ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	Case No. 2011-0033
	)	
Plaintiff-Appellee	)	
v.	)	On Appeal from the Butler County
	)	Court of Appeals,
SUDINIA JOHNSON,	)	Twelfth Appellate District
	)	
Defendant-Appellant	)	Court of Appeals
	)	Case No. CA2009-12-307

BRIEF ON BEHALF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
ELECTRONIC FRONTIER FOUNDATION,
FIRST AMENDMENT LAWYERS ASSOCIATION,
CENTER FOR DEMOCRACY AND TECHNOLOGY,
AMERICAN CIVIL LIBERTIES UNION OF OHIO,
OFFICE OF THE OHIO PUBLIC DEFENDER, and
7 PROFESSORS OF LAW
IN SUPPORT OF APPELLANT

Ravert J. Clark (042027)
Counsel for *Amici Curiae*
National Association of Criminal Defense Lawyers,
Electronic Frontier Foundation,
Center for Democracy and Technology
114 E. 8th Street, Suite 400
Cincinnati, OH 45202
Tel: (513) 587-2887
Fax: (513) 621-2525
Notguilty14@aol.com

RECEIVED
JUN 06 2011
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 06 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Of counsel:

Norman L. Reimer, Esq., Executive Director
(*pro hac vice*)
Michael W. Price, Esq., National Security
Coordinator (*pro hac vice*)
National Association of Criminal Defense
Lawyers
1160 L St., NW, 12th Floor
Washington, DC 20036
Tel: (202) 872-8600
Fax: (202) 872-8690
norman@nacdl.org
michael@nacdl.org

Cullen Sweeney, Esq. (0077187)
Ohio Association of Criminal Defense
Lawyers
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
Tel: (216) 443-3660
Fax: (216) 443-6911
csweeney@cuyahogacounty.us

H. Louis Sirkin, Esq. (0024573)
Jennifer M. Kinsley, Esq. (0071629)
First Amendment Lawyers Association
810 Sycamore St., 2nd Floor
Cincinnati, OH 45202
Tel: (513) 721-4876
Fax: (513) 338-1992
lsirkin@skn-law.com
jkinsley@skn-law.com

Jeffrey M. Gamso, Esq. (00438969)
Cooperating Counsel for *Amicus*
American Civil Liberties Union of Ohio
Foundation, Inc.
Gamso, Helmick & Hoolahan
1119 Adams Street, 2nd Floor
Toledo, Ohio 43605
Tel: (419) 243-3800
Fax: (419) 243-4046
jeff.gamso@gmail.com

Susan J. Walsh, Esq. (*pro hac vice*)
Vladeck, Waldman, Elias & Engelhard, P.C.
1501 Broadway, Suite 800
New York, New York 10036
Tel: (212) 403-7348
Fax: (212) 221-3172
swalsh@Vladeck.com

Timothy Young, Esq. (0059200)
Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Tel: (614) 466-5394
Fax: (614) 644-9972
tim.young@opd.ohio.gov

Jack A. Guttenberg, Esq. (0040043)
Professor of Law
Capital University Law School
303 E. Broad Street
Columbus, OH 43115
Tel: (614) 236-6379
jguttenberg@law.capital.edu

Lewis R. Katz, Esq. (0011124)
John C. Hutchins Professor of Law
Case Western Reserve University
School of Law
Cleveland, Ohio 44106
Tel: (216) 368-3287
lrk@case.edu

Daniel T. Kobil, Esq. (0030529)
Professor of Law
Capital University Law School
303 E. Broad St.
Columbus, Ohio 43215
Tel: (614) 236-6675
Fax: (614) 236-6956
dkobil@law.capital.edu

Margery M. Koosed, Esq. (0011737)
Aileen McMurray Trusler Professor of Law
University of Akron School of Law
Akron, OH 44325-2901
Tel: (330) 972-6793
Fax: (330) 258-2343
mkoosed@uakron.edu

Janet Moore, Esq. (0080506)
Visiting Assistant Professor of Law
University of Cincinnati College of Law
PO Box 210040
Clifton Avenue & Calhoun Street
Cincinnati, OH 45221-004
Tel: (513) 600-4757
Fax: (513) 297-9200
janetm323@cinci.rr.com

John B. Quigley, Esq. (0018379)
President's Club Professor of Law
Moritz College of Law
Ohio State University
55 W. 12th Ave.
Columbus OH 43210
Tel: (614) 292-1764
Fax: (614) 292-2035
quigley.2@osu.edu

Richard B. Saphire, Esq. (0017813)
Professor of Law
University of Dayton School of Law
Dayton, OH 45469-2772
Tel: (937) 229-2820
Richard.Saphire@notes.udayton.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* vii

SUMMARY OF ARGUMENT 1

ARGUMENT 5

Proposition of Law No. 1

The Surreptitious Installation of a GPS Device and Around-the-Clock Tracking and Logging of an Automobile's Travels Without Limitation as to Duration or Location Is a Search That Violates the Fourth Amendment in the Absence of a Warrant Supported by Probable Cause 5

A. People Have a Reasonable Expectation of Privacy in Their Patterns of Travel That Society Finds Objectively Reasonable. 7

B. *United States v. Knotts* Is Not Controlling Precedent. 15

1. Compared to the Beeper Technology in *Knotts*, GPS Technology Is Vastly More Powerful in Its Capability to Constantly, Precisely and Indiscriminately Monitor an Individual's Location and Travels 17

2. The Fourth Amendment Protects Against the Type of Intrusive Warrantless Tracking Capable With GPS. 20

C. The Expectation of Privacy in an Automobile Is Not So Diminished as to Totally Dispense with Any Articulable Reason to Track It or Require a Warrant to Do So. 23

D. GPS Tracking Devices Are a Useful Law Enforcement Tool That Can Be Readily Employed with Judicial Oversight Through Procurement of a Warrant. 25

E. Indiscriminate and Unmonitored Government Use of GPS Tracking Imposes an Unacceptable Burden and Chilling Effect on Liberty and First Amendment Free Association Rights. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Federal Cases

Adams v. Williams, 407 U.S. 143 (1972) 6

Ajjampur v. Apple, No. 11-cv-00895 (M.D. Fla. Apr. 22, 2011) 7

Arizona v. Gant, 129 S.Ct. 1710 (2009) 24

California v. Carney, 471 U.S. 386 (1985) 23, 24

Carroll v. United States, 267 U.S. 132 (1925) 23

Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290 (1981) 29

Delaware v. Prouse, 440 U.S. 648 (1979) 6

In re Application for an Order Authorizing the Extension and Use of a Pen Register Device, 2007 WL 397129 (E.D. Ca. 2007) 13

In re Application for an Order Authorizing the Installation and Use of a Pen Register and Directing the Disclosure of Telecommunications Records for the Cellular Phone Assigned the Number [Sealed], 439 F.Supp.2d 456 (D. Md. 2006) 12

In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F.Supp.2d 747 (S.D. Tex. 2005) 13

In re Application of the U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827 (S.D. Tex. 2010) 14

In re Application of the United States for an Order (1) Authorizing Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing Access to Customer Records; and (3) Authorizing Cell Phone Tracking, 441 F. Supp. 2d 816 (S.D. Tex. 2006) 12

In re Application of the United States for an Order (1) Authorizing Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber and Other Information, 433 F.Supp.2d 804 (S.D. Tex. 2006) 13

In re Application of the United States for an Order (1) Authorizing Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber and Other Information, 622 F.Supp.2d 411 (S.D. Tex. 2007) 13

In re Application of the United States for an Order (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 411 F.Supp.2d 678 (W.D. La. 2006) 13

In re Application of the United States for an Order (1)Authorizing Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location- Based Services, 2006 WL 1876847 (N.D. Ind. July 5, 2006) 12

In re Application of the United States for an Order (1)Authorizing the Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 396 F.Supp.2d 294 (E.D.N.Y. 2005) 13

In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register and Caller Identification System, 402 F.Supp.2d 597 (D. Md. 2005) 12

In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register with Caller Identification Device and Cell Site Location Authority, 415 F.Supp.2d 663 (S.D.W. Va. 2006) 13

In re Application of the United States for an Order Authorizing Installation and Use of Pen Registers and Caller Identification Devices on Telephone Numbers, 416 F.Supp.2d 390 (D. Md. 2006) 12

In re Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Information, 2006 WL 2871743 (E.D. Wis. 2006) 12

In re Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Information, 412 F.Supp.2d 947 (E.D. Wis. 2006) 12

In re Application of the United States for an Order Authorizing the Installation and Use of a Pen Register Device, a Trap and Trace Device, and for Geographic Location Information, 497 F.Supp. 2d 301 (D.P.R. 2007) 12

In re Application of the United States for an Order Authorizing the Release of Prospective Cell Site Information, 407 F.Supp.2d 132 (D. D.C. 2005) 12

In re Application of the United States for an Order Authorizing the Release of Prospective Cell Site Information, 407 F.Supp.2d 134 (D. D.C. 2006) 12

