No. 10-1259

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTOINE JONES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

WALTER DELLINGER
SRI SRINIVASAN
MICAH W.J. SMITH
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, DC 20006
(202) 383-5300
wdellinger@omm.com

STEPHEN C. LECKAR
(*Counsel of Record*)
SHAINIS & PELTZMAN, CHARTERED
1850 M Street, NW
Suite 240
Washington, DC 20036
(202) 742-4242
steve@s-plaw.com

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the warrantless use of a global positioning system (GPS) tracking device to record respondent's pattern of movements in his vehicle for 24 hours a day for four weeks, and to an extent not practically possible through visual surveillance, invaded a reasonable expectation of privacy and thus constituted a "search" under the Fourth Amendment.

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

For four weeks in 2005, law enforcement agents used a global positioning system (GPS) tracking device to record every movement respondent Antoine Jones, his wife, and his son made in their vehicle for 24 hours of every day. The satellite-based GPS device produced information not just about respondent's discrete journeys and stops, but also about a more intimate and intrusive pattern of his repeated movements and habits. And once the GPS device was attached to the vehicle, the government was able to record Jones's movements automatically and remotely, for as long as it wished, as long as it occasionally recharged the device's batteries.

The court of appeals held that the 24-hour GPS monitoring of Jones's movements for an extended period of time—and to an extent not practically possible through visual surveillance—invaded Jones's reasonable expectation of privacy. The court therefore held that the prolonged GPS monitoring constituted a search under the Fourth Amendment and required a valid warrant or a showing that the search was reasonable without a warrant. Because the government failed to meet either requirement in this case, and the introduction of the GPS evidence is not harmless error on the particular facts in the record, the court of appeals reversed Jones's conviction for a narcotics conspiracy offense.

The court of appeals's holding is not inconsistent with this Court's precedents; does not conflict with the decision of any other federal court of appeals or state high court; is correct; and could be affirmed on alternative grounds. The government has identified

no adequate reason for this Court to intervene before a genuine circuit split has developed. And there are good reasons not to intervene prematurely when, as here, the questions presented are not only legally but also technologically complex. Accordingly, the government's petition for certiorari should be denied.

If the government's petition were granted, however, the Court should also review the alternative argument Jones raised below: whether Jones's Fourth Amendment rights were violated not only through the extended GPS tracking, but also through the installation of the GPS device on his vehicle.

STATEMENT OF THE CASE

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

Through the first two decades of the system's existence, only the military could access accurate en-

crypted GPS satellite signals; unencrypted civilian signals were "intentionally riddled with random errors" to "reduce the accuracy of the information transmitted for civilian purposes." *Id.* at 415. But in 2000, the government decided to make accurate transmissions available for civilian use. *Id.* (citing Statement by the President Regarding the United States' Decision to Stop Degrading Global Positioning System Accuracy, 1 Pub. Papers 803 (May 1, 2000)). That decision led to the development of civilian applications of GPS, "including cellular telephones and onboard navigation systems in automobiles." *Id.* at 414. It also led to the proliferation of law enforcement efforts to employ GPS devices in investigations, including the investigation in this case.

2. a. In September of 2005, law enforcement agents submitted an affidavit and secured a warrant from a federal judge in the District of Columbia authorizing them to attach a GPS device to a jeep registered to Jones's wife. Pet. App. 66a-74a; Pet. 3-4.[1] By its terms, the warrant was valid for only ten days

[1] The government asserts that Jones was the "exclusive" driver of the jeep. Pet. 3 n.1. But the agents did not make this assertion when they sought a warrant. And no representation to that effect appears in the accompanying application for GPS tracking or in the incorporated affidavit seeking approval for wiretapping. App. I-257, 269, 346-39. Furthermore, the government made no effort to stop or minimize the GPS device's indiscriminate tracking of the jeep in the event that Mrs. Jones, the Jones's college-age son, or someone other than Jones were to use the vehicle. Nonetheless, for convenience, this brief refers to the vehicle as being driven by Jones himself.

and authorized the installation of the GPS device only within the District of Columbia. *Id.*

The agents failed to comply with the warrant's requirements. They attached the GPS device to Jones's car while it was parked in a public parking lot in Maryland, not in the District of Columbia. Pet. App. 38a-39a n. *. By the time the agents attached the GPS device and later returned to reboot the device, the warrant's 10-day period had expired. *Id.* at 83a. Moreover, the agents decided to use the GPS device to record Jones's movements for 24 hours a day for four weeks—far beyond the ten days that had been authorized under the expired warrant. App. Br. 48 (citing record). As a consequence, the agents could not rely on the warrant to justify their actions.

b. A federal grand jury in the District of Columbia indicted Jones for conspiracy to distribute five kilograms or more of cocaine, and use of telecommunications facilities in furtherance of narcotics trafficking, in violation of 21 U.S.C. §§ 843(b) and 846. Prior to trial, Jones moved to suppress the GPS evidence. The district court denied relief, with the exception of the signals that had emanated while the jeep was parked in Jones's garage. Those signals, the trial judge reasoned, came from inside a private residence where Jones had a reasonable expectation of privacy under *United States v. Karo*, 468 U.S. 705, 715 (1984). Pet. App. 54a, 83a-85a.

