Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SCOTT C. WEAVER,

Defendant-Appellant.

BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWERS, THE NEW YORK STATE DEFENDERS ASSOCIATION, ELECTRONIC FRONTIER FOUNDATION, UNION FOR REFORM JUDAISM, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, AND COUNCIL ON AMERICAN-ISLAMIC RELATIONS AS *AMICI CURIAE*

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit 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 more than 12,000 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.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, which include private practitioners, public defenders, and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its goals include promoting the proper administration of criminal justice; fostering, maintaining, and encouraging the integrity, independence, and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research, to include appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1,500 public defenders, legal aid attorneys, 18-B counsel and private practitioners throughout the state. With funds provided by the state of New York,

NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. This Court has granted NYSDA *amicus* status in numerous criminal cases, including ones addressing search and seizure principles under the State Constitution. NYSDA shares the concerns of other *amici* that installation and ongoing GPS locational monitoring of automobiles by the police, without prior judicial approval and oversight, violates reasonable expectations of privacy of New Yorkers.

The Electronic Frontier Foundation is a non-profit civil liberties organization working to protect free speech and privacy rights in the online world. With more than 10,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil

liberties information at one of the most linked-to web sites in the world, www.eff.org.

As part of its mission, EFF has served as counsel or amicus in a broad range of key cases addressing electronic privacy statutes and the Fourth Amendment as applied to the Internet and other new technologies. EFF has also served as amicus to magistrate judges considering ex parte government applications for cell site data to track a cell phone's physical location.

The Union for Reform Judaism (URJ) encompasses 1.5 million Reform Jews in 900 North American congregations, including approximately 100 congregations and 100,000 members in New York State alone. As we strive to strike the appropriate balance between cherished, constitutionally protected freedoms and ensuring our security, the URJ turns to Jewish law for guidance, which affirms importance of privacy rights. The Talmud, the ancient Jewish legal text, identifies a category of "harm caused by seeing" (heizeq re'iyyah) when one's privacy is violated by the prying eyes of another (Talmud Bavli, Baba Batra 2b-3a). Jewish tradition acknowledges that preventing crime may require discovery of confidential

information, yet this exception is extremely limited. In this age of rapid technological advances, it is essential that no individual's privacy is violated without clear legal standards being met.

The Sikh American Legal Defense and Education Fund (SALDEF) is the oldest and largest Sikh American civil rights and advocacy organization in the United States. SALDEF is a not-for-profit organization which advocates on behalf of over 700,000 Sikhs in the United States on issues relating to, among others, civil rights and civil liberties, religious freedom, racial profiling and privacy rights. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations. SALDEF works to achieve this mission through our four national program areas, legal assistance, education, government advocacy and media relations. Additionally, as part of its mission, SALDEF serves as amicus on a broad range of issues relating to civil right and civil liberties issues including but not limited to detention rights and obligations, privacy, religious freedom, and racial profiling.

The American-Arab Anti-Discrimination Committee (ADC) is the largest Arab-American grassroots civil rights organization. Founded in 1980 by a former U.S. Senator, ADC is committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC is at the forefront in addressing discrimination and bias against Arab Americans wherever it is practiced. ADC's achievements demonstrate the success of Arab Americans in building vibrant institutions that not only draw on the strength of the Arab-American community, but also engender the support of individuals and groups who are equally committed to deterring discrimination against all people. ADC is a proud and active Executive Committee member of the Leadership Conference on Civil Rights (LCCR), the Detention Watch Network (DWN), and a founding member and steering committee member of the Rights Working Group (RWG).

With nearly 40 Chapters nationwide, and members in every state, ADC represents the interests of the Arab American community through litigation, and broader policy discussions. Since September 11, 2001, the American Arab community has been subjected to a

wave of policies and actions that single them out for particularly harsh or difficult treatment. These have ranged from lengthy, pretextual detentions, to private acts of retaliation and violence, and unwarranted surveillances, searches and seizures. ADC has served as counsel, and has been granted *amicus* status in a number of cases, including ones involving unwarranted surveillance practices. In line with its mission, ADC believes that only by safeguarding these rights for all individuals can the courts affirm the solidly American principles of constitutional democracy that have been justly championed by our nation for decades.

The Council on American-Islamic relations (CAIR) is a nonprofit 501(c)(3) grassroots civil rights and advocacy group. CAIR is America's largest Islamic civil liberties group, with regional offices nationwide and in Canada. The national headquarters are located on Capitol Hill in Washington, DC. CAIR's mission includes the goal of enhancing the understanding of Islam and eradicating unlawful and unjustified intrusion upon the rights of law abiding, practicing Muslims. More information can be found under "About Us" on the organization's website, www.cair.com. CAIR aspires to

be a leading advocate for justice and mutual understanding. Since its establishment in 1994, CAIR has been the natural ally of groups, religious or secular, that advocate justice and human rights in America and around the world. CAIR strongly believes that the courts are a necessary means to equality, particularly from the intrusion of law enforcement bodies. CAIR has entered the courts on several occasions as *amicus curiae* and/or directly as counsel for plaintiffs seeking remedies from rampant law enforcement practices and policies.

This case presents the fundamental question of whether federal and state constitutional protection against judicially unregulated search and seizure is applicable in the face of heretofore unimaginable technological advances that enable secret surveillance of New Yorkers without limitation as to duration or location.

SUMMARY OF ARGUMENT

This case presents a critical question in search and seizure jurisprudence: whether to permit law enforcement to surreptitiously install a GPS tracking device within an individual's automobile and thereby monitor and record the location of that vehicle without any

limitation as to time and place, and to do so without any judicial oversight whatsoever. This Court should apply fundamental constitutional principles to reasonably harness the encroaching reach of technological advancement and its threat to eviscerate New Yorkers' protection "from unreasonable government intrusions in their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977). If the Fourth Amendment's proscription against unreasonable searches and seizures remains designed "to protect people and not places," and is to remain vibrant and prescient in a world of advancing technologies, this Court must construe the clandestine installation of tracking devices and their 24/7, electronic surveillance and digital recording of an individual's every movement, without limitation as to duration or location, as a search mandating Constitutional protection. *Katz v. United States*, 389 U.S. 347, 351 (1967); *People v. Scott*, 79 N.Y.2d 474, 488 (1992) ("Our Court, in applying both Federal and State law, has consistently adhered to the concept introduced in *Katz*; that the Fourth Amendment and [New York] article I, sect 12 protect privacy rights of persons, not places," (internal citations omitted)).