In re Application of the United States for an Order Authorizing the Use of a Pen Register with Caller Identification Device Cell Site Location Authority on a Cellular Telephone, 2009 WL 159187 (S.D.N.Y. 2009) 12

In re Application of the United States for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices, 632 F.Supp.2d 202 (E.D.N.Y. 2008) 13

In re Application of the United States for an Order for Disclosure of Telecommunications Records and Authorizing the Use of a Pen Register and Trap and Trace, 405 F.Supp.2d 435 (S.D.N.Y. 2005) 13

In re Application of the United States for an Order for Prospective Cell Site Location Information, 2006 WL 468300 (S.D.N.Y. Feb. 28, 2006) 12

In re Application of the United States for an Order for Prospective Cell Site Location Information, 460 F.Supp.2d 448 (S.D.N.Y. 2006) 13

In re Application of the United States for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location-Based Services, 2007 WL 3342243 (S.D. Tex. 2007) 12

In Re Application of the United States for Order Authorizing the Disclosure of Cell Cite Information, 2005 WL 3658531 (D. D.C. Oct. 26, 2005) 12

In re Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Information, 736 F. Supp. 2d 578 (E.D.N.Y. 2010) 1, 8, 13, 17

In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government, 620 F.3d 304 (3d Cir. 2010) 14

In re United States an Order Authorizing Installation and Use of a Pen Register and/or Trap and Trace Device and Disclosure of Subscriber and Activity Information, 415 F.Supp.2d 211 (W.D.N.Y. 2006) 12

Johnson v. United States, 333 U.S. 10 (1948) 25, 26, 28

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

Kyllo v. United States, 533 U.S. 27 (2001) 4, 7, 22

Marcus v. Search Warrants of Property at 104 E. Tenth St., 367 U.S. 717 (1961) 29

NAACP v. Alabama, 357 U.S. 449 (1958) 29

New Jersey v. T.L.O. 469 U.S. 325 (1985) 26

New York v. Class, 475 U.S. 106 (1986) 24

O'Connor v. Ortega, 480 U.S. 709 (1987) 26

Olmstead v. United States, 277 U.S. 438 (1928) 2, 5

Payton v. New York, 445 U.S. 573 (1980) 28

Smith v. Maryland, 442 U.S. 735 (1979) 5, 14

Stanford v. Texas, 379 U.S. 476 (1965) 29, 30

Terry v. Ohio, 392 U.S. 1 (1968) 21

United States v. Berry, 300 F. Supp. 2d 366 (D. Md. 2004) 18

United States v. Bond, 529 U.S. 334 (2000) 21

United States v. Jacobsen, 466 U.S. 109 (1984) 5

United States v. Karo, 468 U.S. 705 (1984) ..... passim

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

United States v. Marquez, 605 F.3d 604 (8th Cir. 2010) 10, 15

United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010) 3, 7, 16, 30

United States v. Michael, 645 F.2d 252 (5th Cir. 1981) 10

United States v. Miller, 425 U.S. 435 (1976) 14

United States v. Moore, 562 F.2d 106 (1st Cir. 1977) 10

United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010) 9, 15

United States v. Place, 462 U.S. 696 (1983) 21

United States v. Shovea, 580 F.2d 1382 (10th Cir. 1978) 10

Warden v. Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) 5, 26

Watkins v. United States, 354 U.S. 178 (1957) 30

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 17

State Cases

Commonwealth v. Conolly, 913 N.E.2d 356 (Mass. 2009) 9
Foltz v. Commonwealth, 57 Va. App. 68 (2010) 9
Ohio v. Mills, 582 N.E.2d 972 (1992) 24
Oregon v. Campbell, 759 P.2d 1040 (1988) 9
Osburn v. State, 44 P.3d 523 (Nev. 2002) 9
People v. Sullivan, 53 P.3d 1181 (Colo. Ct. App. 2002) 8
People v. Weaver, 909 N.E.2d 1195 (N.Y. 2009) 8, 22
State v. Holden, No. 1002012520, 2010 WL 5140744 (Del. Super. Ct. Dec. 14, 2010) 8
Washington v. Jackson, 76 P.3d 217 (2003) 8

Constitutional Provisions

U.S. Const. amend. I 29
U.S. Const. amend. IV 4

Statutes

18 PA. CONS. STAT. § 5761 9
18 U.S.C. § 3117 ..... 11, 12
18 U.S.C. § 3123(a)(1) 11
47 U.S.C. § 1002(a)(2) 11
CAL. PENAL CODE § 637.7 8
DEL. CODE ANN. tit. 11, § 1335 8
FLA. STAT. § 934.43 9
GA. CODE ANN. § 17-5-21.1 27
HAW. REV. STAT. § 803-42 8
LA. REV. STAT. ANN. § 14:323 8
MICH. COMP. LAWS § 750.539L 8
MINN. STAT. § 626A.35 8
NEB. REV. STAT. § 86-2,103 9
OKLA. STAT. 13 § 177.6 9
OR. REV. STAT. § 133.619 9

S.C. CODE ANN. § 17-30-140 9
TENN. CODE ANN. § 39-13-606 8
TEX. PENAL CODE ANN. § 16.06 8
UTAH CODE ANN. § 77-23a-15.5 9
VA CODE ANN. § 19.2-54 27

Rules

FED. R. CRIM. P. 41 ..... 10, 11, 12, 16
OHIO CRIM. R. 41 27

Other Authorities

Hearing on Electronic Communications Privacy Act Reform and the Revolution in Location Based Technologies and Services Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the S. Comm. on the Judiciary, 111th Cong. 6 (2010) (written testimony of United States Magistrate Judge Stephen Wm. Smith) 13

John Schwartz, *This Car Can Talk. What It Says May Cause Concern*, N.Y. TIMES, Dec. 29, 2003, at C1 8

Justin H. Smith, *Press One For Warrant: Reinventing The Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV. 1591 (2002) 26

WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (4th Ed. 2004) 26

INTEREST OF THE *AMICI CURIAE*

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit professional bar association that represents the nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states.

In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fourth Amendment, and its state analogues, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. Notably, NACDL filed an *amicus curiae* brief with the New York State Court of Appeals in *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009), arguing that the surreptitions installation of a GPS device and subsequent around-the-clock electronic tracking and recording of movements without spacial or temporal limitations is impermissible absent a warrant based upon probable cause.

Ohio Association of Criminal Defense Lawyers

The Ohio Association of Criminal Defense Lawyers is membership organization of 677 lawyers working to together to: defend the rights people accused of committing a crime; educate

and promote research in the field of criminal defense law and the related areas; train attorneys through lectures, seminars and publications to develop and improve their abilities; advance the knowledge of the law as it relates to the protection of the rights of persons accused of crimes; and educate the public about the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties.

First Amendment Lawyers Association

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals that engage in constitutionally protected expression and association. FALA's members practice throughout the United States in defense of First Amendment freedoms and, by doing so, advocate against governmental forms of censorship and intrusion. Member attorneys frequently litigate the constitutionality of police activity, often examining the intersection between the Fourth Amendment's warrant requirement and the right to First Amendment expression and association. Given the nationwide span of their experience and the particularized nature of their practices, FALA attorneys are uniquely poised to comment on the important constitutional issues raised in this case.

Electronic Frontier Foundation

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an area of increasingly sophisticated technology. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases addressing the application of the Fourth Amendment to emerging technologies, including *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

Center for Democracy and Technology

The Center for Democracy and Technology ("CDT") is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open and decentralized Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

American Civil Liberties Union of Ohio

The American Civil Liberties Union of Ohio Foundation, Inc. (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. The ACLU of Ohio's commitment to the Bill of Rights includes commitment to the Fourth Amendment's protections against unreasonable searches and seizures and also to the protections of Section 14, Article I of the Ohio Constitution. In support of those protections, and the interests they embody against warrantless snooping by the government, the ACLU of Ohio offers this brief to assist the Court in resolving this case.

Office of the Ohio Public Defender

The Office of the Ohio Public Defender ("OPD") is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The principal focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal

practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As this Court is abundantly aware, the Fourth Amendment of the United State Constitution, and Section 14, Article I of the Ohio Constitution, protect all individuals from unreasonable searches and seizures. It is of critical importance that this Court continues to safeguard this right, which is violated every time the authorities deploy and monitor—without judicial oversight—a GPS tracking device to follow an individual's travels, around the clock for days or weeks on end. Therefore, the Ohio Public Defender joins this Brief of Amicus Curiae, strongly urging this Court to protect the rights of privacy and association secured by our constitutions, by determining that GPS tracking is lawful only when authorized by a warrant issued by a neutral, detached magistrate, prior to the commencement of such monitoring.