Jones was acquitted of all unlawful telecommunications charges at his first trial, but the jury hung on the conspiracy charge. At Jones's second trial, the GPS logs proved essential to the prosecution's case, as they linked Jones's movements to the

claimed stash house. Jones was convicted of the conspiracy charge. *Id.* at 2a, 30a n.*, 39a-41a.

3. On appeal, Jones argued that both the installation of the GPS device and the resulting remote surveillance violated his Fourth Amendment rights. The court of appeals did not address the installation claim, however, because it agreed that the prolonged, warrantless 24-hour surveillance was an unconstitutional search. *Id.* at 15a-42a.

a. The court of appeals's opinion began by explaining that this Court's decision in *United States v. Knotts*, 460 U.S. 276 (1983), does not resolve whether prolonged, 24-hour GPS surveillance constitutes a Fourth Amendment search. *Knotts* approved of the use of a beeper device that aided law enforcement officials in visually monitoring the movements of a vehicle during the course of a single journey. It "explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case." Pet. App. 17a. "*Knotts* held only that '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another,' not that such a person has no reasonable expectation in his movements whatsoever, world without end, as the Government would have it." *Id.* at 19a (quoting *Knotts*, 460 U.S. at 281).

In fact, the court of appeals observed, *Knotts* "specifically reserved the question whether a warrant would be required in a case involving 'twenty four hour surveillance.'" *Id.* at 17a-18a (quoting

Knotts, 460 U.S. at 283-84). *Knotts* cautioned that "'if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.'" *Id.* at 18a (quoting *Knotts*, 460 U.S. at 84).

The court of appeals concluded that this case was not controlled by the holding of *Knotts* but instead raised the very question *Knotts* expressly declined to resolve. *Id.* The court reached that conclusion because law enforcement "used the GPS device not to track Jones's 'movements from one place to another,' *Knotts*, 460 U.S. at 281, but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place to place." Pet. App. 21a-22a.

b. The court of appeals therefore considered the question left open in *Knotts*. *Id.* at 22a-38a.

Applying the two-step framework of *United States v. Katz*, 389 U.S. 347 (1967), the court first asked whether Jones had a subjective expectation of privacy. Pet. App. 16a, 22a-31a. The court held that he did. Unlike a person's "movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *Id.* at 22a-23a. Indeed, the government could point to no "single actual example of visual surveillance" of the same intrusiveness and duration as the GPS tracking in this case, *id.* at 35a, and "[n]o doubt the reason is that

practical considerations prevent visual surveillance from lasting very long," Pet. App. 36a.

In addition, "the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts." *Id.* at 22a-23a. In particular, extended 24-hour 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." *Id.* at 29a. "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person but all such facts." *Id.* at 30a.

In light of Jones's subjective expectation of privacy, the court turned the second step of the *Katz* framework and asked whether Jones's privacy expectation was reasonable. *Id.* at 32a-35a. The court found that it was. As the court explained, "prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse." *Id.* at 33a. In fact, the "intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*; indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under *Katz*." *Id.* at 33a.

The court of appeals also pointed out that California, Utah, Minnesota, Florida, South Carolina, Oklahoma, Hawaii, and Pennsylvania have all "enacted legislation imposing civil and criminal penalties for the use of electronic tracking devices and expressly requiring exclusion of evidence produced by such a device unless obtained by the police acting pursuant to a warrant." *Id.* at 33a-34a. These state laws, the court of appeals reasoned, "are indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable." *Id.*

The court of appeals emphasized that its holding was narrow. It explained that its decision did not conflict with the holdings of other federal courts of appeals. *Id.* at 20a-22a. In particular, the D.C. Circuit reaffirmed that "[s]urveillance that reveals only what is already exposed to the public—such as a person's movements during a single journey—is not a search." *Id.* at 35a. This case raised a different question, the court explained, because GPS devices produce an intrusive minute-by-minute profile of a person's patterns of movement that cannot feasibly be obtained through visual surveillance. *Id.* at 35a-37a. Hence the "advent of GPS technology has occasioned a heretofore unknown type of intrusion into an ordinary and hitherto privacy enclave." *Id.* at 36a-37a.

The court of appeals explicitly stated that "[t]his case does not require us to, and therefore we do not decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment."

Id. at 37a. Even if it were theoretically possible to obtain information of patterns of movement and habits through visual surveillance, that would not require a finding that prolonged 24-hour GPS tracking is not a search: "'The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.'" *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 35 n. 2 (2001)). As the court of appeals concluded, "when it comes to the Fourth Amendment, means do matter." *Id.*

c. Having found that the government's use of the GPS tracking device constituted a Fourth Amendment search on the particular facts of this case, the court of appeals next considered the government's argument that the automobile exception to the warrant requirement justified the warrantless use of the GPS device for a prolonged period. That argument, the court explained, was "doubly off the mark." Pet. App. 39a. First, "the Government did not raise it below," and the argument was therefore forfeited. *Id.* Second, "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.* And because the government made no other argument in defense of its warrantless search, the search was unreasonable. *Id.*

