NO. 12-2548

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant
v.

HARRY KATZIN, MICHAEL KATZIN, and MARK KATZIN,
Appellees

APPEAL FROM ORDER SUPPRESSING EVIDENCE
IN CRIMINAL NO. 11-226 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ACLU FOUNDATION OF PENNSYLVANIA, ELECTRONIC FRONTIER FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation, ACLU Foundation of Pennsylvania, Electronic Frontier Foundation and National Association of Criminal Defense Lawyers certify that they are not-for-profit corporations, with no parent corporations or publicly-traded stock.

Undersigned counsel certifies that no persons and entities as described in the fourth sentence of F.R.A.P. 28.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal

DATED: November 13, 2012

By /s/Catherine Crump
Catherine Crump

STATEMENT OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before the federal courts on numerous occasions, both as direct counsel and as *amicus curiae.* The protection of privacy as guaranteed by the Fourth Amendment is of special concern to the organization. The ACLU Foundation of Pennsylvania is the Pennsylvania affiliate of the ACLU.

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 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 emerging technologies, including location-based tracking techniques such as GPS and collection of cell site tracking data.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members

include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the Supreme Court, this Court, and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The ACLU, EFF and NACDL each filed *amicus* briefs in *United States v. Jones,* 565 U.S. ___, 132 S. Ct. 945 (2012), the decision that is at the core of the issues raised in this case.

Pursuant to F.R.A.P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money towards the preparation or filing of this brief.

SUMMARY OF ARGUMENT

This appeal raises the question whether law enforcement officers may attach a GPS device to a car to track its movements—conduct that the Supreme Court has unanimously held constitutes a Fourth Amendment search—without first obtaining a warrant based on probable cause. The government, which has long insisted that GPS tracking is not even a search in the first place, now argues that it is the kind of search that fits within a recognized exception to the probable cause and warrant requirements. The district court correctly rejected those arguments.

The Supreme Court has recognized that certain "special needs" searches that are beyond the scope of traditional law enforcement, or aimed at categories of people with reduced expectations of privacy, may not require probable cause warrants. The government seeks to rely on those lines of cases to evade the warrant requirement for GPS tracking, but they are wholly inapposite. GPS tracking of criminal suspects for the purpose of arresting and prosecuting them manifestly is not beyond the scope of traditional law enforcement, and the government targets GPS searches not at discrete groups, like parolees or probationers, but at any and all criminal suspects. At bottom, the government urges a "reasonable suspicion" standard for GPS searches because it considers the privacy interests at issue to be *de minimis*, but the Supreme Court has already repudiated that position.

Relying on a line of cases predicated on the mobility of automobiles, the government argues in the alternative that even if probable cause is required, warrants should not be. But the so-called "automobile exception" was established to prevent contraband from disappearing, not to permit the tracking of an individual. The categorical exigency that the Supreme Court has recognized with respect to mobile contraband simply has no bearing on either the investigatory or privacy interests at stake in GPS tracking. The district court correctly rejected this argument as well.

Finally, the government contends that even if this Court properly concludes that probable cause warrants are required for GPS tracking, it should deny the suppression motion because the FBI agents were acting in "good faith." The Supreme Court, however, has made clear that to invoke good faith, law enforcement officers must rely on binding appellate precedent. No such precedent existed here, as neither this Court nor the Supreme Court had addressed the Fourth Amendment implications of GPS tracking. Instead, the government seeks to rely on out-of-circuit authority, even though that authority was divided at the time of the search in this case. The rule proposed by the government, such as it is, would invite law enforcement to cherry-pick, without consequences, from a grab bag of non-binding authority; erode the privacy protections of the Fourth Amendment; and require vexing and standardless post-hoc judicial determinations in every

case. This danger is particularly acute in an era of rapidly advancing surveillance technologies. A bright-line rule that waives the exclusionary rule only when police rely on binding precedent is not only doctrinally required, but practically beneficial to both law enforcement and the courts.