Ohio Law Professors

Jack A. Guttenberg, Capital University Law School; Lewis Katz, Case Western Reserve University School of Law; Daniel T. Kobil, Capital University Law School; Margery Koosed, University of Akron School of Law; Janet Moore, University of Cincinnati College of Law; John B. Quigley, Ohio State University Moritz College of Law; Richard B. Saphire, University of Dayton School of Law

Amici are seven professors of law from throughout the State of Ohio. They join this brief in their individual capacity as legal educators and not on behalf of any institution, group or association. Their sole purpose is to convey their shared interest in the preservation of fundamental privacy rights and to ensure that the legal system adequately fulfills the vision of the founding fathers of both this nation and state to safeguard the rights of the citizens of Ohio from unreasonable searches and seizures. They believe that the law must not allow technological advances to erode the most fundamental and precious of liberties.

SUMMARY OF ARGUMENT

This Court should construe the clandestine installation and indiscriminate use of electronic surveillance to monitor and record an automobile's every move, around-the-clock and indefinitely, as a search mandating a warrant based on probable cause. This is a seminal opportunity for Ohio's highest Court to secure the relevance of the Fourth Amendment's warrant requirement in the digital age by harnessing the encroaching reach of technological advancement and its threat to eviscerate Ohioans' protection against unreasonable searches and seizures.

The critical question before this Court is whether law enforcement may surreptitiously install a Global Positioning System ("GPS") tracking device on an individual's automobile and thereby remotely track and record that individual's movements, 24 hours a day, for as long as they want, anywhere, without any judicial oversight whatsoever. The decision in this case will have profound consequences for the lives of Ohioans as it will permanently define to what extent citizens of this state must forfeit "any meaningful claim to personal privacy or effectively withdraw[] from a technologically maturing society." *In re Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Information*, 736 F. Supp. 2d 578, 596 (E.D.N.Y. 2010).

GPS tracking devices are qualitatively unique in their ability to surreptitiously and remotely monitor and record a vehicle's location, 24 hours a day, regardless of whether it otherwise would be visible from public space. Far from "augmenting the sensory faculties bestowed upon [law enforcement officials] at birth," this technology can transform a patrolman into a prosthetic and omnipresent guard, capable of watching without seeing – indeed without even ever leaving the living room. *United States v. Knotts*, 460 U.S. 276, 282 (1983). The GPS technology also permits law enforcement to compile and maintain a detailed historical record of

such information, revealing the totality and pattern of an individual's movements and, unlike sense-enhancing devices, enables officers to peer into the past, reviewing records of where drivers traveled yesterday and beyond.

Society recognizes a right to location privacy, and as technology like GPS advances, becoming more accurate, inexpensive, and woven into the fabric of daily life, people become increasingly powerless to protect and preserve their own right to privacy and must rely on the agile application of constitutional safeguards against unwarranted government intrusions on their fundamental "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The need for meaningful judicial oversight in the GPS context is particularly acute given the reality that for the vast majority of Ohioans, short of permanent retreat into their homes, individuals cannot shield themselves from this privacy invasion. Individuals cannot hide their cars from view on the road nor can the vast majority of people plausibly avoid driving on public roads to conduct the private and public affairs of their lives. But until now, they had no reason to believe, indeed they had no reasonable expectation that anyone could or would stitch together every trip that forms their personal, patterned routine and reveal information reasonable people seek to preserve as private.

The warrantless use of such powerful technology has profound consequences for personal privacy, including associational privacy, which implicates the rights of every individual and the community at large. Indeed, it exposes information that would not be apparent from the kind of discrete, single-trip surveillance at issue in earlier cases, such as an individual's habits and routines – and any departure from them. As the D.C. Circuit recently observed:

> Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip

> to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. 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.

United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) (holding that GPS installation and prolonged surveillance is a search requiring a warrant supported by probable cause), *petition for cert. filed sub nom United States v. Jones*, No. 10-1259 (filed Apr. 14, 2010).

Individuals have a reasonable expectation that such comprehensive and highly personal information will not be revealed and recorded without judicial oversight. Citizens do not surrender their right to privacy simply by leaving the house or getting into a car. Although it is now possible to remotely track a vehicle's every turn, it does not follow that reasonable people expect to be monitored 24 hours a day and have their every coming and going electronically logged and catalogued for easy historical reference.

Finally, *amici* recognize that technological advances need not be a one-way ratchet. Surely the judicially supervised use of the GPS tracking device, much like the wiretap, is an efficient and effective crime-fighting tool which should be readily available for that purpose. And, just as technology threatens to encroach on privacy, when utilized responsibly technology can also make abiding constitutional protections easier. Applying for a warrant is more efficient and less burdensome than ever before. Ohio, like at least twenty-three other states and the federal government all provide for telephonic warrants and/or warrants by reliable electronic means such as facsimile or video conference. It is likely that email or iPad warrants are not far behind. Given the invasive nature of GPS tracking technology and the potential for devastating abuse, it is eminently reasonable to require fast application for a warrant before engaging in long-term satellite surveillance.

The essential question this Court confronts "is what limits are there upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 35 (2001). This Court must not permit the protections of the Fourth Amendment to stagnate in a pre-digital age, impervious to the development of a technologically maturing society. Instead, this Court must acknowledge that the clandestine installation of a GPS tracking device and the uninterrupted monitoring and digital recording of an individual's travels without temporal or geographic limitation is a search in violation of the Fourth Amendment in the absence of a warrant supported by probable cause. *Katz v. United States*, 389 U.S. 347, 351 (1967); U.S. Const. amend. IV.

Amici contend that the use of these devices entails unlimited and unprecedented incursions upon privacy, liberty and association, constituting a search under the Fourth Amendment, and urge this Court to impose reasonable judicial limitation upon the use of GPS tracking devices because (A) society reasonably expects to protect the vast amount of information that is obtained through the unlimited, surreptitious use of GPS monitoring; (B) the Supreme Court's decision in *United States v. Knotts* is not controlling precedent in this case; (C) the automobile exception is inapt in the GPS context and is an exception to the warrant clause only; (D) the minimal burden of imposing a warrant requirement balances legitimate law enforcement interests and individual privacy rights; and (E) the use of unlimited GPS surveillance without any judicial oversight imposes an unacceptable burden upon First Amendment free association rights.

ARGUMENT

Proposition of Law No. 1

The Surreptitious Installation of a GPS Device and Around-the-Clock Tracking and Logging of an Automobile's Travels Without Limitation as to Duration or Location Is a Search That Violates the Fourth Amendment in the Absence of a Warrant Supported by Probable Cause.

"The 'principal' object of the Fourth Amendment is the protection of privacy rather than property..." *Soldal v. Cook County,* 506 U.S. 56, 64 (1992) (citing *Warden v. Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)) (internal citations omitted). The Supreme Court of the United States "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by Government action." *Knotts*, 460 U.S. at 280 (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal citations omitted)). A "reasonable expectation of privacy" is an expectation of privacy that is "legitimate" or that "society is prepared to recognize as reasonable." *United States v. Jacobsen*, 466 U.S. 109, 122-23 (1984).

This test, first enunciated in *Katz*, broke with earlier case law which tied Fourth Amendment jurisprudence to notions of property law and trespass on "constitutionally protected areas" explicitly named in the Constitution. *Compare, Olmstead v. United States*, 277 U.S. at 465-66 (reasoning that telephone conversations are not protected by the Fourth Amendment since "one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment"), *with Katz v. United States*, 389 U.S. at 351 (overturning *Olmstead*, reasoning that the "the Fourth Amendment

protects people, not places" and holding that governmental eavesdropping on a public payphone with an electronic device is an unconstitutional "search," despite the absence of physical trespass). Following the rationale in *Katz*, the surreptitious installation and use of GPS tracking devices to remotely monitor and record a driver's every turn, 24 hours a day, without limitation, infringes on an expectation of privacy that society recognizes as reasonable.

Whether one's patterns of movement are truly "expose[d] to the public," *Katz*, 389 U.S. at 351, depends on the actual likelihood that such information would be discovered by a stranger, not on the theoretical and entirely unrealistic possibility that it might be. After all, "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 352. "[P]eople are not shorn of all Fourth Amendment protection when they ...step from the sidewalks into their automobiles." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972)). Even a reduced expectation of privacy does not mean no privacy at all.

This issue presents a watershed moment in Fourth Amendment jurisprudence, very much akin to the "*Olmstead-Katz*" moment. Just as *Katz* recognized that the Fourth Amendment "protects people, not places" and rejected *Olmstead*'s fixation on the antiquated trespass doctrine that bound Fourth Amendment jurisprudence to places and property law, this Court should find that the whole of a person's movements over an unlimited period of time and regardless of location is a search under the Fourth Amendment and requires nothing less than a warrant supported by probable cause. *Katz*, 389 U.S. at 351.

A. People Have a Reasonable Expectation of Privacy in Their Patterns of Travel That Society Finds Objectively Reasonable.