For the overwhelming majority of Americans, including most New Yorkers, who reside outside of an inner city, the automobile is the means by which they travel to conduct the public and private affairs of their lives. The technology used in this case permits law enforcement to monitor more than just an individual's location and travel from point A to point B on a public thoroughfare and is more than the mere enhancement of visual surveillance capability through the use of a secretly attached device. Rather, it permits law enforcement to remotely track and record an individual's complete and uninterrupted pattern of movement for an unlimited duration, in an unlimited space, both public and private, compiling a digital history of not simply a driver's whereabouts, but also her associations, affiliations, practices, and preferences, ranging from the intimately personal to the political. In essence, the technology easily permits the creation of a government compiled and maintained complete virtual profile.

> The fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional question under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this

> Court in its supervision of the fairness of procedures in the federal court system.

Lopez v. United States, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring).

The State argues and the majority in the court below held that such surreptitious installation and continuous remote tracking and recording may be done with no judicial oversight or constitutional protection whatsoever, either before or after the fact, and for as long as law enforcement should desire. And, as the State would have it, we are all subject to such police monitoring regardless of probable cause, reasonable suspicion or even a "hunch" that he or she is engaged in criminal wrongdoing. Indeed, in the absence of any judicial oversight, there would be no legal limitation on such monitoring for malicious or self-serving purposes by a rogue law enforcement officer. Unless a person is charged with a crime, she might never learn of the surveillance – or what illegal use was made of it. This Court must decide whether such breathtaking discretion is something our Federal and New York State Constitutions have surrendered to the police as an inevitable consequence of technological innovation and a cramped

reading of Fourth Amendment, and New York constitutional, jurisprudence.

Amici recognize that Global Positioning System ("GPS'') technology is an effective and valuable law enforcement tool that should be readily available in appropriate circumstances. Because it is qualitatively, quantitatively and durationally different from a mere augmentation of visual surveillance, or "tailing" of a suspect, however, its unfettered use by law enforcement, absent any judicial oversight and constitutional constraint, poses a significant threat to what Justice Brandeis famously described as an individual's "right to be let alone" from government intrusion – "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *People v. Scott*, 79 N.Y.2d 474, 487 (1992)) (quoting the "right to be let alone" as "a core principal reflected in our cases vindicating a broader privacy right" including areas other than search and seizure).

GPS devices are being secretly installed and used by law enforcement throughout the state of New York and elsewhere in the country. In the era before the Supreme Court's decision in *Katz* it

might have been possible to say that if you want to avoid having your conversations overheard, don't use a public phone booth. But as technology advances, people cannot function in society without safeguards protecting their privacy. In *Katz*, the Court found Mr. Katz had a reasonable expectation of privacy in the words he spoke in that phone booth *despite* the existence of the technology used by law enforcement to eavesdrop without prior authorization. *Katz*, 389 U.S. at 352-353 (1967). With ever greater and inexpensive technology available to law enforcement, people become increasingly powerless to protect and preserve their right to privacy. As relates to law enforcement's unwarranted and unsupervised use of GPS devices, it is hardly viable to require a person who wishes to avoid GPS monitoring to forego the use of a car.

Because not every search and seizure of every individual results in the offering of evidence or a criminal prosecution, indeed it is fair to assume most do not, the true extent and use of this currently unsupervised practice is unknowable. The question this Court confronts "is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533

U.S. 27, 35 (2001). The ubiquity of the devices, and the vast amount of sensitive information they secretly track and store, demands no less than the oversight of a detached and neutral magistrate, in advance, through a warrant supported by probable cause. This Court must be mindful that the rule it adopts "must take account of more sophisticated systems that are already in use or development." *Id.* at 36.

Amici join in urging this Court to impose reasonable judicial limitation upon the use of GPS tracking devices because (A) the technology enables unlimited and unprecedented incursions upon privacy and personal expression; (B) the use of these devices constitutes a search under the Fourth Amendment; (C) society reasonably expects to protect the vast amount of personal information that is obtained through the unlimited, surreptitious use of GPS monitoring; (D) the Court should protect the liberty and privacy interests of the public under Article I, Section 12 of the New York State Constitution, irrespective of whether the Court concludes that unlimited use of GPS monitoring without judicial oversight is impermissible under the federal Constitution; (E) the minimal burden

of imposing a probable cause requirement effectively balances legitimate law enforcement interests and individual privacy rights; and (F) the use of unlimited GPS surveillance without any judicial oversight imposes an unacceptable burden upon First Amendment free association rights.

I. THIS COURT SHOULD HOLD THAT SURREPTITIOUS IMPLANTATION OF A GPS MONITORING DEVICE IN AN INDIVIDUAL'S VEHICLE BY LAW ENFORCEMENT AND AROUND THE CLOCK, ELECTRONIC TRACKING AND RECORDING OF MOVEMENTS WITHOUT SPATIAL OR TEMPORAL LIMITATION IS IMPERMISSIBLE, ABSENT A WARRANT BASED UPON PROBABLE CAUSE.

A. GPS TECHNOLOGY PERMITS UNPRECEDENTED AND UNLIMITED COLLECTION AND RECORDING OF PERSONAL DATA

The Q-ball tracking system used by law enforcement in this case is just one of many brands of GPS, or Global Position System, devices. GPS receivers calculate latitude, longitude and altitude by listening to, and processing location information from the unencrypted transmissions of the four nearest of the current 29 GPS satellites in orbit. Today, GPS technology is such that, once a small, handheld device is installed and activated, it is able to track, record and report

every movement, every location, every few seconds, 24/7. In addition to locational and directional data, many of these devices can also measure and record such things as velocity and temperature as well.

Captured and recorded data can be sent to any designated computer remotely, as it was in this case. Indeed, Inv. Minehan could log on to his computer at home while watching a football game, as he explained, and track a vehicle in real time. (A 129-130, R 600-601). The device recorded all of the vehicle's movements and locations over the course of 65 days. (A 38, R 141). Devices such as this one do not distinguish between travel on public and private property, and are always on so long as they are powered. In this case, sometime during the 65-day surveillance period, law enforcement personnel crawled underneath Mr. Weaver's van again in the middle of night in order to change the GPS's batteries. (A 132, R 604).

