

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-3030, 08-3034 (Consolidated)

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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UNITED STATES OF AMERICA, *Appellee*,

v.

LAWRENCE MAYNARD and ANTOINE JONES, *Appellants*.

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On Appeal from the United States District Court  
for the District of Columbia

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**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND  
AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL  
AREA IN SUPPORT OF APPELLANT JONES**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), *amici curiae* Electronic Frontier Foundation (“EFF”) and the American Civil Liberties Union of the National Capital Area (“ACLU-NCA”) certify that:

### **(A) Parties and Amici**

All parties, intervenors, and *amici* appearing in the proceedings below are listed in the Brief of Appellants.

### **(B) Rulings Under Review**

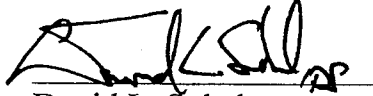
References to the rulings at issue appear in the Brief of Appellants.

### **(C) Related Cases**

The cases on review have not previously been before this Court or any other court, and EFF and ACLU-NCA are not aware of any related cases in this Court or any other court.

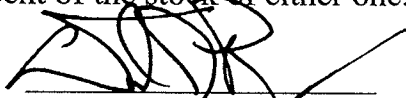
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The Electronic Frontier Foundation ("EFF") is a non-profit, non-stock corporation organized under the laws of the Commonwealth of Massachusetts. There is no parent corporation of EFF, and no publicly held company owns 10 percent or more of the stock of EFF as there is no stock.



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**TABLE OF CONTENTS**

	<u>Page</u>
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	3
I.    GPS TRACKING TECHNOLOGY PERMITS THE POLICE TO REMOTELY COLLECT DETAILED PERSONAL DATA WITHOUT THE NEED FOR ANY PERSONAL OBSERVATION.....	3
II.   THE SUPREME COURT’S RULINGS IN THE “BEEPER” CASES DO NOT CONTROL THE GPS-TRACKING ISSUE BEFORE THIS COURT .....	8
III.  THE FOURTH AMENDMENT PROHIBITS LAW- ENFORCEMENT AUTHORITIES FROM CONDUCTING REMOTE GPS TRACKING WITHOUT A WARRANT .....	11
A.   The Fourth Amendment Protects Against the Warrantless Use of Advanced Technology like GPS to Gather Detailed Information About Americans’ Movements.....	12
B.   Common Sense and Empirical Evidence Demonstrate That Americans Do Not Expect Their Privacy to be Infringed by Remote Monitoring of Their Every Movement.....	22
CONCLUSION .....	25

## TABLE OF AUTHORITIES

### CASES

* <i>Bond v. United States</i> , 529 U.S. 334 (2000).....	16
<i>Carroll v. United States</i> , 267 U.S. 132 (1925).....	14, 21
* <i>Dow Chemical Co. v. United States</i> , 476 U.S. 227 (1986).....	15
* <i>Katz v. United States</i> , 389 U.S. 347 (1967).....	11, 12
* <i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	12, 13, 14
<i>Maryland v. Macon</i> , 472 U.S. 463 (1985).....	19
<i>Maryland v. Wilson</i> , 519 U.S. 408 (1997).....	21
<i>In re Application of the United States For An Order (1) Authorizing The Use Of A Pen Register And A Trap And Trace Device And (2) Authorizing Release Of Subscriber Information And/Or Cell Site Information</i> , 396 F. Supp. 2d 294 (E.D.N.Y. 2005) .....	7
* <i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....	18
<i>People v. Jackson</i> , 150 Wash. 2d 251, 76 P.3d 217 (2003) .....	18
<i>People v. Sullivan</i> , 53 P.3d 1181 (Colo. App. 2002), <i>cert. denied</i> , 2005 Colo. LEXIS 979 (2005).....	22

<i>Smith v. Maryland</i> , 442 U.S. 735 (1979).....	12
<i>State of Delaware v. Biddle</i> , 2005 Del. C.P. LEXIS 49 (2005).....	22
<i>United States v. Askew</i> , 529 F.3d 1119 (D.C. Cir. 2008).....	24
<i>United States v. Berry</i> , 300 F. Supp. 2d 366 (D. Md. 2004).....	9
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975).....	21
<i>United States v. Garcia</i> , 474 F.3d 994 (7th Cir. 2007), <i>cert denied</i> , 128 S. Ct. 291 (2007).....	12, 19, 21
<i>United States v. Jones</i> , 451 F. Supp. 2d 71 (D.D.C. 2006).....	9
* <i>United States v. Karo</i> , 468 U.S. 705 (1984).....	2, 8, 9
* <i>United States v. Knotts</i> , 460 U.S. 276 (1983).....	2, 8, 9, 10, 12
<i>Virginia v. Moore</i> , 128 S. Ct. 1598 (2008).....	21
* <i>Walter v. United States</i> , 447 U.S. 649 (1980).....	16, 17