Although it is now technologically possible to remotely track a vehicle's every turn, it does not follow that reasonable people expect to be monitored 24 hours a day and have their every coming and going electronically logged for easy, historical reference. *See Katz*, 389 U.S. at 352-53 (finding a reasonable expectation of privacy in the content of a telephone call made from a public phone booth despite the fact that law enforcement possessed the technology to eavesdrop); *Maynard*, 615 F.3d at 563 ("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; rather, he expects each of those movements to remain 'disconnected and anonymous[.]'"); *see also, Kyllo*, 533 U.S. at 40 (finding that a reasonable person does not expect to have the heat in his home measured or monitored despite the fact that law enforcement maintains a thermal heat-seeking device capable of doing so).

There is demonstrable evidence that the non-consensual monitoring of the complete pattern of an individual's movement through the use of GPS is something that society expects the law to prohibit and punish, not facilitate without oversight. Consider, for example, the national outrage and class action lawsuit provoked by revelations that the iPhone had secretly logged users' location information and transmitted the data back to Apple. *See* Sara Jerome, *House Republicans Question Google, Apple on Consumer Privacy*, THE HILL (Apr. 25, 2011), http://thehill.com/blogs/hillicon-valley/technology/157659-house-republicans-question-google-apple-on-privacy; *see also*, Complaint, *Ajjampur v. Apple*, No. 11-cv-00895 (M.D. Fla. Apr. 22, 2011) (class action complaint against Apple for secretly tracking location information of iPhone and iPad users). Or consider that cell phone service providers feel compelled to offer "clear notice" of privacy policies to subscribers about opportunities to "choose where and when to turn

location-based services on and off" of their personal devices, warning of "advances in wireless technology, especially the growing availability of location-based services, [which] bring new concerns about how customer information is used and shared." *See, In re Application,* 736 F. Supp. 2d at 593 (citing, *inter alia*, Verizon About Verizon – Privacy Policy, http://www22.verizon.com/about/privacy/policy/#wireless (last visited May 26, 2011)).

Many laws prohibit private citizens from engaging in such surveillance or otherwise guard location tracking information against disclosure. Eight states now impose criminal penalties on citizens who use electronic devices to track or harass their fellow citizens.[1] Other states recognize that the relentless, around-the-clock use of GPS trackers may violate the criminal prohibition against stalking even though the statute does not explicitly mention GPS technology. *See, e.g., People v. Sullivan*, 53 P.3d 1181, 1183-84 (Colo. Ct. App. 2002) (a husband using a GPS tracking device to track his wife was guilty of harassment by stalking); *see also*, John Schwartz, *This Car Can Talk. What It Says May Cause Concern*, N.Y. TIMES, Dec. 29, 2003, at C1 (defendant convicted in Wisconsin for stalking his girlfriend using a secretly installed GPS device to obtain accurate location information by logging onto the Internet). The widespread criminalization of such conduct strongly suggests that notwithstanding one's knowing exposure on public roads, society is not prepared to abrogate every sense of privacy when individuals pull out of the driveway.[2] Indeed, the ubiquity of stalking and harassment

---

[1] Those states are California, CAL. PENAL CODE § 637.7 (2011); Delaware, DEL. CODE ANN. tit. 11, § 1335 (2011); Hawaii, HAW. REV. STAT. § 803-42 (2011); Louisiana, LA. REV. STAT. ANN. § 14:323 (2010); Michigan, MICH. COMP. LAWS § 750.539L (2011); Minnesota, MINN. STAT. § 626A.35 (2011); Tennessee, TENN. CODE ANN. § 39-13-606 (2011); and Texas, TEX. PENAL CODE ANN. § 16.06 (2011).

[2] Of course, several state courts have held under their own state constitutions that the use of the device without any judicial oversight is unconstitutional. *See, People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009); *State v. Holden*, No. 1002012520, 2010 WL 5140744, *8 (Del. Super. Ct. Dec. 14, 2010), *appeal docketed*, No. 30, 2011; *Washington v. Jackson*, 76 P.3d 217 (2003);

statutes, even those that pre-date GPS technology, raise the patent implication that people simply do not expect to be tracked or trailed incessantly whenever they step outside – at least not without judicial supervision. Seven states have already enacted statutes governing this emergent technology that expressly state if, how and under what standard warrants may issue for the placement of tracking devices with this new technology.[3]

The Supreme Court has never considered whether the surreptitious installation and use of a GPS device to track, record, and remotely monitor an individual's whereabouts requires law enforcement to obtain a warrant supported by probable cause (see Point B, *infra*). The Court did make it clear, however, that the indiscriminate use of electronic tracking devices indeed carries Fourth Amendment implications. *See United States v. Karo*, 468 U.S. 705, 716 (1984) (holding that law enforcement must obtain a probable cause warrant to install and monitor a tracking device that follows the movement of an object onto private property). The federal courts are split or undecided about whether the installation and indiscriminate, 24-hour-a-day use of a GPS tracking device constitutes a search. *See, e.g.*, *Maynard*, 615 F.3d at 555-56 (holding that long-term GPS surveillance is a search under the Fourth Amendment requiring warrant and probable cause); *but see*, *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (GPS tracking not a search); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010) (same); *United*

Oregon v. Campbell, 759 P.2d 1040 (1988); *see also*, *Commonwealth v. Conolly*, 913 N.E.2d 356 (Mass. 2009) (installation of device a seizure); *but see*, *Foltz v. Commonwealth*, 57 Va. App. 68 (2010) (holding that tracking is not a search.), *appeal granted by* 57 Va. App. 163 (2010); *Osburn v. State*, 44 P.3d 523 (Nev. 2002).

[3] *See* FLA. STAT. § 934.43 (2011); NEB. REV. STAT. § 86-2,103 (2010); OKLA. STAT. 13 § 177.6 (2011); OR. REV. STAT. § 133.619 (2009); 18 PA. CONS. STAT. § 5761 (2010); S.C. CODE ANN. § 17-30-140 (2010); UTAH CODE ANN. § 77-23a-15.5 (2010); *see also*, *In re Application*, 736 F. Supp. 2d at 588 (specifically citing 47 U.S.C. 222(f) and noting that this national legislation surrounding 9-1-1 provisions recognizes "location information [as] a special class of customer information, which can only be used or disclosed in an emergency situation, absent express prior consent by the customer.").

States v. Marquez, 605 F.3d 604, 609-10 (8th Cir. 2010) (same). Several others courts are undecided as to whether installing tracking devices converts the subsequent surveillance into a search, but even among the circuits that have not historically required a warrant for analogous precursor technology, several have relied on at least some showing of criminality to find the practice legal. *United States v. Michael*, 645 F.2d 252, 258 (5th Cir. 1981) (holding the use of a beeper on the defendant's car without a warrant was justified by a showing of reasonable suspicion); *United States v. Shovea*, 580 F.2d 1382, 1388 (10th Cir. 1978) (suggesting that law enforcement had probable cause to attach a beeper without first acquiring a court order); *United States v. Moore*, 562 F.2d 106, 112-13 (1st Cir. 1977) (holding no warrant is required for the use of a beeper so long as there is probable cause).

Additionally, the Federal Rules of Criminal Procedure clearly contemplate the need for law enforcement to obtain a warrant in order to install and monitor a mobile tracking device. The Federal Rules prescribe specific parameters for such surveillance, requiring that the device be installed within 10 days of court authorization and limiting the length of surveillance to 45 days unless re-authorized. FED. R. CRIM. P. 41(e).[4] Such a rule underscores that society, like Congress, is willing to recognize a reasonable expectation of privacy in the pattern of one's movements over time. The Advisory Committee Notes to Rule 41 make clear that "[t]he amendment to Rule 41 does not resolve [the standard for the installation of a tracking device] or hold that such warrants may issue only on a showing of probable cause," but those notes also make clear that the Committee believed that "[t]racking device warrants ... are by their nature

[4] Rule 41 of the Federal Rules of Criminal Procedure, entitled "Search and Seizure," was amended in 2006 to provide, inter alia, procedures for issuing tracking device warrants. Provisions specifically addressing tracking device warrants are set forth in sections (a)(2)(e), (b)(4), (e)(2)(B), and (f)(2) of Rule 41.

covert intrusions" into an individual's right to privacy. FED. R. CRIM. P. 41(d), (f)(2)(c) advisory committee notes (2006 Amendment).

Furthermore, the only federal statute to addresses electronic tracking devices, 18 U.S.C. § 3117, suggests that location information is entitled to special protection. Section 3117, titled "Mobile Tracking Devices," does not provide a particular standard for approving the use of such devices, but clearly contemplates some judicial oversight, authorizing judges "to issue a warrant or other order for the installation of a mobile tracking device" that, as in this case, may move from one jurisdiction to another. 18 U.S.C. § 3117(a); Hr'g Tr. 14:9-17.

Similarly, detailed location information gleaned from other sources, such as cell phone location records, are generally inaccessible to law enforcement without a warrant. Under the Communications Assistance for Law Enforcement Act of 1994 (CALEA), law enforcement cannot obtain location information for a cell phone user pursuant to the low bar of the Pen/Trap Statute, which requires only a certification that "the information likely to be obtained . . . is relevant to an ongoing investigation." 18 U.S.C. § 3123(a)(1). CALEA states that "with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices *... such call-identifying information shall not include any information that may disclose the physical location of the subscriber* (except to the extent that the location may be determined from the telephone number)." 47 U.S.C. § 1002(a)(2) (emphasis added). Thus, Congress plainly envisioned a higher burden on law enforcement to obtain location information from cell phone records.