This locational and directional data can even be synchronized with applications such as Google Earth to enable the viewing of the target's movements in real-time, on real maps and landscapes. And it can provide movement alerts through email and text messaging. These handheld, mountable GPS devices are also capable of storing

the data so that the entire history of recorded movements and locations from the moment of installation is easily downloadable, for example when law enforcement visits the device for a battery change. The accuracy of GPS today is ever-increasing, with devices capable of recording and reporting pinpoint locations within just an arm's length. Finally, it is critical to note what the GPS cannot do, and that is shut itself down when the target crosses from the "public" to the "private" arena. *See* Renee McDonald Hutchins, *Tied Up In Knotts? GPS Technology and The Fourth Amendment*, 55 U.C.L.A. L. Rev. 409, 414-21 (2007) (providing extensive detail on the origins, science and function of GPS technology); *and see, e.g.,* "GPS snitch" vendor Blackline GPS at http://gps-snitch.com/marketing/moreAbout.html (last visited Nov. 23, 2008) ("GPS Snitch can tell you where it's located, from your web browser, in real-time"); "Super Trackstick Data Logger" vendor Trackstick GPS at http://www.trackstick.com/products/supertrackstick/index.html (last visited Nov. 23, 2008) ("Super Trackstick works anywhere on the planet. Its traveled locations can be shown via a red line that is traced on satellitc photos and 3D terrain using the latest mapping technologies from Google Earth....continuously records its exact

route, stop times, speed, direction, and other valuable information, all of which can be quickly downloaded and viewed on your computer.")

The GPS Snitch and the Super Trackstick Data Logger, just two of many brands, can be easily purchased online for under $300. *See, e.g.,* www.shopwiki.com (last visited Nov. 23, 2008); *see also* The Spy Store online at www.thespystore.com (last visited Nov. 23, 2008) (selling a miniaturized GPS device called the GPS-4 for just under $400 that it boasts "is small enough for personal tracking (placement in a suitcase, purse, backpack, or practically anywhere you could imagine) and it can be installed in, on, or under a vehicle in about 10 seconds which makes it ideal for use as a detailed surveillance tool for government, law enforcement, investigative journalists, private investigators, and individuals.").

Put simply, currently available GPS technology permits unprecedented and unlimited collection of personal data. Even as compared to the technology used in this case just three years ago, GPS devices on the market today grow ever more advanced and inexpensive.

B. SURREPTITIOUS INSTALLATION OF A GPS TRACKING DEVICE AND THE SUBSEQUENT TRACKING AND RECORDING OF ITS COMPLETE AND UNINTERRUPTED PATTERN OF MOVEMENTS IS A SEARCH UNDER THE FOURTH AMENDMENT.

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 and reasonable or a legitimate expectation of privacy that has been invaded by Government action." *United States v. Knotts,* 460 U.S. 276, 280 (1983). 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).[1] The surreptitious installation and unlimited, 24/7 monitoring and recording of a driver's movement conducted from a remote

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[1] The test, first annunciated in *Katz*, broke with earlier jurisprudence which tied Fourth Amendment jurisprudence to notions of property law and physical trespasses against "constitutionally protected areas" explicitly named in the Constitution. *Compare Olmstead v. United States*, 277 U.S. 438, 465-66 (1928) (articulating the subsequently rejected rationale that "The reasonable view is that 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. 347, 351 (1967) (holding that "the Fourth Amendment protects people, not places").

location infringes on an expectation of privacy society is certainly prepared to recognize as reasonable. Accordingly, its installation and use by law enforcement is a search, under the Federal Constitution.

In 1983 and 1984, the Supreme Court held that the secret monitoring of contraband ingredients inside a container in an individual's car through the use of an implanted beeper tracking device did not constitute a search under the Fourth Amendment, unless and until the monitoring crossed the threshold of the home. *See United States v. Knotts,* 460 U.S. 276 (1983) (beeper tracking in a container on public roads not a search); *see also United States v. Karo*, 468 U.S. 705 (1984) (beeper tracking in a container inside the home is a search). Noting the diminished expectation of privacy in a car and reasoning that there is no expectation of privacy in a vehicle's movement on public streets, the Supreme Court held the monitoring of the beeper only on the public road in neither case was a search requiring constitutional protection. The *Karo* court drew a line when the beeper container crossed the public/private threshold and was monitored inside the home, notwithstanding the fact that had the

agents been continuously watching presumably they could have seen the container with the beeper enter and exit private property.

The Appellate Division, as well as several courts that have relied on these cases to sanction wholesale, unsupervised use of the GPS devices by law enforcement, have read both *Knotts* and *Karo* far too narrowly and applied them far too expansively. These courts fail to recognize that the constitutionality of the "dragnet-type law enforcement practices" now capable of being employed by this newer technology was an unanswered question left wide open in the Supreme Court's decision in *Knotts*. *Knotts*, 460 U.S. at 283-84 (announcing that if the "'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision'....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*" (emphasis added)). The time to address that question has now arrived. In doing so, this Court should not ignore the fundamental precept that what an individual "seeks to preserve as private, even in an area accessible to the public, may be

constitutionally protected[.]" *Katz*, 389 U.S. at 351-353 (1967); *see also Bond v. United States*, 529 U.S. 334, 338-39 (2000) (knowing exposure of luggage to public did not eliminate privacy right or constitute knowing exposure to all law enforcement tactics such as the unconstitutional search by physical manipulation).

Significantly, in neither *Knotts* nor *Karo* was the installation of the device into containers of contraband ingredients effectively challenged. In *Knotts*, the defendant lacked standing to raise the issue and in *Karo*, installation of the device was conducted on consent of the owner at the time of installation. Accordingly, neither case directly addressed the surreptitious attachment of a tracking device on private property at issue here. *See also* Advisory Committee Notes to FED. R. CRIM. P. 41(d)(3)(A) (noting "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). Unlike here, in *Knotts* and *Karo*, the tracking was not of the individual's car, but of a container carrying the ingredients for contraband.