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

a. In a short opinion concurring in the denial of rehearing en banc, Judges Ginsburg, Tatel, and Grif-

fith "underline[d] two matters." *Id.* at 44a. First, "because the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful." *Id.* The government's only argument was based on the automobile exception to the warrant requirement, and that exception did not apply. *Id.* Second, "the Government's petition complains that the court's opinion 'implicitly calls into question common and important practices such as sustained visual surveillance and photographic surveillance of public places,' Pet. at 2, but that is not correct." *Id.*

b. Chief Judge Sentelle wrote an opinion dissenting from the denial of rehearing en banc. Although GPS tracking devices do not merely aid visual surveillance, but make prolonged 24-hour surveillance possible for the first time, Chief Judge Sentelle nevertheless thought that this case should be controlled by the statement in *Knotts* 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.'" Pet. App. 46a (quoting *Knotts*, 460 U.S. at 282). Chief Judge Sentelle also rejected the panel's distinction, foreshadowed in *Knotts*, between visual surveillance of discrete journeys and prolonged 24-hour GPS surveillance. In his view, "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." *Id.* at 47a-48a.

c. Judge Kavanaugh wrote a separate dissenting opinion from the denial of rehearing en banc. Although Judge Kavanaugh expressed agreement with Chief Judge Sentelle's opinion, he clarified that "[t]hat is not to say, however, that I think the Government necessarily would prevail in this case." Judge Kavanaugh would have considered en banc the question that "the panel opinion did not address": whether "the police's installation of a GPS device on one's car is an unauthorized physical encroachment within a constitutionally protected area." *Id.* at 49a, 52a (citation and internal quotation marks omitted). "In any event," Judge Kavanaugh concluded, "it is an important and close question, one that the en banc Court should consider along with the separate issue raised by Chief Judge Sentelle." *Id.* at 52a.

REASONS FOR DENYING THE PETITION

I. The D.C. Circuit's Holding That Prolonged 24-Hour GPS Surveillance Constitutes a Search Does Not Warrant Review

The advent of satellite-based tracking technology has enabled the government to engage in 24-hour tracking of the movements of any private citizen for extended—indeed, unlimited—periods of time. Courts across the country are only beginning to grapple with the Fourth Amendment implications of this powerful and fast-improving technology. And the Seventh, Eighth, and Ninth Circuits have recently held that use of GPS technology does not require a warrant where there was no dispute that the information recorded could have been obtained through visual surveillance. *See infra* pp. 19-23.

In this case, the D.C. Circuit did not consider whether the use of GPS technology is *always* a search, and it had no occasion to disagree with the holdings of the Seventh, Eighth, and Ninth Circuit. Instead, the D.C. Circuit, as the court itself explained, confronted a narrower question that had not previously been pressed before a federal court of appeals: whether law enforcement's 24-hour use of a GPS device over a prolonged period of time, and to an extent *not* feasible through visual surveillance, constituted a Fourth Amendment search. The court held that it did.

The government now urges this Court to grant review of the D.C. Circuit's decision. But the decision is in harmony with this Court's precedents; does not conflict with the decision of any other federal

court of appeals or any state high court; was carefully limited to its facts and thus does not threaten other well-accepted law enforcement techniques; correctly resolved the precise question presented; and could be affirmed on alternative grounds in any event. The government's petition for certiorari therefore should be denied.

A. The D.C. Circuit's Holding Does Not Conflict with This Court's Decisions In *Knotts* and *Karo*

The question in this case is highly fact-specific: whether the warrantless use of a satellite-based GPS tracking device to record a private citizen's movements in his vehicle, for 24 hours of every day for a prolonged period of time, constitutes a Fourth Amendment search in those instances in which it reveals patterns of movement and habits that could not have been obtained through mere visual surveillance. In resolving the question, the D.C. Circuit paid careful attention not only to the general guidance obtained from this Court's precedents but also to the particular facts of the case.

The government argues that this Court already resolved the question three decades ago in its decisions in *Knotts*, 460 U.S. 276, and *Karo*, 468 U.S. 705. *See* Pet. 13-16. And it asserts that this Court's review is warranted because the D.C. Circuit's holding is in tension or outright conflict with those decisions. The government's argument is incorrect.

1. This Court has never considered the Fourth Amendment implications of satellite-based GPS technology—which is unsurprising given that accu-

rate, non-degraded GPS transmissions were only made available for civilian use in 2000. *See supra* pp. 2-3. The government nonetheless argues that this Court's precedents are directly controlling. And it cites this Court's decisions in *Knotts* and *Karo*, in which the Court assessed the Fourth Amendment significance of beeper technology. The government's argument misconstrues the Court's precedents and fails to recognize the salience of the dramatic differences between beepers and GPS.

Both *Knotts* and *Karo* involved visual surveillance: the government in those cases actually observed the movements of the defendants on public thoroughfares. *See Knotts*, 460 U.S. at 278-79; *Karo*, 468 U.S. at 709-10. The issue was whether the government could, without obtaining a valid warrant, *facilitate* its visual surveillance through the use of beepers. Beepers are radio transmitters that emit periodic signals that can be picked up by a radio receiver. *Knotts*, 460 U.S. at 277. They do not enable the government to record an individual's movements automatically and remotely. To the contrary, they require the government to remain sufficiently nearby so as to pick up the radio signals. Thus, as the Court noted, beepers merely "augment[] the sensory faculties bestowed upon [the police] at birth." *Id.* The Court compared them to a "searchlight." *Id.* (citing *United States v. Lee*, 274 U.S. 559, 563 (1927)).