Moreover, in a somewhat analogous context, numerous courts have held that access to cell phone location information is deserving of Fourth Amendment protection. In fact, it is not uncommon for courts to treat cell phone location requests as applications for "electronic tracking

devices" governed by FED. R. CRIM. P. 41(b)(4) and § 3117, both of which require law enforcement to establish probable cause. A majority of magistrate judges and district courts, which of course conduct the bulk of these types of *ex parte* government applications, have denied government applications for real-time location information via cell site data in the absence of a warrant supported by probable cause.[5] Furthermore, "not one reported decision has

---

[5] A majority of published decisions require probable cause for government access to real-time or "prospective" cell site information. *See In re Application of the United States for an Order Authorizing the Use of a Pen Register with Caller Identification Device Cell Site Location Authority on a Cellular Telephone*, 2009 WL 159187, *3 (S.D.N.Y. 2009); *In re Application of the United States for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location-Based Services*, 2007 WL 3342243, *1 (S.D. Tex. 2007); *In re Application of the United States for an Order Authorizing the Installation and Use of a Pen Register Device, a Trap and Trace Device, and for Geographic Location Information*, 497 F.Supp. 2d 301, 311 (D.P.R. 2007); *In re Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Information*, 2006 WL 2871743, *5 (E.D. Wis. 2006); *In re Application for an Order Authorizing the Installation and Use of a Pen Register and Directing the Disclosure of Telecommunications Records for the Cellular Phone Assigned the Number [Sealed]*, 439 F.Supp.2d 456, 457 (D. Md. 2006); *In re Application of the United States for an Order (1) Authorizing Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing Access to Customer Records; and (3) Authorizing Cell Phone Tracking*, 441 F. Supp. 2d 816, 836 (S.D. Tex. 2006); *In re Application of the United States for an Order (1)Authorizing Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location- Based Services*, 2006 WL 1876847, at *4-5 (N.D. Ind. July 5, 2006); *In re Application of the United States for an Order for Prospective Cell Site Location Information*, 2006 WL 468300, at *2 (S.D.N.Y. Feb. 28, 2006); *In re Application of the United States for an Order Authorizing Installation and Use of Pen Registers and Caller Identification Devices on Telephone Numbers*, 416 F.Supp.2d 390, 397 (D. Md. 2006); *In re United States an Order Authorizing Installation and Use of a Pen Register and/or Trap and Trace Device and Disclosure of Subscriber and Activity Information*, 415 F.Supp.2d 211, 219 (W.D.N.Y. 2006); *In re Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Information*, 412 F.Supp.2d 947, 954 (E.D. Wis. 2006); *In re Application of the United States for an Order Authorizing the Release of Prospective Cell Site Information*, 407 F.Supp.2d 134, 135 (D. D.C. 2006); *In re Application of the United States for an Order Authorizing the Release of Prospective Cell Site Information*, 407 F.Supp.2d 132, 132 (D. D.C. 2005); *In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register and Caller Identification System*, 402 F.Supp.2d 597, 598 (D. Md. 2005); *In re Application of the United States for Order Authorizing the Disclosure of Cell Cite Information*, 2005 WL 3658531, at *1 (D. D.C. Oct. 26, 2005); *In re Application of the United States for an Order (1)Authorizing*

ever allowed access to unlimited (*i.e.*, multi-tower, triangulation or GPS) location data on anything other than a probable cause showing." *Hearing on Electronic Communications Privacy Act Reform and the Revolution in Location Based Technologies and Services Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the S. Comm. on the Judiciary*, 111th Cong. 6 (2010) (written testimony of United States Magistrate Judge Stephen Wm. Smith).

A number of courts have also found that access to historical cell cite location information demands a showing of probable cause. For example, in *In re Application*, 736 F. Supp. 2d at 582, in denying an *ex parte* government application for historical cell phone location the court directly embraced both the reasoning and the holding of the *Maynard* court in applying the Fourth Amendment and finding a reasonable expectation of privacy in location information. Magistrate James Orenstein, the first federal Magistrate to publish on the subject of cell site

---

the Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 396 F.Supp.2d 294, 322 (E.D.N.Y. 2005); *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority,* 396 F.Supp.2d 747, 757 (S.D. Tex. 2005).

A minority permits access under a lesser standard. *See In re Application of the United States for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices,* 632 F.Supp.2d 202, 206-07 (E.D.N.Y. 2008); *In re Application of the United States for an Order (1) Authorizing Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber and Other Information,* 622 F.Supp.2d 411, 415-16 (S.D. Tex. 2007); *In re Application for an Order Authorizing the Extension and Use of a Pen Register Device,* 2007 WL 397129, at *2 (E.D. Ca. 2007); *In re Application of the United States for an Order for Prospective Cell Site Location Information,* 460 F.Supp.2d 448, 462 (S.D.N.Y. 2006); *In re Application of the United States for an Order (1) Authorizing Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber and Other Information,* 433 F.Supp.2d 804, 806 (S.D. Tex. 2006); *In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register with Caller Identification Device and Cell Site Location Authority,* 415 F.Supp.2d 663, 665 (S.D.W. Va. 2006); *In re Application of the United States for an Order (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber Information and/or Cell Site Information,* 411 F.Supp.2d 678, 682-83 (W.D. La. 2006); *In re Application of the United States for an Order for Disclosure of Telecommunications Records and Authorizing the Use of a Pen Register and Trap and Trace,* 405 F.Supp.2d 435, 450 (S.D.N.Y. 2005).

location information observed that our notions of reasonable expectations of privacy "is not stuck in the amber of 1791....but instead evolves along with myriad ways in which humans contrive to interact with one another." *Id.* at 595.

Similarly, the United States District Court for the Southern District of Texas reversed its prior decisions which had previously granted cell site location applications. In the wake of advancing technology and in particular developments in the caselaw, the court adopted *Maynard's* "Prolonged Surveillance Doctrine" and held that the locational information sought through "historical cell site records are subject to Fourth Amendment protection." *In re Application of the U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827, 838, 840 (S.D. Tex. 2010); *but see In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government*, 620 F.3d 304, 313 (3d Cir. 2010) (finding that probable cause is not required to obtain historical cell cite information, but suggesting that if such information could be used to infer an individual's present location, it would qualify as a "tracking device" and therefore require the traditional probable cause determination).[6]

Thus there is emerging evidence that society reasonably expects to protect as private the vast amount of location information that constant electronic tracking can capture and forever

[6] *Amici* agree that the "location information" sought in either context (either via prospective or historical cell phone records or by GPS tracking) is equally deserving of Fourth Amendment protection and should only be accessible by law enforcement through a warrant supported by probable cause. It is the information that the Amendment was designed to protect regardless of the methodology/technology employed to access it. However, arguably the secret installation of the GPS device on an individual's private property effectuated by affirmative trespass on an entirely unwitting target might be more abhorrent to Fourth Amendment notions of privacy. In any event, the surreptitious installation and trespass in the GPS context leaves no room for even an argument that such tracking is constitutional because the subject voluntarily communicates the information to a third party per *United States v. Miller*, 425 U.S. 435 (1976) or *Smith v. Maryland*, 442 U.S. 743 (1979).

record. These trends are particularly important because the nature of surreptitious GPS tracking renders it virtually impossible to assess the "subjective expectation of privacy" prong in the *Katz* test. There is little a reasonable person can do to shield her automobile from sight short of permanently garaging it or conducting an exhaustive search of their automobile to be sure that a secret tracking device has not been installed. The individual's inability to shield herself from the privacy intrusion is particularly good reason for judicial intervention.

B. *United States v. Knotts* Is Not Controlling Precedent.

As an initial matter, and contrary to the court's holding below and a smattering of case law upholding warrantless electronic tracking without end or any judicial oversight, the United States Supreme Court has *never* reached the constitutional question as to whether the secret installation of a tracking device and prolonged, 24-hour-a-day surveillance of an individual with GPS technology constitutes a search. Those courts which have relied on *Knotts* to uphold unrestricted government monitoring of an automobile have applied the decision much too broadly in the GPS context. *Knotts*, 460 U.S. at 284-85.