Additionally, in both *Knotts* and *Karo*, the ability, and thus the utility, of the devices was qualitatively different than GPS tracking devices of today. First, the beeper devices in question in both cases at most could register the relative distance between those engaged in surveillance and the object they were tracking in order to enable law enforcement not to totally lose sight of it. *See, e.g., United States v. Berry*, 300 F.Supp.2d 366, 367-68 (D.Md. 2004) (noting the significant technological distinction between the beeper and current GPS technology – "a beeper is unsophisticated, and merely emits an electronic signal that the police can monitor with a receiver.....police can determine whether they are gaining on a suspect because the strength of the signal increases as the distance between the beeper and the receiver closes[,]" while the GPS "unlike a beeper is a substitute for police surveillance."). Here, the GPS devices -- through satellite coordinates – can pinpoint the precise longitudinal and latitudinal coordinates of the car, the speed at which it is traveling, where, when, how long and how often it stops, and digitally transcribe and store this information, all from a remote location. The GPS device, unlike the beepers used in *Knotts* and *Karo*, is not merely an "augmentation" of the ordinary human senses allowing the trackers to keep closer tabs on

the suspect which visual surveillance might not afford. Instead, the GPS is quite literally a more powerful, precise, omniscient, and omnipresent substitute, indeed a surrogate, for ordinary senses – permitting unlimited tracking from a remote location – in this case theoretically from the laptop in the officer's living room, and storing a permanent electronic record of movements. (*See* A 129-130, 132-133, R 600-601, R 604-605). *See Berry*, 300 F. Supp.2d 366 (discussing, but not reaching, the constitutional question because officers had in fact obtained a court order in advance authorizing installation of the device); *see also*, Hutchins, *supra*, at 457-464 (distinguishing the two technologies and arguing for constitutional protection through pre-authorized warrant based on probable cause).

The majority below and several other courts' myopic reading of *Knotts* and *Karo* -- equating the technology to enhanced "tailing" of a suspect -- overlook the qualitative and quantitative difference in the GPS technology and the beeper technology of more than 20 years ago. These courts sanction law enforcement's unrestricted use of the GPS device by erroneously relying on the proposition that a person has no reasonable expectation of privacy on a public road. *See, e.g., United*

States v. Garcia, 474 F.3d 994 (7th Cir. 2007); *United States v. Moran*, 349 F.Supp.2d 425 (N.D.N.Y. 2005); *People v. Gant*, 2005 NY Slip Op 25307, 9 Misc. 3d 611(Westchester Cty Ct 2005). But the general proposition that a person has a diminished expectation of privacy on a public road, which affords law enforcement reasonable leeway in the context of vehicle stops to enforce laws and investigate suspicion of on-going or imminent crime, is of dubious value in the context of GPS technology. That a person has a diminished expectation of privacy when operating or riding in a vehicle cannot obscure the reality that citizens have a perfectly reasonable expectation that law enforcement will not compile a complete, uninterrupted catalog of their every movement outside of the home without an iota of suspicion of wrongdoing and wholly without judicial oversight. While an individual may reasonably risk that her travel on an public road may be "voluntarily conveyed to anyone who wanted to look" surely she does not contemplate a round-the-clock, year round cataloging of *every*where she goes, what times, how fast, where she stops, how often and for how long? *See Knotts*, 460 U.S. at 281; *see also* April A. Otterberg, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's Theory of*

The Public Space Under the Fourth Amendment, 46 B.C. L.Rev. 661 (2005).

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 equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 (2001). As the Court found in *Kyllo*, the impact on privacy is not what the technology monitors – it is what it reveals. *Id.*

In *Bond v. United States*, *supra*, the Supreme Court recognized degrees of exposure and the degree of intrusiveness upon public exposure that the Fourth Amendment will and will not countenance. 529 U.S. at 335. In *Bond*, similar to a driver on a public road, the defendant knowingly exposed his luggage to the public by taking it on a bus and thus could reasonably expect that it would be touched or moved by others. *Id.* The Court drew the constitutional line however, when law enforcement physically manipulated the bag,

squeezing the soft-sided luggage in search of hard objects. There, the Court held that knowing exposure to the public did not necessarily mean knowing exposure to *all* law enforcement practices and thus, knowing exposure did not eliminate *all* expectation of privacy. The Court held the physical manipulation was a search worthy of constitutional protection under the Fourth Amendment. *Id.* at 338-339. The same analysis applies to a driver's knowing exposure of his movements on a public road. Knowing someone could see you in your car or even follow behind you simply does not translate into knowing that your every movement may be secretly tracked whenever and for however long a police officer wishes.

Importantly, while there may be a reduced expectation of privacy in a car for myriad reasons including their mobility, visible interiors, operation on public streets and their extensive regulation, no court has held that there is none. *See, e.g., Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *People v. Yancy*, 86 N.Y.2d 239 (1995). In short, even though a driver on a public road may expect to be seen, inspected, or pulled over, that does not equate to a reasonable expectation that she will be subjected to the trespass of secret

installation to permit the kind of intrusive monitoring of the long-term pattern of her every movement.

While the courts upholding the unregulated use of the GPS device take great pains to distinguish tracking of a vehicle on public roads versus private property, such distinctions are practically and constitutionally flawed. First, in reality the devices do not determine, much less anticipate, when and where they cross from public to private property. They continue to track, record and download regardless of their global position. The U.S. Government conceded this to be true of even the rudimentary beepers utilized in *Karo*. The Government argued, without success, that the warrant requirement for tracking a beeper into a home was a law enforcement hardship and would require warrants in every case since the trackers could not know in advance where the device might travel. *See Karo,* 468 U.S. at 717-18. The Supreme Court rejected that argument, holding that the use of the device in that case was a search, and the government's argument could not overcome the necessity of a warrant. *Id.*

Further, the public road /private road distinction ignores the development of Fourth Amendment jurisprudence away from neat

"locational" boundaries, particularly in the technological arena. *See, e.g., Katz, supra,* at 352 n. 9, ("It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." internal citations omitted); *see also Scott*), 79 N.Y.2d at 474, 488 (holding that "[r]everting to the ...pre-*Katz,* property oriented approach would subvert New York's acceptance of [constitutional protections applying] not to places, but to an individual's legitimate expectation of privacy"); Ian James Samuel, *Warrantless Location Tracking*, 83 N.Y.U. L.Rev. 1324 (2008) (discussing cell phone tracking technology in terms of "location privacy" and arguing warrant requirement based on probable cause to satisfy Constitutional mandates); Otterberg, *supra,* 46 B.C. L.Rev. 661.