The Court ultimately held that the government did not need a warrant to facilitate its visual surveillance on public roads using beeper technology. It reached this result because the beepers merely aided

the government in tracking movements on public roads that "could have been observed by the naked eye." *Karo*, 468 U.S. at 713-14 (describing *Knotts*); *see also Knotts*, 460 U.S. at 281-82 ("When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property."); *id.* at 282 ("Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police."). As a consequence, the information was relinquished to public view, and there was no reasonable expectation of privacy. *Knotts*, 460 U.S. at 282-83; *Karo*, 468 U.S. at 719-21.

2. a. The government contends that *Knotts* and *Karo* created a bright-line rule that a private citizen can never have a reasonable expectation of privacy in his movements on public roads. *See* Pet. 13-14. But the opinions said no such thing. They were concerned with the facts before them, and thus held only that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements *from one place to another*." *Knotts*, 460 U.S. at 281 (emphasis added). Neither *Knotts* nor *Karo* resolved the question—which would have been purely hypothetical at the time—whether a person has a reasonable expectation of privacy in his minute-by-minute patterns of movement and habits over a prolonged period of time. In fact, *Knotts* explicitly reserved the question whether the Fourth Amendment tolerates "twenty-four hour sur-

veillance of any citizen of this country … without judicial knowledge or supervision." *Knotts*, 460 U.S. at 283 (citation and internal quotation marks omitted).[2]

The 24-hour surveillance that this Court hypothesized in *Knotts* is now a reality in light of the advent of GPS technology. GPS devices make possible the minute-by-minute surveillance of an individual's movements for extended periods of time because they do not merely aid visual surveillance, but render visual surveillance unnecessary. Unlike a beeper that aids visual surveillance, or a searchlight that facilitates law enforcement's observations, a GPS device conducts the observations itself.

Given the limited nature of the holdings in *Knotts* and *Karo*, the dramatically different technology involved in those cases, and this Court's explicit statement in *Knotts* that it was deciding no more than necessary to resolve the issues actually raised, the D.C. Circuit properly viewed the question in this

---

[2] The Court's refusal to resolve the question was particularly appropriate because, while the respondent in *Knotts* warned of the dangers of hypothetical 24-hour surveillance, he explicitly conceded at oral argument that the government did not engage in a search when it used the beeper technology to "assist surveillance" of his movements on public thoroughfares. *See* Tr. of Oral Arg. in *United States v. Knotts*, O.T. 1982, No. 81-1802, p. 40 ("We are submitting that the result which we seek in this case would not prevent the warrantless use of beepers only to assist surveillance which is generally the use to which beepers are put. Our only contention is that if there is a possibility that the item to which a beeper is attached on or installed in is likely to end up at a person's residence, then a warrant is required.").

case as an open one.

b. The government offers two other arguments based, alternatively, on *Knotts* and *Karo*, both of which are meritless.

First, the government insists that even if *Knotts* is distinguishable, the decision in *Karo* is not. Pet. 14-15. It observes that the government in *Karo* had engaged in "'months-long tracking' … through 'visual and beeper surveillance,'" and yet "[t]he Court expressed no concern about the prolonged monitoring." *Id.* at 15. That argument fails. The government does not suggest that law enforcement in *Karo* had engaged in prolonged "twenty-four hour surveillance." *Knotts*, 460 U.S. at 283. And prior to the advent of GPS technology, it would have been practically impossible to do so for an extended period of time. *See supra* pp. 6-8. Accordingly, *Karo* plainly did not take up the issue that *Knotts* declined to resolve.

Second, the government argues that *Knotts* meant only to reserve the question of whether "mass, suspicionless GPS monitoring" would be permitted under the Fourth Amendment. Pet. 15. It draws that inference from *Knotts*'s use of the word "dragnet," which the government asserts "generally … refer[s] to high-volume searches that are often conducted without any articulable suspicion." *Id.* And the government assures the Court that "[t]he GPS monitoring in this case was not 'dragnet' surveillance." *Id.* "Any constitutional questions about hypothetical programs of mass surveillance," the government submits, "can await resolution if they ever occur." *Id.* at 16.