In *Knotts*, the U.S. Supreme Court confronted the question of whether the augmentation of short-term, visual surveillance of a container traveling in an automobile by the use of an electronic beeper constituted a search. *Id. Knotts* ruled that "a person traveling in an automobile on a public thoroughfare has no reasonable expectation of privacy in his movements from one place to another...." *Knotts*, 460 U.S. at 281. Several courts have latched onto that language to foreclose constitutional protections even on long-term government surveillance by GPS, implying that *Knotts*' holding on public roads forecloses any claim of unconstitutionality even as to long-term surveillance. *See, e.g., Garcia*, 474 F.3d at 996; *Pineda-Moreno*, 591 F.3d at 1216; *Marquez*, 605 F.3d at 609-10. Those courts have misread *Knotts* to have addressed and reserved

decision on "mass surveillance" as opposed to long-term tracking, which those cases imply, is foreclosed by its holding. But in upholding the search in *Knotts*, the Court did not decide the issue this court now confronts: the constitutionality of prolonged, uninterrupted monitoring of the individual's automobile over an extended period of time without any limitation as to length of time or place. *See Maynard*, 615 F.3d at 556.

A careful reading of *Knotts* reveals that the court reserved on the issue of long-term electronic surveillance and uninterrupted tracking on every road. The *Knotts* court specifically reserved on the constitutionality of "twenty four hour surveillance of any citizen of this country ..., without judicial knowledge or supervision," remarking that "if such dragnet-type law enforcement practices ...should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Knotts*, 460 U.S. at 283-84. The *Knotts* court does not reference "mass surveillance" but instead forecasts the possibility of prolonged "*twenty-four hour*" surveillance, and specifically not surveillance of the "masses" or every citizen but instead, of "*any*" citizen. *Id.* (emphasis added). Thus, the very issue before this Court is not foreclosed by the *Knotts* holding; instead, it is precisely the issue upon which it reserved decision.[7] *See Maynard*, 615 F.3d at 556; *see also*, *In re Application*, 736 F. Supp. 2d.

[7] Furthermore, unlike here, and as the *Knotts* concurrence noted, it would have been a "much more difficult case if respondent had challenged, not merely certain aspects of the monitoring of the beeper ....but also its original installation." *Knotts*, 460 U.S. at 286 (Brennan, J. and Marshall, J. concurring in the judgment) (emphasis added); *see also id.* at 280 n. ** (noting that "with respect to warrantless installations," [the court has] not before and do[es] not now pass on the issue."). In fact in neither beeper case, *Knotts* or *Karo*, was the actual installation of the device challenged since it was inserted into the container of contraband with the owner's consent. *Id.* at 278; *Karo*, 468 U.S. at 718. Accordingly, neither case directly addressed the surreptitious attachment of a tracking drive onto private property, a necessary prerequisite for the prolonged monitoring. *See also*, FED. R. CRIM. P. 41(d)(3)(A) advisory committee notes (2006 Amendment) ("The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved and has reserved ruling on the issue," (citing *Karo*, 468 U.S. at 718 n. 5)).

at 584 ("I find the opinion of *Maynard* persuasive, both with respect to its demonstration that *Knotts* is not dispositive on the issue of prolonged location tracking, and with respect to its analysis of the privacy interest at stake ....").

It is clear that the *Knotts* Court addressed a discrete, binary trip, surveilling a targeted item from point A to point B with the short term adjunct of an electronic homing device to aid contemporaneous tracking. It was quite simply not confronted with the broader question that this Court faces: the judicially unsupervised, clandestine installation and uninterrupted, electronic hunting and recording of a citizen's movement without temporal end or spatial limitation. Accordingly, the *Knotts* case is not controlling and the relentless six days of tracking that took place in this case is a search.

1. Compared to the Beeper Technology in *Knotts*, GPS Technology Is Vastly More Powerful in Its Capability to Constantly, Precisely and Indiscriminately Monitor an Individual's Location and Travels.

While *Knotts* may support the proposition that a person does not have a reasonable expectation of privacy in their location in a public place at any one particular moment, it did not reach the question of whether a person has such an expectation in their location over time and space, continuously, secretly and indefinitely. The *Knotts* Court did not reach that question because the "reality" in the short-term beeper case did not "suggest[] the abuse" of long-term, 24-hour surveillance. *Knotts*, 460 U.S. at 283-84 (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978) (holding that very few instances of issuances of warrants on newspaper premises ...hardly "suggests abuse" of the warrant to the extent that newspapers are targeted or chilled in their gathering or reporting of information)).

Compared to the GPS tracking device in this case, the beepers in *Knotts* and *Karo* were qualitatively and quantitatively different in their technological capabilities, and consequently, the

depth of their penetration into the personal and private patterns of one's affairs was significantly limited. The beeper devices of the *Knotts* era could at most emit an electronic signal registering the relative distance between the target and the tracker, enabling more efficient human "tailing." *See, e.g., United States v. Berry*, 300 F. Supp. 2d 366, 368 (D. Md. 2004) ("[A] beeper is unsophisticated, and merely emits an electronic signal that the police can monitor with a receiver ... [and] determine whether they are gaining on a suspect because the strength of the signal increases as the distance between the beeper and receiver closes. ... [But] GPS ... unlike a beeper, is a substitute for police surveillance."). The GPS device, unlike the beepers in *Karo* and *Knotts*, is more than mere "augmentation" of the ordinary human senses that, like a pair of binoculars, would allow law enforcement to keep closer tabs on the target. Instead, the GPS device is a surrogate for the senses – quite literally a more powerful, precise, omniscient and omnipresent substitute permitting unlimited tracking and recording from a remote location.

GPS tracking devices calculate latitude, longitude and altitude by listening to and processing location information from the unencrypted transmissions of at least four of the current 30 GPS satellites in orbit. The accuracy of GPS tracking is continually improving, and depending on the make and model of the device employed, an individual's location can be determined within a matter of inches. *See, e.g.*, X5 GPS Tracking, http://x5gps.com/real_time_gps_tracking.aspx (last visited May 18, 2011); X5 GPS Tracking User Manual, 3 (2nd ed. 2009), *available at* http://x5gps.com/Manual/1.html. Moreover, such technology is relatively inexpensive, with some devices costing less than $100, and the most advanced features available for well under $1,000. *See* Zoombak Personal GPS Locators, http://www.zoombak.com/products/ (last visited May 18, 2011); GPS Tracking Equipment – USA, http://www.thespystore.com/gps-usa.htm (last visited May 18, 2011).

Today, GPS technology is such that once a small, pager-sized device is installed and activated, it is possible to continuously track, record and report the location and movements of the person, vehicle or object to which the device is adhered. GPS Tracking Equipment-USA, *supra.* GPS devices can continue to operate on their own power for months and are capable of storing a complete history of recorded movements and locations that is easily downloaded and reviewed at a later date. *Id.* The data can also be viewed in real time from any computer connected to the Internet and it is possible to create automated "alerts" delivered via email or text message that tell monitors when the target enters a specific area, for example, a specific church, synagogue or mosque, a clinic or hospital, or the offices of a particular political party. Zoombak Personal GPS Locators, *supra.* The data can also be synchronized with software applications such as Google Earth to enable viewing of the target's movements in real time, on real maps and landscapes. Zoombak Personal GPS Locators, *supra*; Mot. to Suppress Hr'g Tr. 14:1-6.

The device used by law enforcement in this case is just one of many GPS tracking devices available today. *See, e.g.* PT-X5 Live Real Time GPS Tracking Unit, http://x5gps.com/personal_gps_tracking.aspx (last visited May 24, 2011). Law enforcement used the device to secretly and continuously track Mr. Johnson's location from October 23, 2008, to October 28, 2008. Hr'g Tr. 12:5-7, 25:2-3, 6-8. Mr. Johnson's every turn was captured and logged regardless of whether he traveled on public or private land and did not distinguish between the two. *Id.* at 43:7-9. GPS tracking devices, unlike law enforcement officers, do not distinguish between the two.

Currently available GPS technology permits the unprecedented and almost unlimited remote collection of personal data that can be culled from a person's pattern of travel and location. Even compared to the pager-sized device used in this case three years ago, the

technology continues to advance with greater pinpoint precision and ever smaller devices. In fact, one type of tracking technology already in widespread use, Radio Frequency Identification (RFID), employs a more limited tracking ability but has developed implantable microchips as tiny as a grain of rice. *See* A1-RFID.com, http://www.a1-rfid.com/human-radio-frequency.htm (last visited May 26, 2011) (reporting on a new RFID microchip the size of a grain of rice); *see also* INSTITUTE FOR SECURITY AND OPEN METHODOLOGIES, HACKING EXPOSED LINUX: LINUX SECRETS & SOLUTIONS 299-303 (3d ed. 2008); (RFID tags used in multitude of ways, including passports, credit cards and location services).

The issues here, however, are questions that were left open in *Knotts* because they embrace a degree of intrusiveness not possible in the beeper era. Here, the installation and prolonged tracking is a level of intrusiveness well beyond the operation of a finite, binary observation of a container from one location to another. The degree of intrusiveness that GPS technology enables is simply qualitatively and quantitatively different than what the court found unobjectionable with the *Knotts* beeper.

2. The Fourth Amendment Protects Against the Type of Intrusive Warrantless Tracking Capable With GPS.

GPS provides law enforcement with access to areas it could not get into otherwise without a warrant. That degree of intrusiveness means that GPS warrantless tracking cannot withstand constitutional scrutiny. The Supreme Court has routinely predicated what is "reasonable" under the Fourth Amendment on degrees of intrusion and layers of privacy.