Finally, while trespass alone may not be the *sine qua non* of whether a Fourth Amendment violation has occurred, *compare Katz, supra,* (no trespass, but finding Fourth Amendment violation) *with Oliver v. United States*, 389 U.S. 347 (1984) (trespass, but finding no federal violation), the secret attachment of a device to permit long-

term tracking goes well beyond the confines of trespass and real property law. This technology and its exploitation is trespass plus. The degree of this kind of intrusion is hardly akin to visibility of the exterior of the car on a public street (*Cardwell v. Lewis*, 417 U.S. 583 (1974); the removal of paint scrapings from car's tire (*Id.*); a peek at auto's undercarriage with a flashlight, (*United States v. Rascon-Ortiz*, 994 F.2d 749 (10th Cir. 1993)); or even lawful access to the undercarriage during a border search and inspection (*United States v. Columbe*, 2007 U.S Dist. LEXIS 86756 (N.D.N.Y. 2007)).

Many courts have questioned the constitutionality of government access to cell phone records that can be used to approximate location. See, e.g. *In the Matter of the Application*, 534 F.Supp.2d 585, 599-600 (W.D.Pa. 2008), *aff'd*, 2008 WL 4191511 (W.D.Pa. Sept. 10, 2008). The tracking here is even more offensive to the Fourth Amendment. The subject of the surveillance in no way voluntarily communicates the data this GPS tracker generates to a third party, leaving the government no argument that the tracking is constitutional under *United States v. Miller*, 425 U.S. 435 (1976). In cases that involve tracking a cell phone, the government neither

trespasses on private property nor installs any device. Here, the government affirmatively trespassed to secretly attach a surveillance device to personal property in order to monitor defendant's movements for 65 days and to create records of his movements that may last much longer. The tracking here is more accurate, more persistent and more clandestine than cell phone tracking. This combination of trespass, tracking and absolute secrecy is far more invasive, and more certainly unconstitutional, than the surveillance that occurred in any of the cases cited by the government.

The secret installation into a person's private vehicle of a monitoring device that affords law enforcement spatially and temporally unlimited surveillance capabilities should be deemed trespass plus, and accordingly constitutes an unreasonable search absent the issuance of a warrant by a neutral magistrate.

In *Katz*, holding that a person has a reasonable expectation of privacy in his conversation on a public telephone, the court pointed out that "[t]o read the constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communications." *Katz*, 389 U.S. at 352. To read the constitution

more narrowly in the context of surreptitious GPS monitoring is to ignore the vital role that the automobile has come to play as an integral necessity of daily life as the sole means by which many individuals can participate in social, personal, political, religious, and private affiliations. The secret conversion by law enforcement of that necessity into a transmitter of an individual's pattern of movements, without demonstrating probable cause and absent judicial oversight, ignores the vital role of the car today, much like the public telephone had come to play in the *Katz* era.

C. SOCIETY REASONABLY EXPECTS TO PROTECT THE VAST AMOUNT OF INFORMATION THE UNLIMITED, SURREPTIOUS MONITORING A GPS CAPTURES AND RECORDS

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 protect throughout the country. In New York State, legislation has been introduced that would enhance criminal penalties under the harassment statute for the surreptitious use of these tracking devices to follow or monitor an individual's whereabouts. S. 884/A. 1176 and S.

707/A. 9840 (2007). Indeed, several states in the U.S. have criminalized the surreptitious use of the devices for non-consensual tracking. *See, e.g., People v. Sullivan*, 52 P.3d 1181 (Colo. Ct. App. 2002) (a husband using a GPS tracking device was guilty of harassment by stalking); *State of Delaware v. Biddle*, 2005 Del. C.P. Lexis, 49 (2005) (defendant held criminally liable for privacy violation in attaching GPS tracking device to victim's car); *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). Societal steps to criminalize secret installation and monitoring of one's movements, strongly suggests that notwithstanding one's knowing exposure on public roads, society is not prepared to abrogate every sense of privacy when individuals enter their cars.

The federal courts are split or undecided on the issue as to whether police installation and use of the device constitutes a search, or what standard is applied for its surreptitious installation and monitoring if it does. *See United States v. Garcia, supra*; *United*

States v. Moran, supra; *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999) (permitting it); *but see United States v. Bailey*, 628 F.2d. 938 (6th Cir. 1980); *United States v. Shovea*, 580 F.2d 1382 (10th Cir. 1978); *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977) (not permitting it). As noted, the Supreme Court of the United States has not addressed the issue. *See Knotts, supra.*

Nevertheless, there are already precise federal rules for the application of the devices when a warrant is sought, including specific parameters on how long after the authorization the device may be installed (within 10 days) and how long the person or property may be tracked without a renewed application (45 days). *See* FED. R. CRIM. P. 41(e).[2] Congressional action to oversee and limit both the circumstances and duration of surreptitious monitoring through tracking devices by law enforcement strongly suggests recognition of a protected interest in the privacy of at least of the pattern of one's movements over time. While the Advisory Committee notes to the

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[2] 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 devices and tracking device warrants are set forth in §§ (a)(2)(E), (b)(4), (d), (e)(2)(B), (f)(2) of Rule 41.

2006 amendments to Rule 41 are clear that "[t]he amendment to Rule 41 does not resolve this issue [of the standard for the installation of a tracking device] or hold that such warrants may issue only on a showing of probable cause," those notes also make clear the Committee's view that "*[t]racking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used.*" Advisory Committee Notes to FED. R. CRIM. P. 41(d), (f)(2)(C) (2006) (emphasis added).

State courts have also held that the use of the device without any judicial oversight is unconstitutional relying on state constitutional grounds. *See Washington v. Jackson*, 76 P.3d 217 (2003) (holding on state constitutional grounds police GPS attachment and monitoring in absence of warrant unconstitutional); *see also*, *Oregon v. Campbell*, 759 P.2d 1040 (1988) (holding, on state constitutional grounds, police attachment and monitoring of a transmitter on a car without a warrant was an unconstitutional search and seizure); *but see, People v. Gant, supra* (holding no search warrant required).