ARGUMENT

I. TRACKING A CAR BY PHYSICALLY ATTACHING A GPS DEVICE TO IT REQUIRES A WARRANT BASED ON PROBABLE CAUSE.

A. The Fourth Amendment Includes a Strong Presumptive Warrant Requirement, Which Applies to GPS Tracking.

In *United States v. Jones*, 565 U.S. —, 132 S. Ct. 945 (2012), the Supreme Court held that the physical attachment of a GPS tracking device to a vehicle constitutes a search within the meaning of the Fourth Amendment. Based on that holding, the Supreme Court reversed and remanded, without reaching any of the further issues concerning the reasonableness of that search. Because warrantless searches are per se unreasonable, amici urge this Court to hold that such GPS tracking in the absence of a warrant violates the Fourth Amendment unless it fits within a recognized exception to the warrant requirement. As the district correctly held, in this case it does not.

"[E]very case addressing the reasonableness of a warrantless search [should begin] with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the

Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Warrants are presumptively required because they "provide[] the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Thus, the warrant requirement is "not an inconvenience to be somehow 'weighed' against the claims of police efficiency," but rather "an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous, executive officers who are a part of any system of law enforcement." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (internal quotation marks and citation omitted).

The safeguard provided by the warrant requirement is particularly important in the GPS tracking context because of that surveillance technique's low cost and high degree of intrusion. GPS tracking "is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously." *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring); *see also id*. at 963-64 (Alito, J., concurring in the judgment) (noting difficulty and expense of continuous, extended tracking

by traditional means). Thus, if GPS tracking is not subject to a warrant requirement, it can "evade[] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Id*. at 956 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

Although no appellate courts have yet weighed in on the matter, after *Jones* some trial courts have already held that tracking a vehicle by physically attaching a GPS device to it requires a warrant based on probable cause. *United States v. Smith*, No. 2:11-cr-0058-GMN-CWH, 2012 WL 4911724, at *4 (D. Nev. July 24, 2012) ("Unquestionably, the warrantless installation of a GPS device on a vehicle violates the Fourth Amendment."), *adopted*, 2012 WL 4898652, at *4 (D. Nev. Oct. 15, 2012); *United States v. Lujan*, Criminal Action No. 2:11CR11–SA, 2012 WL 2861546, at *4 (N.D. Miss. July 11, 2012) ("[T]he placement and use of a GPS tracker in this instance was per se unreasonable without a warrant under the Fourth Amendment."); *United States v. Leon*, 856 F. Supp. 2d 1188, 1191 (D. Haw. 2012) (holding the attachment and use of a GPS device unconstitutional, but refusing suppression, under the good faith exception to the exclusionary rule).

The government offers an array of explanations for why probable cause warrants should not be required for GPS tracking, but at bottom its argument boils down to the dubious proposition that location tracking is minimally intrusive. It

advanced the same argument, unsuccessfully, in *Jones*. "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); *see also Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."). When the government seeks such intimate information about an individual in the course of a criminal investigation, it should be required to obtain advance approval from a neutral magistrate. Because it did not do so here, the warrantless search and resulting seizure are presumptively unreasonable and unconstitutional.

B. No Exception to the Warrant Requirement Is Applicable to GPS Tracking by Law Enforcement.

Warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. The government argues that it was sufficient that attachment of the GPS met the reasonable suspicion standard and that no judicial involvement was necessary, but the cases upon which it relies are inapplicable. Many are "special needs" cases in which the Court permitted application of a lower standard because, unlike the

search in this case, the searches were for purposes other than law enforcement or involved individuals with reduced expectations of privacy. The government also places much weight on the automobile exception, but that doctrine, developed to allow a search of the contents of vehicles, cannot be stretched so far as to support GPS tracking of people who are criminal suspects.

1) GPS Searches by Law Enforcement Do Not Fall Within a "Special Need."

The Supreme Court has recognized that certain searches outside the scope of traditional law enforcement, or aimed at categories of people under circumstances where they enjoy reduced expectations of privacy, may not require probable cause warrants. While the government cites to these precedents in insisting that GPS tracking should be exempted from the warrant requirement, Gov't Br. 23-24, a review of these exceptions and their underlying justifications makes it plain that they are inapplicable.

