wardlaw, Paez, and Berzon, dissented from the Ninth Circuit's denial of rehearing en banc. *United States* v. *Pineda-Moreno*, 617 F.3d 1120 (2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515). Chief Judge Kozinski believed that the expectation of privacy in one's driveway (as "curtilage") is the same as in the home itself and that the agents' installation of the device while the vehicle was parked in the defendant's driveway was therefore problematic. *Id.* at 1121-1123. He also believed that rehearing en banc was warranted to address whether prolonged warrantless surveillance using a GPS device is permissible under the Fourth Amendment, given this Court's decision in *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001), to "take the long view" from the original meaning of the Fourth Amendment in order to guard against advances in technology that can erode Fourth Amendment privacy interests. *Pineda-Moreno*, 617 F.3d at 1124.

device, they could see the car's travel history. *Ibid.* The Seventh Circuit held that no warrant was required to conduct continuous electronic tracking using a GPS device because the device was a "substitute * * * for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment." *Id.* at 997.

The Eighth Circuit similarly concluded that a warrant was not required in *Marquez.* In that case, DEA agents placed a GPS device on a truck that the agents believed was involved in drug trafficking. 605 F.3d at 607. The agents changed the battery on the device seven times over the course of a prolonged investigation, and the device "allowed police to determine" that the truck was traveling back and forth between Des Moines, Iowa, and Denver, Colorado. *Ibid.* The Eighth Circuit held that the defendant did not have "standing" to challenge the warrantless use of the GPS device because he was only an occasional passenger in the vehicle. *Id.* at 609. But the court further concluded that "[e]ven if [the defendant] had standing, we would find no error." *Ibid.* The court stated that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another," *ibid.*, and concluded that "when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time," *id.* at 610.[4]

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[4] In addition, appellate courts in Virginia, Wisconsin, and Maryland have concluded that police officers do not need to obtain a warrant before using a GPS device to track the movements of a vehicle on public roads. See *Foltz* v. *Commonwealth*, 698 S.E.2d 281, 285-292 (Va. Ct.

The D.C. Circuit's contrary opinion in this case creates a division of authority in the federal courts of appeals.[5] The conflict became intractable when the D.C. Circuit denied the government's petition for rehearing en banc in this case. App., *infra*, 49a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting conflict with Seventh, Eighth, and Ninth Circuits). This Court's intervention is therefore necessary to resolve the conflict.

C. The Question Presented Is Of Substantial And Recurring Importance

This Court's resolution of the question presented is critically important to law enforcement efforts through-

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App. 2010) (use of GPS monitoring device not a Fourth Amendment search where police officer "could have followed and personally recorded the movements" of defendant's vehicle without violating any recognized right of privacy), aff'd on other grounds, No. 0521-09-4, 2011 WL 1233563 (Va. Ct. App. Apr. 5, 2011) (en banc); *State* v. *Sveum*, 769 N.W.2d 53, 57-61 (Wis. Ct. App. 2009) (holding that no Fourth Amendment search or seizure occurs "when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view"); *Stone* v. *State*, 941 A.2d 1238, 1249-1250 (Md. Ct. Spec. App. 2008) (holding trial court did not abuse its discretion in cutting short defendant's cross-examination about a GPS tracking device because defendant had no reasonable expectation of privacy in his location while he traveled on public thoroughfares).

[5] Several state courts have also held that police use of GPS devices to monitor the public movements of vehicles is unlawful, but have done so only under their respective state constitutions, and not under the Fourth Amendment. See *People* v. *Weaver*, 909 N.E.2d 1195, 1202 (N.Y. 2009); *Commonwealth* v. *Connolly*, 913 N.E.2d 356, 366-372 (Mass. 2009); *State* v. *Jackson*, 76 P.3d 217, 224 (Wash. 2003); *State* v. *Campbell*, 759 P.2d 1040, 1049 (Or. 1988); but see *Osburn* v. *State*, 44 P.3d 523, 524-526 (Nev. 2002) (upholding attachment of electronic monitoring device under state constitution).

out the United States. The court of appeals' decision, if allowed to stand, would stifle the ability of law enforcement agents to follow leads at the beginning stages of an investigation, provide no guidance to law enforcement officers about when a warrant is required before placing a GPS device on a vehicle, and call into question the legality of various investigative techniques used to gather public information. GPS tracking is an important law enforcement tool, and the issue will therefore continue to arise frequently. This Court should intervene to clarify the governing legal principles that apply to an array of investigative techniques, and to establish when GPS tracking may lawfully be undertaken.