Thus there is emerging evidence that society reasonably expects to protect as private the vast amount of information that the unlimited, surreptitious monitoring a GPS device can easily capture. These trends are especially important because the nature of surreptitious GPS tracking renders it virtually impossible to assess the "subjective expectation of privacy" prong in the *Katz* test. A reasonable person can do little to exhibit a subjective expectation of privacy in the constant surveillance of his automobile travels short of (i) an exhaustive search of his own personal property every time he uses his vehicle to visit a house of worship, a political club, or some other constitutionally protected activity, or even just to run an errand, (ii) post a "hands off" sign on the car, which under the Appellate Division holding below would hardly suffice to preclude law enforcement from installing a GPS device, or (iii) never drive and, somewhat ironically, only use *public* transportation. Clearly, the individual's inability to shield himself from the intrusion is reason for judicial intervention and, accordingly, this Court should recognize a protectable privacy right in the context of surreptitious GPS tracking.

D. THE COURT SHOULD RECOGNIZE RESIDENTS' LIBERTY AND PRIVACY INTEREST UNDER ARTICLE I, SECTION 12 OF THE NEW YORK STATE CONSTITUTION, WHICH HISTORICALLY HAS AFFORDED NEW YORK RESIDENTS GREATER PRIVACY PROTECTION THAN ITS FEDERAL COUNTERPART.

Finally, as briefed by another *amicus curiae* (the New York Civil Liberties Union), New York has a tradition of providing broader protection of individual liberty and privacy interests under its own State Constitution than does the Federal Constitution, particularly in the area of search and seizure. Regardless of the outcome of the federal constitutional analysis, and if this Court does not embrace the Fourth Amendment argument submitted by Petitioner and *amici*, the Court should hold that surreptitious implantation and use of a GPS monitoring device in an individual's vehicle is impermissible under the New York Constitution absent a warrant based upon probable cause.

As early as 1938, when New York rejected the federal courts' acceptance of non-trespassory wiretapping upheld in *Olmstead v. United States*, 277 U.S. 438 (1928), through the adoption of Article I, Section 12, New York and this Court have not hesitated to depart

from what it has deemed insufficient protection of its residents' privacy under parallel federal constitutional provisions. *See* N.Y.Const. art. I, § 12; *People v. Elwell*, 50 N.Y.2d 231, 235 (1980) ("[t]o the extent that [U.S. Supreme Court precedent] may be read as imposing a less stringent test under the Federal Constitution, we decline to construe the parallel provision of our State Constitution similarly and adopt the rule set forth above as a matter of State constitutional law" (citations omitted)); *People v. Belton*, 55 N.Y.2d 49, 51 (1982) (greater state protection in automobile searches incident to arrest may be found as New York courts are not proscribed from "more strictly construing the State Constitution than the Supreme Court has construed the Federal Constitution"); *People v. Gokey*, 60 N.Y.2d 309, 312 (1983) (limiting permissible scope of "grabbable area" allowed under Fourth Amendment but impermissible under State Constitution); *People v. P.J. Video*, 68 N.Y.2d 296, 304 (1986) (rejecting the need for state-federal constitutional uniformity "when weighed against the ability to protect fundamental constitutional rights" in context of probable cause for allegedly obscene materials); *People v. Torres*, 74 N.Y.2d 224, 226 (1989) (rejecting Supreme Court expansive view of "stop and frisk" procedures as applied to

automobiles under State Constitutional analysis); *People v. Dunn*, 77 N.Y.2d 19, 24 (1990) ("[a]t the outset we note that in the past this Court has not hesitated to interpret Article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court ...has threatened to undercut of our citizens to be free from unreasonable government intrusions"); *People v. Scott*, 79 N.Y.2d 474, 480(1992) (collecting NY cases "adopting a more protective rule under our State Constitution" and ultimately rejecting federal absolute rule in "open fields"); *People v. Robinson*, 97 N.Y.2d 341, 350 (2001) ("[T]his Court has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved..." (internal citations omitted)); *see generally* Robert Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decision Making*, 62 Brook.L.Rev.1 (1996); Hon. Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 41st Annual Benjamin N. Cardozo Lecture Delivered Before the Association of the Bar of the City of New York (Feb. 26, 1987) (transcript available at

http://www.courts.state.ny.us/history/pdf/Library/Judges/Dual_Constitutionalism.pdf) (last visited Jan. 7, 2009).

For all of the reasons above, those expressed in Petitioner's brief and those advanced by *amicus curiae* NYCLU, should this Court conclude that the Fourth Amendment of the United States Constitution does not protect the pervasive and invasive use of this technology by law enforcement without requiring any judicial oversight, it should honor this State's legal traditions and precedent and find that the surreptitious installation of a tracking device and the ensuing, comprehensive tracking and recording of a vehicle, without probable cause and a pre-authorized warrant, is unconstitutional under Article I, Section 12 of the New York Constitution.

E. THE MOST EFFECTIVE BALANCE OF LAW ENFORCEMENT INTERESTS AND INDIVIDUAL PRIVACY RIGHTS IS THROUGH A PRE-AUTHORIZED WARRANT REQUIREMENT BASED ON PROBABLE CAUSE.

Application of technological advancements can, of course, serve as a useful tool for ferreting out crime and serve the ends of law enforcement, and law enforcement should not be precluded from utilizing technological advancements to that end. Tracking through

GPS is a relatively inexpensive and effective crime fighting tool. It is certainly cheaper than "another 10 million police officers to tail every vehicle" hypothesized by the court in *Garcia*. *See Garcia*, 474 F.3d at 998 (rejecting Fourth Amendment argument and permitting clandestine GPS installation and monitoring, finding it premature to hold whether a program of mass surveillance "could not be a search because it would merely be an efficient alternative to hiring another 10 million police officers to tail every vehicle on the nation's roads"). However, unlike a hypothetically readily available "10 million officers," given the device's low cost and the intrusiveness of its application, practically, the cost and manpower limitations on dragnet, mass surveillance has given way to the new technology now that tracking can be accomplished at minimal cost. Accordingly, some pre-determined judicial constraints must be implemented to balance law enforcement needs with the liberty and privacy interests of the individual. That balance is best met though the warrant application process upon a showing of probable cause.[3]

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[3] *Amici* note that Appellant argues that a reasonable suspicion requirement is a satisfactory alternative to a probable cause requirement in order to protect against unreasonable GPS searches. (See Appellant's br. at 49-50, 59). For the reasons

The Supreme Court has essentially created a presumption that a warrant is required, unless not feasible, for a search to be reasonable. *See, e.g. United States v. Leon*, 468 U.S. 897 (1984); *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Henry v. United States*, 361 U.S. 98 (1959). The requirement that the police "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure" serves to ensure that a determination of the reasonableness of the search results from a neutral balancing of the need for the intrusion on the one hand and the severity of the invasion on an individual's legitimate expectation of privacy on the other." *People v. Quakenbush*, 88 N.Y.2d 534, 541 (1996) *quoting Terry v. Ohio*, 392 U.S. 1, 20 (1968). That balancing test in GPS cases should be done in advance of any installation and monitoring.