Exemption from the warrant requirement under the special needs exception is justified "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)); *see also Ferguson v. City of*

Charleston, 532 U.S. 67, 73 & n.7 (2001). GPS searches by law enforcement for the purpose of tracking criminal suspects, as occurred here, cannot be justified under this rationale.

The cases the government cites are "special needs" cases. Many involve regulating immigration and controlling border security, both government interests long viewed as beyond the scope of criminal law enforcement. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 551-52 (1976) (allowing border checkpoint stops with no individualized suspicion to regulate immigration); *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (allowing disassembly of a gas tank during a border search without reasonable suspicion).

The government also relies on *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny in urging a warrantless reasonable suspicion standard for GPS tracking. Gov't Br. 23-24 (citing *Terry*; *Maryland v. Buie*, 494 U.S. 325 (1990); and *United States v. Place*, 462 U.S. 696, 706 (1983)). *Terry* articulated an exception to the warrant requirement by allowing warrantless temporary stops for a brief on-the-spot investigation upon articulable suspicion of contemporaneous criminal activity and protective frisks for officer safety. *Terry*, 392 U.S. at 27; *United States v. Moorefield*, 111 F.3d 10, 13–14 (3d Cir. 1997). But *Terry*'s "officer safety" rationale is inapplicable to GPS searches. "GPS installation and monitoring—involving a trespass to property and tracking of a vehicle's whereabouts

indiscriminately for over a month—is simultaneously more intrusive than a *Terry* stop-and-frisk and less justified by a need to dispel suspicion about 'rapidly unfolding and often dangerous situations on city streets.'" *United States v. Ortiz*, — F. Supp. 2d —, Criminal Action No. 11–251–08, 2012 WL 2951391, at *16 (E.D. Pa. July 20, 2012), appeal pending, No. 12-3225 (3d Cir.)[1] (citing *Terry*, 392 U.S. at 10). The Fourth Amendment interest at stake in GPS tracking—the privacy of one's location at all times over a period of days or weeks—is significantly more substantial than the minimal interests identified in *Terry* and progeny. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 413–15 (1997) (finding that passengers in a vehicle already stopped by police may be ordered out of the car because "the additional intrusion on the passenger is minimal"); *United States v. Place*, 462 U.S. 696, 706 (1983) (finding "some brief detentions of personal effects [at an airport to be] minimally intrusive of Fourth Amendment interests"). GPS tracking does not facilitate a brief and contemporaneous investigation of suspected criminal activity that is presently 'afoot', like a *Terry* stop; rather, it is an ongoing and open-ended investigation of future activity. The balance weighs in favor of requiring a warrant based on probable cause.

[1] The government's motion to stay briefing of its appeal in *Ortiz*, pending disposition of the instant appeal, is pending before a motions panel of this Court as of this writing.

Nor can GPS searches be categorically exempted from the warrant requirement on the ground that the subjects of the searches have reduced expectations of privacy. The Supreme Court has upheld warrantless searches of parolees and probationers on a "reasonable suspicion" standard because, inter alia, those individuals are still subject to state controls. *See United States v. Knights*, 534 U.S. 112, 119-21 (2001) (upholding the warrantless search of a probationer); *Samson v. California*, 547 U.S. 843, 850 (2006) (same, for parolees, because "parolees have [even] fewer expectations of privacy than probationers"). While those precedents might plausibly be read to permit GPS tracking of parolees and probationers on a reasonable suspicion standard, they in no way support the government's contention that GPS searches are categorically exempt from the warrant requirement or probable cause standard.[2]

GPS searches of the kind at issue here are wholly unrelated to either of the special needs rationales recognized by the Supreme Court. Their purpose is to arrest and convict criminals, not to deter dangerous conduct. And they are directed not at discrete groups with reduced privacy expectations, but at any person

[2] The government also cites to cases involving warrantless searches of public school students. These cases are distinguishable from GPS searches on *both* of the grounds discussed above: School safety is a legitimate need beyond traditional law enforcement, and school children have a reduced expectation of privacy. *See, e.g., T.L.O.*, 469 U.S. at 340; *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

suspected of a crime—the very class the First Congress and the People sought to protect by adopting the Fourth Amendment.