For example, in *United States v. Bond*, the Supreme Court held that knowing, public exposure of a piece of luggage in an overhead bus bin was not a wholesale relinquishment of privacy to all law enforcement tactics, such as physical manipulation of the luggage to probe its

contents. 529 U.S. 334, 338-339 (2000). The Court reasoned that simply because one can anticipate or even expect that another would touch one's bag placed in the luggage bin, does not mean that one would anticipate, or more importantly, that the Constitution countenances every kind of touching without limitation. In *Bond*, the Court found that law enforcement's probing and squeezing of the bag, a degree beyond knowing exposure to simple touching was a search worthy of Fourth Amendment protection. *Id.*

Similarly, the *Terry* stop line of cases have also recognized an incremental level of constitutional tolerance in the physical detention and "pat down" search of a person on less than probable cause. *Terry v. Ohio*, 392 U.S. 1, 10-11 (1968); *see also United States v. Place*, 462 U.S. 696, 702 (1983) (applying *Terry* stop principles to airport luggage search but finding 90 minute detention a constitutional violation).

In its own line of beeper cases, the Supreme Court itself acknowledged that the Fourth Amendment will not tolerate warrantless electronic tracking that is overly intrusive. Just one year after *Knotts*, the *Karo* Court made it clear that beeper tracking, even with comparatively primitive 1980s technology, was not without constitutional limitation. *Karo*, 468 U.S. at 716. When confronted with the constitutionality of monitoring contraband ingredients inside a container in a car through the use of an implanted beeper, the *Karo* court placed limits on the surveillance when the beeper crossed the public/private threshold and was tracked and monitored onto private property. *Id.* This is true notwithstanding the fact that had the agents been stationed outside the private property around the clock, surely they could have observed the contraband cross the threshold of the property on its way in or out, even with their un-augmented, naked eye. Nevertheless, the *Karo* court found this degree of tracking unconstitutional.

The overly simplistic reliance upon diminished privacy on a public road also ignores emerging case law that recognizes the Fourth Amendment implications of advancing technology. For example, the court below overlooks what Justice Scalia noted in his opinion in *Kyllo*, "the fact that the equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at 35. In *Kyllo*, the court found the use of a thermal imaging device to measure the relative heat emanating from inside a home to be an illegal search. The fact that the same information might be observable without technology – "for example, by observing snow melt on the roof" was "quite irrelevant." *Id.* Similarly, it is quite irrelevant that law enforcement could perhaps garner the same information as a GPS tracking device by physically tailing a suspect, regardless of how implausible or unrealistic the scenario. As the Court found in *Kyllo*, the impact on privacy is not what the technology monitors; it is what it reveals. *Id.* Unlike travel from point A to point B, the GPS records can reveal the "whole of a person's progress through the world," including "indisputably private" activities such as "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *Weaver*, 909 N.E.2d at 1198-99. It not only discloses "where we go, but by easy reference [it reveals] our associations – political, religious, amicable and amorous," as well as "the pattern of our professional and vocational pursuits." *Id.*[8]

Unlike the *Knotts* and *Karo* beepers, or even the naked eye, the technology here reveals a pattern of travel and compiles a permanent digital roadmap of an individual's travels – accessible

[8] The right to form and maintain such associations is protected by the First Amendment, and as discussed in Point E, *infra*, GPS tracking imposes and unacceptable burden and chilling effect on the right to free association.

by quick and easy historical reference. With remote GPS tracking like that used in this case, law enforcement need only access a digital archive to see where whomever is monitored traveled last week, the week before and earlier. As Detective Mike Hackney testified in this case when questioned as to the time law enforcement located the van, the police were "able to look back historically and then I can [sic] look at that and still give an exact time." Hr'g Tr. 24: 20-22.[9]

The ability to recreate a historical record of where one once travelled, to monitor the frequency, duration and destination of any individual's travels for time immemorial, is a scope and scale of intrusion unprecedented before today. Its use by law enforcement requires the reasonable oversight that the limitations of the Fourth Amendment provide.

C. The Expectation of Privacy in an Automobile Is Not So Diminished as to Totally Dispense with Any Articulable Reason to Track It or Require a Warrant to Do So.

Although several courts have relied on that reduced expectation of privacy to justify tracking, the automobile exception is inapt. The general proposition that a person has a diminished expectation of privacy in an automobile affords law enforcement reasonable leeway in the context of vehicle stops, but it is of dubious value in the context of GPS technology. The primary rationale for the automobile exception relies on a car's ability to be "quickly moved," *Carroll v. United States*, 267 U.S. 132, 153 (1925); *see also, California v. Carney*, 471 U.S. 386, 390 (1985) ("our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception.") (internal citations omitted); *Ohio v. Mills*, 582 N.E.2d 972, 983

---

[9] *See also*, Hr'g Tr. 41: 4-11:

Q: So correct me if I am wrong, [it] stores I guess a permanent record of every place that the van has been so that you can get on at any point and see that?

A: [Detective Hackney] Yeah, if I looked at it. If the [GPS] were put on it at 10:00 in the morning and I get on it right now,....I am able to see if [the van] had moved, if it had went to any other locations." *See also* Hr'g. Tr. 59, 63.

(1992) ("the mobility of automobiles ... is the traditional for this exception to the Fourth Amendment.") (internal citations omitted.) This rationale – the "recognized distinction between stationary structures and vehicles," *Carney*, 471 U.S. at 390, which can quickly ferry away contraband, people and evidence – simply does not apply in the 24-hour surveillance context. The entire utility and efficacy of the GPS device is premised on the automobile's ready mobility, without which there would be no tracking. The mobility of the auto does not create a risk of the loss of evidence; it is the auto's very mobility that creates the evidence in the GPS context. So, the justification on which the exception is premised is inapposite with GPS tracking. If the justification for the exception is absent, the exception should not apply. *See Arizona v. Gant*, 129 S.Ct. 1710, 1714 (2009) (rejecting wholesale authorization for a vehicle search incident to every arrest when there is no indication that the twin rationales for the exception, safety and preservation of evidence, apply).

The other justification for finding a lesser expectation in privacy in automobiles, pervasive regulation, is, at most, marginally relevant to GPS tracking. *See generally*, *Carney*, 471 U.S. 386. The expectation that one might be pulled over, ticketed, spotted and even inspected on the public road does not translate to an expectation that one will be relentlessly followed. Indeed, the regulatory expectations society recognizes are grounded in safety justifications, not arbitrary or indiscriminant application. As the Supreme Court noted, "we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, *see New York v. Class*, 475 U.S. 106, 112 (1986), [but] the former interest is nevertheless important and deserving of constitutional protection." *Gant*, 129 S.Ct. at 1720.

Even a reduced expectation of privacy does not mean no privacy at all. Most importantly, the automobile exception simply does away with the necessity of a warrant prior to a search. It

does not eliminate the probable cause requirement or embrace arbitrary and wholesale disregard for the privacy of every vehicle on the public road.

D. GPS Tracking Devices Are a Useful Law Enforcement Tool That Can Be Readily Employed with Judicial Oversight Through Procurement of a Warrant.

To be sure, law enforcement should not be precluded from utilizing technological innovations to ferret out crime. GPS tracking is undoubtedly an efficient, cost-effective and safe means by which to monitor suspected criminal conduct. However, the potential for over-reaching and abuse is enormous given the ubiquity of the device, its cheap cost, and the speed and secrecy with which it can be attached. Accordingly, some pre-determined judicial constraints must be implemented to balance law enforcement needs with the privacy rights of the people. *See Katz*, 389 U.S at 357 (warrantless searches are "per se unreasonable – subject to only a few specifically established and well delineated exceptions.").

"The primary reason for the warrant requirement is to interpose a 'neutral and detached magistrate' between the citizen and 'the officer engaged in the often competitive enterprise of ferreting out crime.'" *Karo*, 468 U.S. at 717 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). But, as the State would have it, we are all subject to unsupervised GPS police monitoring without any limitation regardless of probable cause, reasonable suspicion or even a "hunch" about criminal wrongdoing. Without judicial oversight, there is no check against the use of GPS tracking for unlawful purposes. Indeed, people might never learn of such surveillance unless they are ultimately charged with a crime. As the Supreme Court has often observed, "it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" *Soldal*, 506

U.S. at 69 (quoting *Camara*, 387 U.S. at 530; *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *New Jersey v. T.L.O.* 469 U.S. 325, 335 (1985)).

There is no way to determine how many Ohioans have already been arbitrarily tracked, and under the state's vision of the Fourth Amendment, no way to determine how many more will be. In this case, law enforcement implied that it had been utilizing the GPS devices for at least the past two years. *See*, Hr'g Tr. at 27. This Court must decide whether such breathtaking discretion is something our Federal and State Constitutions have surrendered to law enforcement as an inevitable consequence of technological innovation and a cramped reading of our Fourth Amendment.