1. The court of appeals' decision, which will require law enforcement officers to obtain a warrant before placing a GPS device on a vehicle if the device will be used for a "prolonged" time period, has created uncertainty surrounding the use of an important law enforcement tool. Although in some investigations the government could establish probable cause and obtain a warrant before using a GPS device, federal law enforcement agencies frequently use tracking devices early in investigations, before suspicions have ripened into probable cause. The court of appeals' decision prevents law enforcement officers from using GPS devices in an effort to gather information *to establish* probable cause, which will seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, and other crimes.

2. Additionally, the court of appeals' opinion gives no guidance to law enforcement officers about when a warrant is required. Use of a GPS device for a few hours (or perhaps a few days) is presumably still acceptable under *Knotts*. But the court's opinion offers no

workable standard for law enforcement officers to determine how long a GPS device must remain in place before their investigation reveals enough information to offend a reasonable expectation of privacy (and therefore become a Fourth Amendment search). See App., *infra*, 48a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem").

3. Significantly, the court of appeals' legal theory that the aggregation of public information produces a Fourth Amendment search, even when short periods of surveillance would not, has the potential to destabilize Fourth Amendment law and to raise questions about a variety of common law enforcement practices. Protracted use of pen registers, repeated trash pulls, aggregation of financial data, and prolonged visual surveillance can all produce an immense amount of information about a person's private life. Each of these practices has been held not to be a Fourth Amendment search. See *Smith*, 442 U.S. at 745-746; *Greenwood*, 486 U.S. at 44-45; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Karo*, 468 U.S. at 721. But under the court of appeals' theory, these non-search techniques could be transformed into a search when used over some undefined period of time or in combination. Just as "[a] reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there," App., *infra*, 31a, a person does not expect anyone to pull his trash every day for six weeks, or monitor the phone numbers he dials for months, or

review every credit card statement he receives and every check he writes for years. The court of appeals "aggregation" theory thus has limitless potential to require courts to draw impossible lines between the moderate degree of review or observation permitted under the court's approach, and the excessive or prolonged degree that becomes a search.

4. Finally, the use of GPS tracking devices is a common law enforcement investigative technique, and the question presented is therefore of recurring importance. In the wake of the decision in this case, suppression motions based on the use of prolonged GPS tracking have proliferated. Two motions have recently been decided in the government's favor. See *United States* v. *Walker*, No. 2:10-cr-00032, 2011 WL 651414, at 2-3 (W.D. Mich. Feb. 11, 2011) (noting that issue of warrantless GPS tracking "is a contentious issue regarding which there have been great differences of opinion among the federal courts" and holding that warrantless GPS tracking of vehicle did not constitute Fourth Amendment search under the "steadfastly cardinal rule in a universe of varying expectations," that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection") (brackets in original) (internal quotation marks omitted); *United States* v. *Sparks*, No. 10-10067-WGY (D. Mass. Nov. 10, 2010) (noting that "[t]he proper inquiry * * * is not what a random stranger would actually do or likely do, but rather what he feasibly could," and holding that warrantless GPS tracking of a vehicle for 11 days was not a Fourth Amendment search). Additional motions filed or supplemented after the court of appeals' opinion in this case remain pending in the district courts. See, *e.g.*, Docket entry No. 47, *United States* v. *Oladosu*,

No. 1:10-cr-00056-S-DLM (D.R.I. Jan. 21, 2011) (motion to suppress evidence obtained through warrantless use of GPS device); Docket entry No. 48, *United States* v. *Lopez*, No. 1:10-cr-00067-GMS (D. Del. Feb. 8, 2011) (expanding previous suppression motion to request suppression of evidence obtained from GPS devices attached to various vehicles driven by defendant), and Docket entry No. 54, *Lopez*, *supra* (Mar. 4, 2011) (continuing trial date and reopening hearing on defendant's suppression motion); Docket entry No. 99, *United States* v. *Santana*, No. 1:09-cr-10315-NG (D. Mass. Nov. 19, 2010) (supplemental memorandum in support of suppression motion; expanding original suppression motion to include request for suppression of evidence obtained through warrantless use of GPS device). This litigation will continue unabated in the absence of a definitive resolution of the conflict by this Court. And confusing or inconsistent case law with respect to GPS tracking or other means of acquiring or aggregating data not normally thought of as a search will hamper important law enforcement interests. This Court's intervention to forestall those consequences is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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