That argument lacks merit. The government's arguments in this case would sanction "mass, suspicionless GPS monitoring." *Id.* at 15. After all, the D.C. Circuit did not prohibit prolonged GPS searches; it merely held that they *are* searches. And the government's principal contention is not that it should only be required to show reasonable suspicion before engaging in prolonged GPS tracking. Its argument is that GPS tracking of movements on public roads is *never* a search, and thus requires no explanation at all. *See id.* at 19-20 (agreeing with Chief Judge Sentelle 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.'" (quoting Pet. App. 47a-48a). If accepted, that view would authorize "mass, suspicionless GPS monitoring." The government does not explain how the Court could conclude that prolonged use of GPS tracking is *not* a search when the government engages in prolonged 24-hour surveillance of one individual, but *is* a search when the government does the same to several individuals.[3]

---

[3] It *might* be possible to hold that prolonged GPS tracking is a search, but that only reasonable suspicion is required. And the government does assert, in passing, that "[e]ven if [its GPS tracking] were (incorrectly) deemed a Fourth Amendment search, it would be a reasonable one." Pet. 15. The government failed to develop an evidentiary basis for this argument in the lower courts—indeed, it failed even to raise the argument—and the D.C. Circuit therefore refused to consider it. *See* Pet. App. 38a-39a (noting that the government on appeal had only argued that the automobile exception should apply,

The government's argument also fails because it misreads *Knotts*. As the D.C. Circuit persuasively explained, *id.* at 18a-20a, *Knotts* was not reserving a question of its own imagining. Instead, "[i]n reserving the 'dragnet' question, the Court was not only addressing but in part actually quoting the defendant's argument that, if a warrant is not required, then prolonged 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.'" *Id.* at 18a (quoting *Knotts*, 460 U.S. at 283); *compare* Br. of Resp. in *United States v. Knotts*, No. 81-1802, pp. 9-10. And "[t]he Court avoided the question whether prolonged 'twenty-four hour surveillance' was a search by limiting its holding to the facts of the case before it." *Id.* at 18a-19a (quoting *Knotts*, 460 U.S. at 283).

B. The D.C. Circuit's Holding Does Not Conflict with The Holding of Any Other Federal Court of Appeals

The government argues that this Court's review is warranted because the D.C. Circuit's opinion conflicts with decisions of the United States Courts of Appeals for the Seventh, Eighth, and Ninth Circuits. Pet. 20-23. That is incorrect. Not only is the D.C.

---

and even that argument had not been raised in the district court); *see also id.* at 44a (Ginsburg, J., joined by Tatel, J., and Griffith, J., concurring in the denial of rehearing en banc) ("[B]ecause the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful."). It is therefore too late for the government to make the argument now.

Circuit's decision consistent with the rulings of other federal courts of appeals, but it is the first—and thus far the only—federal court of appeals decision to squarely consider the question left open in *Knotts*.

1. As the D.C. Circuit itself explained at length, Pet. App. 20a-22a, its decision does not directly conflict with the holding of any other federal court of appeals or state high court. At the time of the D.C. Circuit's decision, the Seventh, Eighth, and Ninth Circuits had upheld the government's warrantless use of a GPS device. *Id.* (citing *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010), *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), and *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007)).[4] But none of these courts of appeals was asked to address whether the government invades a reasonable expectation of privacy when it obtains information about patterns of movement and habits that would be infeasible to obtain through visual surveillance, as opposed to merely information about discrete journeys.

For example, the defendant in *Pineda-Moreno* did not ask the Ninth Circuit to resolve the question that *Knotts* expressly left open concerning the permissibility of 24-hour surveillance without a warrant. Instead, the defendant specifically "'acknowledged'" that *Knotts* was controlling, and merely argued that this Court's decision in *Kyllo*, 533 U.S. 27, had "'heavily modified the Fourth Amendment anal-

[4] A small handful of state intermediate courts of appeal had also reached that result. *See* Pet. 22-23 n.4. Other state courts have reached the opposite result under state constitutions. *Id.* at 23 n.5.

ysis.'" Pet. App. 20a-21a (quoting *Pineda-Moreno*, 591 F.3d at 1216). The Ninth Circuit rejected that claim. Similarly, the defendant in *Garcia* "d[id] not contend that he ha[d] a reasonable expectation of privacy in the movements of his vehicle while equipped with the GPS tracking device," and rested his challenge "solely with whether the warrantless *installation* of the GPS device, in and of itself, violates the Fourth Amendment." *Id.* at 20a (quoting Br. of Appellant at 22 (No. 06-2741) (emphasis added)).

The defendant in *Marquez* likewise did not ask the Eighth Circuit to consider the question that this Court explicitly left open in *Knotts*. In fact, the defendant's opening brief in *Marquez* overlooked *Knotts* altogether, and when the government cited the case in its appellee brief, the defendant dropped the issue and did not argue the point further in his reply. *See* Br. of Appellant (No. 09-1743), *available at* 2009 WL 2058799; Reply Br. for Appellant, *available at* 2009 WL 4611117.

2. Given that the Seventh, Eighth, and Ninth Circuits had not been asked to consider the question this Court explicitly left open in *Knotts*, they should not be read as having resolved the question. As the D.C. Circuit explained, "[t]he federal circuits that have held use of a GPS device is not a search were not alert to the distinction drawn in *Knotts* between short-term and prolonged surveillance." Pet. App. 34a.

A recent Seventh Circuit decision confirms that there is no concrete conflict. Although the government argues that the Seventh Circuit's decision in

Garcia conflicts with the D.C. Circuit's decision, *see* Pet. 20, the Seventh Circuit does not agree with the government. In *United States v. Cuevas-Perez*, — F.3d—, No. 10-1473, 2011 WL 1585072 (7th Cir. Apr. 28, 2011), a divided panel acknowledged that the question considered in the present case remains an open question in the Seventh Circuit.