In *Karo*, the government argued that requiring a warrant to monitor the container carrying the beeper into the home would be particularly difficult, because law enforcement could not know in

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set forth in this section, *Amici* disagree. Nevertheless, our positions converge on this fundamental principle: if this Court were not to conclude that a warrant based upon probable cause is required, (except, of course upon a showing of exigent circumstances), a reasonable suspicion requirement, subject to judicial review, is infinitely preferable to permitting surreptitious GPS surveillance without any judicial oversight whatsoever.

advance where the beeper would travel, thus a warrant would be required in every case. *See Karo,* 468 U.S. at 717-18. The Supreme Court rejected this argument, noting the objection was not compelling enough to dispense with the warrant requirement when tracking does invade the home. *Karo,* 468 U.S. at 718-19. It is precisely because law enforcement (and certainly not the device) cannot know if the monitoring will occur only on public roads, or on the contrary, traverse into a driveway, an attached garage, across state lines or onto private land, that pre-authorization through the warrant application is necessary. Any argument that the car will remain only on public property throughout the monitoring period strains credulity as the likelihood of that is remote.

Surely warrant requirements can be met. Law enforcement can describe with particularity why the installation of a GPS device is necessary to obtain evidence of a crime, where the device will be installed and the duration of the tracking. It is significant that in fact a warrant *was* secured in advance in the *Karo* beeper case itself, "seemingly on probable cause." *Karo*, 468 U.S. at 718.

Application for prior judicial approval before installation of a tracking device can hardly be described as a hardship resulting in significant delay of the investigation. This is especially true given that the utility of the device's information is generally to be found over the course of a sustained period of monitoring. In this case, the GPS device was installed on Appellant's vehicle for 65 days. (A 37-38, R 140-141). Given the minimal time required for the actual surreptitious installation, which is a prerequisite for the device's effectiveness as a secret crime fighting tool, a brief lapse of time to secure a warrant would not impede the device's utility.

Any time lapse before installation to secure a warrant, particularly for these devices, would be *de minimis*. Both the New York Criminal Procedure Law and the Federal Rules of Criminal Procedure have in place methods for expeditious telephonic or facsimile warrant applications. *See*, NY CPL §690.36 (adopted in 1982, it provides for a mechanism for application to a judge by telephone, radio or other means of electronic communication); *see also* FED. R. CRIM. P. 41(d)(3) (adopted in 1977, and amended 2006, it authorizes the application for a warrant based on information

communicated by telephone or other appropriate means, including facsimile). In practice, it is well-established that warrants can be obtained in a matter of hours, thus rendering the necessity of obtaining one a trivial concern when balanced against monitoring that will continue unabated for days, weeks or months.

Should expediency or the press of an investigation require immediate police action, there are emergency/exigency exceptions enough to the warrant requirement, well-settled within current Fourth Amendment jurisprudence, to meet those needs. *See, e.g., Warden v. Hayden*, 387 U.S. 294 (1967); *People v. Mitchell*, 39 N.Y.2d 173 (1976).

Finally, law enforcement would be hard pressed to suggest that judicial pre-authorization through the warrant application process is an undue burden in cases involving GPS when law enforcement is already seeking warrants for this type of tracking. In fact, case law shows that such applications are being made even in Weaver's own jurisdiction. *See People v. Mabeus*, 47 A.D.3d 1073 (3rd Dept. 2008) (police sought and were granted a warrant authorizing the

surreptitious placement of a GPS tracking device to track and monitor robbery suspect).

This Court has time and again referred to the use of electronic surveillance as insidious and threatening to the right of citizens "...to be free from unjustifiable governmental intrusion into one's privacy..." *People v. Shulz,* 67 N.Y.2d 144, 148 -49 (1986). "The purpose of the warrant requirement is to interpose a neutral and detached Magistrate between citizens and the police to protect individuals from having to rely on the good conduct of the officer in the field for the protection of their right to be free of unreasonable searches." *People v. Bialostock,* 80 N.Y.2d 738, 744 (1993).

"[B]ypassing a neutral predetermination of the scope of a search leaves individuals security from Fourth Amendment violations 'only in the discretion of the police.'" *Katz,* 389 U.S. at 358, *citing Beck v. Ohio,* 379 U.S. 89 (1964). Given the vast amount of personal data that can be secretly tracked, recorded and stored, the relative ease with which a warrant can be secured, the practical utility of the tool over an extended period of time, and the well-settled exceptions for exigent circumstances, the analysis tips the balance in favor of a pre-

authorized warrant requirement. An authorized warrant sets reasonable limits on the duration of the tracking, where and when it can be installed, where the device can tracked, and ensures in advance that there is probable cause to believe the target has committed or is committing a crime.

F. THE USE OF UNLIMITED SURVEILLANCE FREE FROM ANY JUDICIAL OVERSIGHT IMPOSES AN UNACCEPTABLE BURDEN UPON THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF ASSOCIATION

The dissent below concluded that "while the citizens of this state may not have a reasonable expectation of privacy in a public place at any particular moment, they do have a reasonable expectation that their every move will not be continuously and indefinitely monitored by a technical device without their knowledge, except where a warrant has been issued on probable cause." *People v. Weaver*, 2008 Slip Op. 4960, 52 A.D.3d 138, 145 at *14, 860 N.Y.S.2d 223, 228 (3d Dept. 2008). The dissent was correct, and for more than just the Fourth Amendment grounds discussed earlier in this *amicus* brief.