Any contention that electronic surveillance without a warrant is reasonable "is based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant." *Karo*, 468 U.S. at 717 (quoting *Johnson*, 333 U.S. at 14). Application for judicial approval before installation of a device can hardly be described as a hardship resulting in a delay in the investigation. This is especially truly given that the utility of the device's information is generally found over the course of a sustained period of monitoring.[10]

In addition to Ohio, telephonic and other means of electronic applications for warrants are also permissible in at least 23 other states.[11] Fast and efficient application for warrants aided

---

[10] Obviously, the well delineated exceptions to the warrant requirement, such as exigent circumstances, would apply with equal force in this context where circumstances merit it.

[11] The 23 states are Alabama, Alaska, Arizona, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Michigan, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, South Dakota, Oregon, Utah, Vermont, and Washington. *See* 511 n. 29 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.3(3)(c) (4th Ed. 2004) (providing reference to the statutes authorizing oral warrants); *see also*, Justin H. Smith, *Press One For Warrant: Reinventing The Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV. 1591, 1608-09 (2002); GA.

by technology is common to almost every jurisdiction in the United States and is equally true in Ohio. As one Utah County Sheriff put it, "officers [in Utah] can get electronic warrants in about 20 minutes. ... 'It's not that hard.'" *See* Janice Peterson, *Conflicting views on no-warrant GPS ruling*, Daily Herald, Sept. 5, 2010, *available at* http://www.heraldextra.com/news/local/article_6d44220a-e8d1-5d0b-a072-bce72e97a835.html according to the Utah County Sheriff.

In fact, Ohio has enacted legislation to enable, swift and efficient electronic application for warrants in this state. "A warrant shall issue on either an affidavit or affidavits sworn to before a judge of a court of record or an affidavit or affidavits communicated to the judge by reliable electronic means .....". OHIO CRIM. R. 41(c)(1). The Ohio statute even purposely provides a flexible approach to accommodate the ever-advancing types of technology employed in ascertaining a warrant in the modern age. As the official comment notes, "[t]he revisions to Crim. R. 41 now permit an applicant for a search warrant to be in communication with a judge by *reliable electronic means*. The concept of reliable electronic means is seen as broad enough to encompass present communication technologies as well as those that may be developed over the next decades." OHIO CRIM. R. 41(c)(1), Official Comment (2010 Amendments) (emphasis added).

In *Karo*, the government argued that requiring a warrant to monitor that container carrying a beeper onto private property would be particularly difficult given that law enforcement could not know in advance where the device might travel and thus a warrant would be required for every installation. The Supreme Court dismissed this argument noting that it was "hardly compelling" enough to do away with this essential safeguard. It is precisely because

---

CODE ANN. § 17-5-21.1 (2011) (application by videoconference permitted in Georgia); VA CODE ANN. § 19.2-54 (2011) (application by facsimile permitted in Vermont).

neither law enforcement (nor the device) will know if the monitoring will be contained to public spaces, or on the contrary traverse the driveway, cross-onto private property or, as it did here, cross-over state-lines, that the imposition of a neutral magistrate is necessary. Ironically, as the *Karo* Court pointed out, that was not a particularly "attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained, [ ] seemingly on probable cause." 468 U.S. at 718.

"When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson*, 333 U.S. at 14 (quoted with approval in *Payton v. New York*, 445 U.S. 573, 586 (1980)). An authorized warrant sets reasonable limits on the duration of the tracking, where and when it can be installed and tracked and ensures, in advance that there is an objective determination of probable cause to believe the target has or is committing a crime. The citizens of Ohio are deserving of nothing less.[12]

E. Indiscriminate and Unmonitored Government Use of GPS Tracking Imposes an Unacceptable Burden and Chilling Effect on Liberty and First Amendment Free Association Rights.

"The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."

---

[12] *Amici* note that some courts have suggested or interposed an intermediate standard of judicial review, a reasonable suspicion standard. For the reasons set forth in this section and given the scope and scale, of the invasiveness of the procedure, in particular the duration and the susceptibility to trespass onto historically private grounds, we urge that a judicial pre-determination based upon probable cause is most likely to both insure reasonable limitation on the scale of the technology's use as well as insure the greatest public confidence in the legality of the procedure. Nevertheless, amici acknowledge that a reasonable suspicion requirement, subject to judicial review, is infinitely preferable to leaving the discretion entirely out of the realm of an independent judiciary and exclusively in the hands of law enforcement.

Marcus v. Search Warrants of Property at 104 E. Tenth St., 367 U.S. 717, 729 (1961). Thus, the Fourth Amendment's protection of privacy rights also serves the important function of protecting associational rights. *See Katz*, 389 U.S. at 350 (noting that Fourth Amendment concerns are heightened where associational interests are also at stake). Surreptitious GPS data collection by law enforcement, without judicial oversight, imperils those fundamental rights that have long been recognized in one's associations. Ohioans, no less than every other American, enjoy a constitutionally protected fundamental right to association. U.S. Const. amend. I. "The commands of our First Amendment (as well as the prohibitions of the Fourth and Fifth) ...are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (internal citations omitted).

Given the ability to download, store, and retrieve vast historical detail of one's life without judicial oversight, use of GPS tracking devices in the manner urged by the State would give the government free rein to harvest volumes of data about an individual's habits and patterns. Sustained monitoring of an individual's movements throughout society raises major concerns with respect to the associational freedoms protected by the First Amendment and to individual privacy rights. Unlimited, 24-hour surveillance reveals not just public exposure of one's location in a discrete moment in time, but also patterns, practices, affiliations and constitutionally protected associations. *See generally, NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations" and reversing contempt order against NAACP for failure to comply with Alabama court's compelled production of membership lists); *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981) ("the practice of persons sharing common

views banding together to achieve a common end is deeply embedded in the American political process"); *see also Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Watkins v. United States*, 354 U.S. 178, 197 (1957). With the secret use of around-the-clock GPS surveillance, the government can ascertain information concerning membership and attendance at both private and public gatherings as effectively as if compulsory disclosure of membership data were required. "Prolonged 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*." *Maynard*, 615 F.3d at 562 (emphasis added).

"It is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson*, 372 U.S. at 546. Nevertheless, in this case the State urges a rule of law whereby *absolutely no showing what so ever* is required to gather the kind of information – indirectly through GPS technology – that the law clearly proscribes it from gathering directly without judicial oversight. Such blanket discretion to law enforcement absent even the slightest judicial oversight is reminiscent of the very inspiration from which the Fourth Amendment has its genesis: the writs of assistance which gave blanket authority for officials to search where they pleased. *See Stanford*, 379 U.S. at 481. Those blanket writs were rightly described as "the worst instruments of arbitrary power, the most destructive of [] liberty and the fundamentals of law,..." because they placed "the liberty of every man in the hands of every petty officer." *Id.*

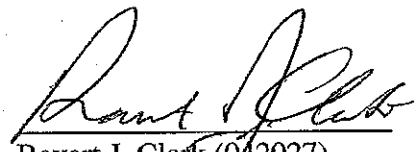
The balance between this First Amendment liberty interest and legitimate law enforcement objectives can be preserved only by requiring that law enforcement demonstrate

probable cause to undertake this far reaching and invasive surveillance. In sum, consideration of Ohioans association rights alone is sufficient to require law enforcement to secure a warrant based on probable cause prior to the installation of the GPS devices.

CONCLUSION

Accordingly, for the reason set forth above, this Court should hold that the surreptitious implantation of a GPS monitoring device in an individual's vehicle by law enforcement coupled with around the clock electronic, remote tracking and recording of its movement without spatial or temporal limitation is in violation of the Fourth Amendment absent a warrant based on probable cause.

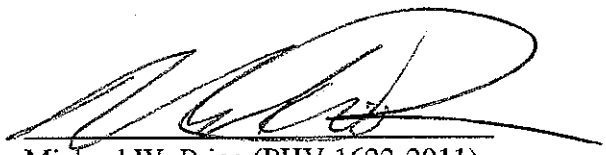
Respectfully submitted,



Ravert J. Clark (042027)
(signed by Michael Price per telephonic authorization on June 3, 2011 at 12:40 p.m.)
Counsel for *Amici Curiae*
National Association of Criminal Defense Lawyers,
Electronic Frontier Foundation,
Center for Democracy and Technology
114 E. 8th Street, Suite 400
Cincinnati, OH 45202
Tel: (513) 587-2887
Fax: (513) 621-2525
Notguilty14@aol.com

CERTIFICATE OF SERVICE

I certify that a copy of this motion has been served on the Butler County Prosecutor and William R. Gallagher, Esq. by ordinary U.S. mail on June 4, 2011.



Michael W. Price (PHV 1622-2011)
National Association of Criminal Defense Lawyers
1160 L St., NW, 12th Floor
Washington, DC 20036
Tel: (202) 872-8600
Fax: (202) 872-8690
michael@nacdl.org