Judge Cudahy, the author of the Seventh Circuit's panel opinion, left for another day whether prolonged GPS surveillance could constitute a search, because he concluded that the limited GPS surveillance in that case did not raise the concerns that the D.C. Circuit had identified in the present case. *Id.* at *3. Judge Wood dissented, and argued that the D.C. Circuit's decision should have applied on the facts of the case. *Id.* at *13-22. And Judge Flaum, in a concurring opinion, argued that the D.C. Circuit's approach should be rejected, although even he acknowledged that "[t]here may be a colorable argument … that the use of GPS technology to engage in long-term tracking is analogous to general warrants that the Fourth Amendment was designed to curtail, because of the technology's potential to be used arbitrarily or because it may alter the relationship between citizen and government in a way that is inimical to democratic society." *Id.* at *12. None of the judges on the panel thought that the Seventh Circuit's prior decisions had already held that GPS tracking could never be a Fourth Amendment search.

Just as the Seventh Circuit was willing to consider the issue reserved in *Knotts* once that issue was actually raised, the Eighth and Ninth Circuits

are presumably willing to do the same. That is particularly true because Fourth Amendment cases are extraordinarily fact-sensitive and generally should not be read to stand for more than they resolve. As this Court cautioned just a year ago, "[p]rudence counsels caution before the facts in [a single] case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010); *accord* Pet. App. 38a ("'Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations.'" (quoting *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n.5 (1986)).

Because there is no genuine split of authority on the precise question raised in this case—much less an "intractable" conflict, Pet. 23—this Court's review is unwarranted.

C. The Government Has Identified No Persuasive Reason for This Court To Intervene Before a Circuit Split Has Developed

As explained, the D.C. Circuit's decision does not conflict with this Court's decisions or with the decision of any other federal court of appeals. Indeed, no other federal court of appeals or state high court has considered the precise argument presented in this case. And the government has identified no persuasive reason for this Court to intervene prematurely and before a circuit split develops. Indeed, there are several significant reasons for the Court to decline review and to allow for additional consideration in the lower courts.

1. a. This Court has recognized that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Quon*, 130 S. Ct. at 2629 (noting that although the Court initially held that wiretaps were not a search, it eventually overruled that conclusion). That caution is uniquely applicable here.

To begin with, the D.C. Circuit was the first federal court of appeals in the country to consider whether the government engages in a Fourth Amendment search when it uses a GPS device to obtain patterns of movement that could not feasibly be obtained through visual surveillance. Because the question presented is not only legally but also technologically complex, "further consideration of the … problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting the denial of the petitions for writs of certiorari). If the Court were instead to grant review of the technologically complex question without the benefit of a fully developed split of authority in the courts below, the risks of judicial error would be magnified.

The risk of error is of substantial concern. GPS technology is "surely capable of abuses fit for a dystopian novel." *Cuevas-Perez*, 2011 WL 1585072, at *4; *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("1984 may have come a bit later than predicted, but it's here at

last."); *id.* at 1126 ("There is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of deja vu."). In fact, the technology has already "occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave." Pet. App. 37a. Should the Court mistakenly conclude that the Fourth Amendment plays no role in restraining the use of GPS technology, that error may well be "dire and irreversible." *Pineda-Moreno*, 617 F.3d at 1126 (Kozinski, J., dissenting from the denial of rehearing en banc).

That is particularly true because whatever Fourth Amendment rule the Court ultimately adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. And while GPS is already a powerful technology, "the current state of the technology is constantly being enhanced." Hutchins, *supra*, at 420. For instance, "GPS products are in development that will be small enough to implant under the human skin." *Id.* at 421.

b. Premature review is also unwarranted because the question whether prolonged GPS tracking constitutes a search cannot meaningfully be reviewed in isolation.

In the court of appeals, Jones presented an alternative Fourth Amendment argument: that the warrantless *installation* of the GPS device on his vehicle was itself a violation of the Fourth Amendment, even if the subsequent *use* of the device was not. As Judge Kavanaugh explained, this alternative argu-

ment raises "an important and close question." *See* Pet. App. 49a-52a.[5] It is also antecedent to the question on which the government seeks review: if the installation of the GPS device did require a warrant, then the question whether the use of a GPS device is a Fourth Amendment search would be of little consequence. For those reasons, the questions should either be considered together, or not at all. *See id.* (Kavanaugh, J.) (recommending that the en banc Court consider both questions jointly).

But while Jones preserved this antecedent question, the D.C. Circuit did not resolve it. The court of appeals agreed with Jones that prolonged use of the GPS device constituted a search, and therefore declined to review the permissibility of the warrantless installation. The existence of this unresolved and antecedent question presents a further reason to deny the petition for certiorari.

2. At the same time, the government identifies no persuasive reason for this Court to intervene prematurely. And no persuasive reason exists, because the D.C. Circuit's narrow holding does not forbid extended 24-hour GPS tracking, but merely requires the government to obtain a warrant or else show that the warrantless search was nonetheless reasonable.

---

[5] In *Karo*, this Court held that the government did not engage in a search by placing a beeper in a container *before* an individual purchased it. 468 U.S. at 716-18. This case raises a significantly different question: whether it is a search to trespass on property that already belongs to an individual. *See* Pet. App. 49a-52a.