The Fourth Amendment's protection of privacy rights also serves the important function of protecting associational rights recognized under the First Amendment. *See Katz,* 389 U.S. at 350 (noting that Fourth Amendment concerns are heightened where associational interests are also at stake); *In the Matter of the Application*, 534 F.Supp.2d at 585, 591 n. 21 (same). In the recent *In the Matter of the Application* decision by the U.S. District Court for the Western District of Pennsylvania, that Court rejected a government application for an order requiring a cell phone provider to provide customer records that would provide information about "an individual's past or present physical/geographic movements/locations," because the application was not based up any probable cause, but rather simply because the government believed the data would be "relevant to … a criminal investigation." *Id.* at 585. That court recognized that

> Location information may reveal, for example, an extra-marital liaison or other information regarding sexual orientation/activity; physical or mental health treatment/conditions (including, *e.g.*, drug or alcohol treatment and/or recovery programs/associations); political and religious affiliations; financial difficulties; domestic difficulties and other family

> matters (such as marital or family counseling, or the physical or mental health of one's children); and many other matters of a potentially sensitive and extremely personal nature. *It is likely to reveal precisely the kind of information that an individual wants and reasonably expects to be private.*

Id. at 586 n. 6 (emphasis added). The rule enunciated by the Third Department below and urged upon this Court *does not even require* an articulated relevance to a criminal investigation in order to install and monitor a GPS *unsupervised*, no less a requirement to demonstrate probable cause to suspect wrongdoing.

New Yorkers, and indeed all Americans, enjoy a constitutionally protected, fundamental right of freedom of association. *See* U.S. CONST. amend. I; N.Y.Const. art. I, § 8 (freedom of speech and press) and § 9 (right to assembly and petition). Surreptitious GPS data collection by law enforcement, without judicial oversight, imperils fundamental associational rights that have long been recognized, in particular privacy in one's associations. *See generally NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (reversing a contempt order against the NAACP for failure to comply with the efforts of the Alabama Supreme Court to compel the production by

the NAACP of its membership list containing names and addresses, recognizing "the vital relationship between freedom to associate and privacy in one's associations"); *Figari v. N.Y. Tele. Co.*, 32 A.D.2d 434, 442 (2nd Dept., 1969) (finding unconstitutional a Public Service Commission approved telephone tariff requiring an organization's subscribers to disclose their names and addresses, recognizing that "the Supreme Court has consistently held unconstitutional, in their application, statutes, ordinances and court directives requiring associations to disclose their membership lists where threats of reprisals or harassment were apparent and no vital national interest would be served by disclosure[,]" adding that "[w]hile anonymity is not accorded absolute constitutional protection [citations omitted], the Supreme Court in [citation omitted] recognized that the governmental interest requiring disclosure must be substantial.")[4]

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[4] In a 1975 criminal case before the Supreme Court, New York County, the court suppressed evidence and dismissed the indictments against the defendant where law enforcement, among a plethora of illegal acts, had engaged in undercover surveillance and infiltration of the individual's associations without a warrant or probable cause. *People v. Collier*, 85 Misc.2d 529 (Sup Ct, NY Cty 1975) (McQuillan, J.). In that case, the court warned that "[g]overnmental surveillance activity is proliferating to such an extent as to jeopardize the rights of free speech, association and privacy" and that "[i]nfiltration and clandestine surveillance by undercover operatives necessarily produce a plethora of raw data, that is filed, indexed, cross-referenced, computerized, exchanged, leaked, etc.," pointing out

Respondents here urge a rule of law whereby no warrant, no probable cause, no reasonable suspicion and no government interest, substantial or otherwise, would be necessary for law enforcement to gather the kind of information indirectly – through GPS technology -- that the law clearly proscribes it from gathering directly, absent a substantial showing and court oversight.

It is clear that sustained monitoring of an individual's movements throughout society raises major implications not just to individual privacy but to associational freedoms also protected by the First Amendment. Particularly, given the ability to download and store vast detail of one's life without judicial oversight, utilization of

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that "[t]his hyperactivity in data collection by intelligence agencies poses a clear threat to civil liberties." *Id.* at 560. While GPS devices can provide certain information about an individual's associations, they cannot infiltrate an organization in the same way as an undercover officer. But they can gather associational information in which the individual has an unquestionably reasonable, and constitutionally protected, expectation of privacy. Indeed, the court in *Collier*) was clear – "The right of associational privacy must never be narrowly construed by a court." *Id.* In the same way that the *Collier* court held that "[a] police agency does not have an unlimited power to plant a spy within a community[,] (*Id.*) at 556), so too a police agency should not have an unlimited power to plant a GPS on an individual's private vehicle. And just as "[t]he objective of the First Amendment is to keep the government off the backs of people[,]" (*Id.*) at 559), those same protections should operate to keep a 24/7 electronic government off the backs of people as well, unless by warrant based on probable cause.

the device gives the government the technological ability to harvest volumes of data about an individual's practices, patterns and preferences; from the personal to the political. Sustained use of the device, over a prolonged period, as occurred in this case, can reveal not simply the travel from point A to point B on a public road, but the frequency and duration of such trips, including time spent at both public and private locations. Indeed, absent a probable cause requirement, or some other judicial oversight, (even if a lesser showing is deemed sufficient), there is no limit on the number of individuals who can be monitored in this fashion. In other words, the government will be empowered to gather the kind of fundamentally protected data that is squarely within the ambit of constitutional association rights. As effectively as if compulsory disclosure of membership data were required, the government can ascertain information concerning membership and attendance at both private and public gatherings.

The balance between valid law enforcement objectives and fundamental personal liberty and privacy rights can be preserved *only* by requiring that law enforcement demonstrate probable cause to

undertake this kind of sweeping surveillance. GPS technology allows law enforcement to continuously monitor a citizen's personal associations. Thus, even if the individual remains entirely on public premises, the government can learn where a person worships, what clubs they attend, what political activities they participate in, where they sleep, and other personal information completely irrelevant to legitimate law enforcement needs. And because law enforcement's conduct in this area is wholly unmonitored, there is no way to know if this is already taking place, nor the extent to which it is also occurs when the individual's vehicle crosses onto private property.

In sum, consideration of New Yorkers' Association rights *alone* is sufficient to compel a decision requiring law enforcement to secure warrants based on probable cause prior to the installation of GPS monitoring devices.

CONCLUSION

Accordingly, for the reasons set forth above, the Court of Appeals should hold that surreptitious implantation of a GPS monitoring device in an individual's vehicle by law enforcement and around the clock electronic tracking and recording of its movement,

without spatial or temporal limitation, is impermissible, absent a warrant based upon probable cause.

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