#### MISCELLANEOUS

Ben Hubbard, <i>Police Turn to Secret Weapon: GPS Device</i> , Washington Post, Aug. 13, 2008, at A01 .....	6
--	---

Renee McDonald Hutchins, *Tied Up In Knotts? GPS Technology and The Fourth Amendment*, 55 U.C.L.A. L. Rev. 409 (2007)..... 4, 5, 6

J. King & C. Hoofnagle, *Research Report: A Supermajority of Californians Supports Limits on Law Enforcement Access to Cell Phone Location Information*, available at <http://ssrn.com/abstract=1137988> (Apr. 18, 2008)..... 23

Darren Murph, *Underground/Indoor GPS repeater maintains your position*, Engadget, Feb. 21, 2007, <http://www.engadget.com/2007/02/21/underground-indoor-gps-repeater-maintains-your-position/> (visited Feb. 26, 2009) ..... 5-6

Lisa Rein, *Federal Agents Aided Md. Spying*, Washington Post, Feb. 17, 2009, at B01 ..... 8

Lisa Rein, *Police Spied on Activists in Md.*, Washington Post, July 18, 2008, at A01 ..... 8

John Schwartz, *This Car Can Talk. What it Says May Cause Concern*, New York Times, Dec. 29, 2003, at C1 ..... 22

Christopher Slobogin, *Public Privacy: Camera Surveillance Of Public Places And The Right To Anonymity*, 72 U. Miss. L. Rev. 213 (2002) ..... 23, 24

StarChase, [http:// www.starchase.org](http://www.starchase.org) (last visited Feb. 26, 2009) ..... 6

[http://www.nacdl.org/public.nsf/mediasources/GPSAmicusBrief/\\$FILE/gps.pdf](http://www.nacdl.org/public.nsf/mediasources/GPSAmicusBrief/$FILE/gps.pdf)) ..... 18

<http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081203275.html?hpid=topnews> (visited Feb. 26, 2009) ..... 24

\* Authorities upon which we chiefly rely are marked with asterisks.

This brief is submitted by *amici curiae* Electronic Frontier Foundation (“EFF”) and the American Civil Liberties Union of the National Capital Area (“ACLU-NCA”) in support of Appellant Antoine Jones.

**INTEREST OF AMICI CURIAE**

This case presents the question of whether the Fourth Amendment prohibits the Government from installing and using a remotely-operated Global Positioning System (“GPS”) location-tracking device, without a warrant, to track the movements of an individual’s automobile over an extended period of time.

EFF is a non-profit, member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases addressing civil liberties issues raised by the Internet and other emerging technologies, specifically including location tracking.

The ACLU-NCA is the local affiliate of the American Civil Liberties Union, a nationwide, non-profit membership organization with more than half a million members that, from its founding in 1920, has been devoted to protecting and defending the constitutional rights of Americans. In that cause, the ACLU-NCA has frequently appeared before this Court in cases arising under the Fourth Amendment, either as counsel for parties or as *amicus curiae*.

## SUMMARY OF ARGUMENT

GPS technology provides police with a powerful and inexpensive method to remotely track in great detail the movements of individuals by foot or by automobile, over an extensive period, and across public and private areas. Without a warrant requirement, an individual's every movement could be subject to remote monitoring, and permanent recording, at the sole discretion of any police officer.

Neither the Supreme Court nor this Circuit has ever decided whether the warrantless use of GPS tracking technology is constitutional. The Supreme Court's "beeper" cases (now 25 years old) do not control the question. Indeed, when the Court permitted the use of *lawfully installed* radio "beepers" in *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), to augment the senses of police physically following a vehicle on public roads, the Court made clear that its ruling did not control "dragnet-type law enforcement practices," *Knotts*, 460 U.S. at 284, or technological intrusion into private places. *Karo*, 468 U.S. at 714.

GPS tracking (1) does not merely augment the senses of police officers, but provides a complete technological replacement for human surveillance; (2) enables twenty-four hour a day "dragnet" surveillance at nominal cost; (3) enables police to track vehicles or persons in private places as well as on public roads; and (4) enables the simultaneous surveillance of essentially unlimited numbers of people.

In at least these four important ways, it does not resemble the use of “beepers” previously approved by the Supreme Court.

Subsequent to the “beeper” cases, the Supreme Court has recognized that a Fourth Amendment search may occur through the use of advanced technology to reveal detailed and personal information about individuals. These characteristics apply to GPS tracking, and a warrant should therefore be required for its unconsented use. Such a ruling also comports with the public’s rejection of “Big Brother” police surveillance, and with the empirical evidence that Americans have a strong expectation of privacy that their every movement by automobile or by foot will not remotely be tracked and recorded by private parties or law enforcement.