To be sure, the government suggests it may be burdensome to obtain a warrant. Pet. 24. But the government is poorly positioned to argue that obtaining a warrant is highly burdensome, given the ease with which it obtained a warrant in this case. *See* Pet. App. 15a-16a, 38a-39a; *accord Karo*, 468 U.S. at 718 ("[T]his is not a particularly attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained in this case, seemingly on probable cause."). The government's argument is further weakened by the fact that it appears to have a policy in favor of obtaining warrants before seeking to acquire location data. *See In re United States ex rel. Historical Cell Site Data*, 747 F. Supp. 2d 827 n.70 (S.D. Tex. 2010) (citing e-mail from Mark Eckenwiler, Assoc. Dir., Office of Enforcement Operations, Criminal Division, United States Department of Justice, to unknown recipients (Nov. 16, 2007), *available at* http://www.aclu.org/pdfs/freespeech/cellfoia_release_crm200800549f_20080822).

The government also asserts that it sometimes uses GPS tracking devices *before* it has probable cause in order to establish probable cause for a warrant. Pet. 24-25. But the limited scope of the D.C. Circuit's ruling significantly weakens the force of that argument. To begin with, the ruling does not treat all uses of GPS tracking devices as Fourth Amendment searches. Law enforcement may still use GPS tracking devices to determine where an individual travels on discrete journeys or trips. Furthermore, the D.C. Circuit's holding does not preclude the government from using a GPS tracking device for periods of tracking that could feasibly have

been conducted through visual surveillance instead. The D.C. Circuit merely held that the government engages in a Fourth Amendment search when it conducts 24-hour GPS tracking for an *extended* period of time, beyond what is feasible through visual surveillance, and to an extent that allows the recording of patterns of movement. And even then, the D.C. Circuit did not rule out the possibility that reasonable suspicion might suffice for a GPS search in a future case; the government simply failed to develop or preserve that issue in this case. *See supra* n.3.

The government also contends generally that the D.C. Circuit's ruling threatens to "destabilize Fourth Amendment law." Pet. 25. That is incorrect. The D.C. Circuit carefully limited its holding to prolonged GPS searches, and explicitly stated that its ruling would not apply beyond the precise facts and issues presented. Pet. App. 35a-38a; *see also id.* at 44a. And the D.C. Circuit's decision does not call into question the aggregation of data relinquished to public view. *But see* Pet. 25. It merely recognizes that when a GPS device is used to record patterns of movement in a manner not practically feasible through visual surveillance, it records information that *has not* been relinquished to public view.

In any event, should the D.C. Circuit's decision ever be applied out of context to invalidate a well-established law enforcement investigative technique, as the government suggests it might, there will be time enough to review that case when it arises.

D. The D.C. Circuit's Holding Is Correct

This Court's review is unwarranted for the additional reason that the D.C. Circuit's holding is correct. The D.C. Circuit properly applied this Court's precedents in determining that prolonged GPS tracking can constitute a Fourth Amendment search.

1. The D.C. Circuit correctly recognized that prolonged use of GPS devices allows the government to record information that cannot practically be obtained through visual surveillance. Accordingly, although an individual's discrete travels on public roads may be readily observable by the naked eye, the same cannot be said of an individual's long-term pattern of movement and stops.

Moreover, the D.C. Circuit was correct to hold that pattern information is dramatically more intrusive than mere information about an individual's discrete journeys. *See* Pet. App. 22a-37a. Indeed, the distinction between discrete bits of information and patterns of conduct is well-accepted. The government itself often invokes the argument in foreign-intelligence cases. *See, e.g.*, *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (agreeing that the "mosaic-like nature of intelligence gathering" requires taking a "broad view" in order to contextualize information (internal citations and quotations omitted)); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."). In fact, the government often relies on a whole-is-more-

revealing-than-its-parts theory when seeking to establish probable cause for a warrant. *See, e.g.*, *United States v. McDuffy*, No. 10-1022, 2011 U.S. App. LEXIS 7054, at *6 (7th Cir. Apr. 7, 2011) (affirming denial of motion to suppress based on the view that "[e]ach individual detail in the affidavit would not have been sufficient by itself to support a finding of probable cause, but the details were mutually reinforcing," and "[t]he whole was greater than the sum of the individual details"); *United States v. Muniz-Melchor*, 894 F.2d 1430, 1438 (5th Cir. 1990) (facts in their interrelated context may reinforce each other, "so that the laminated total may indeed be greater than the sum of its parts"); *United States v. Ramirez-Cifuentes*, 682 F.2d 337, 342 (2d Cir. 1982) ("[W]e view the whole mosaic rather than each tile.").