The government tips its hand when it argues that it should not be required to show probable cause to utilize GPS tracking, because it often must use GPS tracking to establish probable cause. Gov't. Br. 27. That is not a "special need"; it is impermissible bootstrapping. Doubtless, the government would find it useful to employ warrantless wiretaps or home searches to establish probable cause for an arrest, but mere usefulness or expedience is not the standard for dispensing with the warrant requirement. No existing exception to the warrant requirement applies and none can or should be created, consistent with Fourth Amendment principles, to cover GPS tracking.

2) The Automobile Exception and Its Justifications Are Inapplicable to Location Tracking.

The government argues in the alternative that even if the Court rejects its contention that GPS searches require only reasonable suspicion, it should still be excused from the warrant requirement under the automobile exception. The automobile exception allows law enforcement officers to conduct warrantless seizures and searches of any area of a car where they have probable cause to believe contraband or evidence of criminal activity is contained. *See California v. Acevedo*, 500 U.S. 565, 579-80 (1991). The exception was created in response to

the inherent mobility of cars; it recognizes "the exigent circumstances that exist in connection with movable vehicles." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). "This [concern] is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened." *Id*.

To apply the automobile exception to GPS searches, as the government urges, would be to radically expand the doctrine. The exception permits stops of moving vehicles upon probable cause and searches of a car for contraband and evidence of crime, not tracking of its driver and passengers. Put otherwise: The automobile exception is about preventing contraband and evidence of crime from absconding; GPS searches are about tracking individual persons as they go about their business.

Thus, the primary justification for the automobile exception, the exigency created when physical evidence of crime might disappear, is wholly absent in the GPS context. "The automobile exception applies when there is no time to apply to a magistrate because 'an immediate intrusion is necessary if police officers are to secure the illicit substance.'" *Ortiz*, 2012 WL 2951391, at *18 (citing *United States v. Ross*, 456 U.S. 798, 806 (1982)). The overwhelming majority of GPS searches involve no such risk of destruction or removal of evidence. Rather, they involve surreptitious attachment in the dead of night and extended remote

monitoring, the very antithesis of exigency. To be sure, in cases of actual exigency, for example, where police have both probable cause to believe that a vehicle contains contraband or evidence of criminal activity and good reason to believe that the vehicle might disappear before a warrant can be obtained, no warrant will be required for the initial attachment. *See*, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) (holding that a warrantless search is permissible where "the exigencies of the situation" make the search "objectively reasonable"). Even then, however, no exigency would prevent law enforcement officials from promptly applying for a warrant to continue tracking.

The Supreme Court has recognized a second rationale justifying warrantless searches of motor vehicles that is equally inapplicable to GPS searches. The Court has explained that people have reduced expectations of privacy in their cars because of "pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 392 (1985) (citing *Cady v. Dombrowski*, 413 U.S. 433, 440-441 (1973)). But GPS searches do not intrude upon expectations of privacy about cars; they intrude upon expectations of privacy about their drivers' and passengers' locations over time. *United States v. Maynard*, 615 F.3d 544, 561-62 (D.C. Cir. 2010); *see also Jones*, 132 S.Ct. at 955 (Sotomayor, J., concurring). And at least five Justices of the Supreme Court believe that technologically advanced tracking of a person's location can in fact

violate reasonable expectations of privacy. *See Jones*, 132 S.Ct. at 957, 964 (Alito, J., concurring in the judgment) ("Longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *id.* at 955 (Sotomayor, J., concurring).

3) Linking the Warrant Requirement to the Duration of the Tracking Would Be Unworkable.