*Amici* therefore urge this court to find that GPS location tracking is a search under the Fourth Amendment that may not be employed without a warrant issued upon a showing of probable cause.

### **ARGUMENT**

#### **I. GPS TRACKING TECHNOLOGY PERMITS THE POLICE TO REMOTELY COLLECT DETAILED PERSONAL DATA WITHOUT THE NEED FOR ANY PERSONAL OBSERVATION**

In this case, the FBI surreptitiously affixed a GPS tracking device to a concealed location on Appellant Jones’ vehicle without a warrant, and then precisely tracked his location and movements over a one-month period. (Appellants’ Br. at 48.) This technology did not require FBI agents to follow

Jones' vehicle or to make any personal observation of his vehicle's location once the device was installed. The FBI did not do so for much of the surveillance period. (App. 827-28.)

The GPS tracker automatically recorded the vehicle's movements and locations every ten seconds while the vehicle moved. (App. 829-830, 903; Trial Tr., Vol. II, at 91-92, Nov. 20, 2007 afternoon session [hereinafter "Bitsie Tr."]). (A copy of this portion of the trial transcript, which describes the operation of GPS transmission devices, is appended to this brief as an Addendum.) The tracking was "perfectly accurate" to within 50-100 feet of Jones' location. (Bitsie Tr. at 92.) The GPS device accumulated a huge amount of data about Jones' movements over the one-month period, amounting to 3,106 printed pages of data. (App. 903.)

GPS receivers calculate latitude, longitude, altitude, direction, and speed by receiving and processing location information from the unencrypted transmissions of the four nearest GPS satellites in orbit. *See* Renee McDonald Hutchins, *Tied Up In Knotts? GPS Technology and The Fourth Amendment*, 55 U.C.L.A. L. Rev. 409, 415 (2007) (describing the technology and capability of GPS systems) (hereinafter "Hutchins"). The GPS satellite system can support an unlimited number of receivers. Hutchins, at 418. Today, GPS *receivers* are commonly built into cell phones and vehicles, but these devices either do not *transmit* the GPS location

data, or only do so with the consent and knowledge of the owner. (Bitsie Tr. at 90-96.)

Government installed GPS tracking technology differs from GPS receivers and from user-controlled GPS devices in important, constitutionally significant ways. For example, the device affixed to Jones' vehicle was designed to collect location and directional data without his knowledge or consent. The device used cell phone technology to secretly transmit the information to a law enforcement-owned laptop. (Bitsie Tr. at 93, 94.) GPS tracking devices track individuals or vehicles as they traverse private property as well as public streets. These GPS trackers give the police the ability to remotely monitor individuals' physical locations with great accuracy, without leaving the stationhouse.

GPS technology is growing ever more powerful. Currently, police can easily tag one or more vehicles, people, or objects with GPS-enabled tracking devices that are too tiny or cloaked for the target to notice, and then remotely monitor the precise location of the tagged vehicle, person or object from a home computer, FBI office, cell phone, or other tracking center. *See Hutchins*, at 418. Though pure GPS devices historically functioned best outdoors, assisted GPS and other innovations that enable reliable indoor tracking are under development. *Hutchins*, at 419-20. *See also* Darren Murph, *Underground/Indoor GPS repeater maintains your position*, Engadget, Feb. 21, 2007,

<http://www.engadget.com/2007/02/21/underground-indoor-gps-repeater-maintains-your-position/> (visited Feb. 26, 2009).

The Los Angeles Police Department has begun to outfit its cruisers with air guns that can launch GPS-enabled “darts” at passing cars. Hutchins, at 418-19. These darts consist of a miniaturized GPS receiver, radio transmitter, and battery embedded in a sticky compound material. When fired at a vehicle, the compound adheres to the target, and thereafter permits remote, real-time tracking of the target from police headquarters. *Id.* See StarChase, [http:// www.starchase.org](http://www.starchase.org) (last visited Feb. 26, 2009) (official website of a commercial provider of GPS-enabled dart technology).

GPS tracking is being used with increasing frequency, though “[m]ost police departments in the Washington area resist disclosing whether they use GPS to track suspects.” Ben Hubbard, *Police Turn to Secret Weapon: GPS Device*, Washington Post, Aug. 13, 2008, at A01. The Washington Post reported recently reported that Arlington County police used GPS devices 70 times in the 2005-07 period, and that Fairfax County police used GPS devices 61 times in 2005, 52 times in 2006, and 46 times in 2007. *Id.*

When a GPS device is placed on a person or other personal effect, the device can provide the police with exact information about his or her visits to any residence, any place of business or entertainment, or any therapist’s office or other