2. The government takes issue with the D.C. Circuit's reliance on its determination (which remains unchallenged) that prolonged 24-hour visual surveillance is practically impossible. Pet. 16-20. According to the government, "[t]his 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." Pet. 16. The government's argument conflates what is possible with what is likely, and in any event fails on its own terms.

a. As an initial matter, the government's argument that "the Court has never engaged in a 'likelihood' analysis for cases involving visual surveillance of public movements," Pet. 17, is beside the point. The D.C. Circuit did not rest its conclusion on a find-

ing that prolonged 24-hour surveillance is *unlikely*. It expressly found that extended minute-by-minute surveillance is not a practical possibility: "The likelihood a stranger would observe all those movements is not just remote, *it is essentially nil*." Pet. App. 26a (emphasis added); *see also id.* at 35a-36a ("[P]ractical considerations prevent visual surveillance from lasting very long."). The D.C. Circuit therefore concluded that a person does not actually or constructively expose her pattern of movements to public observation. That conclusion was correct.

b. The government's argument also fails on its own terms. Contrary to the government's assertion, this Court's precedents clearly call for a "likelihood" inquiry in determining whether information has been exposed to the public. In *Bond v. United States*, 529 U.S. 334 (2000), for example, the Court found that police officers committed a search when they squeezed the outside of a bus passenger's carry-on luggage and discovered drugs. The Court reasoned that "[w]hen a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another," but he "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-39. That analysis applies here: even if an individual may expect that his discrete journeys will be observed, he does not expect that his movements will be tracked 24 hours a day for an extended period of time.

The government responds that *Bond* is limited to cases involving "tactile observation." Pet. 16. But nothing in *Bond* supports that limit. Although the

Court noted that the case involved tactile rather than visual observation, it noted that distinction only to explain why the bus passenger had not "lost a reasonable expectation that his bag would not be physically manipulated" simply by virtue of his having "expos[ed] his bag to the public." *Bond*, 529 U.S. at 337. The relevant inquiry continued to be whether a reasonable expectation of privacy existed. *Id.* at 338. And the Court answered it by determining what types of intrusions are likely to occur. *Id.*

Even if the government were correct that *Bond* is solely a "tactile" case, this Court's "flyover" cases would apply in any event, and they provide for the very "likelihood" analysis the government now criticizes. *See* Pet. 18 (acknowledging that *California v. Ciraolo*, 476 U.S. 207 (1986), and *Florida v. Riley*, 488 U.S. 445 (1989), employ a "likelihood" analysis). The government counters that the flyover cases apply only to "visual inspections of private areas (the curtilage of homes), not public movements." *Id.* But this Court's decisions did not recognize that distinction, and it would be inconsistent with *Katz*, 389 U.S. at 351, which protects reasonable expectations of privacy regardless of whether they are in "private areas."

* * * * *

This Court's precedents—from *Katz* to *Bond* and the flyover cases—all support the D.C. Circuit's approach to prolonged 24-hour GPS tracking. Because the D.C. Circuit's decision is in harmony with this Court's precedents, review is not warranted.

II. If The Court Grants The Government's Petition for Certiorari, It Should also Decide Whether Warrantless Installation of a GPS Device Violates The Fourth Amendment

As noted, if the Court does grant the government's petition, it should also grant review of the alternative argument Jones raised in the D.C. Circuit, and that the court had no occasion to resolve: whether the installation of the GPS device on Jones's vehicle was itself a violation of the Fourth Amendment. This "property-based Fourth Amendment argument" raises "an important and close question." Pet. App. 50a, 52a (Kavanaugh, J.). And it is antecedent to the question on which the government seeks review. *See supra* pp. 25-26.

The Fourth Amendment "'protects property as well as privacy.'" Pet. App. 50a (Kavanaugh, J.) (quoting *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992)). In this case, "the police not only engaged in surveillance by GPS but also intruded (albeit briefly and slightly) on the defendant's personal property, namely his car, to install the GPS device on the vehicle." *Id.* Just as "squeezing [the] outer surface of a bag" constitutes a Fourth Amendment search, *id.* at 51a (citing *Bond*, 529 U.S. 334), the government's installation of a device on Jones's private vehicle constitutes a search. *See id.* at 52a (Kavanaugh, J.) (noting the argument that "[a]bsent the police's compliance with Fourth Amendment requirements, 'people are entitled to keep police officers' hands and tools off their vehicles'" (quoting *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Klein-

feld, J., concurring)); *but see McIver*, 186 F.3d at 1126-27 (reaching the erroneous conclusion that because there is no reasonable expectation of privacy in preventing a *visual inspection* of the exterior of a car, there cannot be a reasonable expectation of privacy in preventing physical trespasses).

To be sure, the D.C. Circuit did not consider this alternative ground, because it agreed with Jones that the extended use of the GPS device constituted a search. But as noted, *supra* pp. 25-26, the fact that the D.C. Circuit has not resolved the question presents no reason to deny review of the question; it is if anything a reason to deny review of the entire case. If the Court nonetheless grants the petition for certiorari, then the Court should consider both questions together, as Judge Kavanaugh urged his colleagues on the D.C. Circuit to do. Pet. App. 52a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER DELLINGER
SRI SRINIVASAN
MICAH W.J. SMITH
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, DC 20006
(202) 383-5300
wdellinger@omm.com

STEPHEN C. LECKAR
(*Counsel of Record*)
steve@s-plaw.com
SHAINIS & PELTZMAN, CHARTERED
1850 M Street, NW
Suite 240
Washington, DC 20036
(202) 742-4242

June 7, 2011