The government argues that the duration of GPS tracking should be a factor in evaluating whether a warrant based on probable cause is required. Because the GPS tracking in this case lasted "only" two days, as opposed to the 28 days in *Jones,* the government maintains that the concerns raised by Justices Alito and Sotomayor in their concurring opinions are not implicated here.[3]

In practice, however, linking the warrant requirement to the duration of the GPS tracking would prove unworkable. Because the Court's holding in *Jones* rested on a trespass theory based on the initial attachment of the device, the Court has not yet given guidance on how "prolonged" GPS tracking would have to be to implicate a target's reasonable expectation of privacy. More saliently, at the time the FBI agents attached the GPS device in this case, they did not know, and could not have known, whether the tracking would last for two days or 28, or perhaps

[3] This Court need not address this argument. Because the initial, warrantless physical attachment of the GPS device was a search under *Jones,* and because no exception to the warrant requirement applies here, the evidence must be suppressed.

even longer. A rule that imposes different constitutional restraints based on factors wholly outside of law enforcement's control would be a recipe for chaos. It would require law enforcement to make guesses about the duration of tracking and to link those guesses to their own assessments of reasonable suspicion and probable cause. Moreover, it would require courts, in *every* GPS case, to conduct lengthy post-hoc evidentiary hearings on inevitable suppression motions. The better practice for both law enforcement and the courts is for the police to demonstrate probable cause ex ante to a neutral magistrate, and for the surveillance to take place under judicial supervision.

II. THE DISTRICT COURT CORRECTLY APPLIED THE EXCLUSIONARY RULE BECAUSE THE FBI AGENTS DID NOT RELY ON BINDING APPELLATE PRECEDENT.

A. Clear Precedent Supports the District Court's Conclusion.

The district court properly excluded the GPS evidence under its faithful application of *Davis v. United States*, 131 S. Ct. 2419 (2011). *Davis* is the latest in a line of cases that has examined whether the exclusionary rule applies when police rely in objective good faith on binding legal authority. After carefully considering the costs and benefits of exclusion, the Supreme Court determined that the exclusionary rule does not apply to searches conducted in objectively reasonable reliance on binding appellate precedent. *Id.* at 2423-24. The government advocates for a broader exception—one that would permit reliance on any body of

persuasive, unsettled law. This unjustified reading would subvert *Davis*'s clear holding, exceed the bounds of the exclusionary rule, and prove unworkable in practice.

In *Davis*, while the defendant's appeal was pending, the Supreme Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), which announced a new rule governing automobile searches incident to arrest. *Gant* held that automobile passenger compartment searches conducted after the handcuffing and securing of a defendant violated the Fourth Amendment. The decision expressly narrowed *New York v. Belton*, 453 U.S. 454 (1981), and thus overruled the Eleventh Circuit decision in *United States v. Gonzalez*, 71 F.3d 819, 822, 824-27 (11th Cir. 1996), which relied on a broad reading of *Belton* in authorizing warrantless searches even after the defendants were secured. *See Gant*, 556 U.S. at 348. Davis conceded on appeal that the police had "fully complied with 'existing Eleventh Circuit precedent,'" namely *Gonzalez*. *Davis*, 131 S. Ct. at 2426. The Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis,* 131 S. Ct. at 2423.

Applying *Davis*'s clear rule, the district court correctly held that the good faith exception does not apply when law enforcement agents were not acting in accord with binding precedent. *United States v. Katzin*, Criminal Action No. 11–226, 2012 WL 1646894, at *7 (E.D. Pa. May 9, 2012). The government urges a

much broader reading of *Davis,* insisting that *Davis* "just happened to involve" binding appellate precedent. Gov't Br. at 59. But the Court's plain language contradicts this view. Justice Alito's opinion for the Court refers to "binding" authority at numerous points. *Davis*, 131 S. Ct. at 2423, 2428, 2432, 2434. It does not mention any source of law more permissive than "binding appellate precedent," and even implies a different result for "defendants in jurisdictions in which the question remains open." *Id.* at 2433; *see also id.* at 2435 (Sotomayor, J., concurring in the judgment) (clarifying that the "markedly different question" whether the exclusionary rule applies when the law relied upon was unsettled was not before the Court). Further confirming the clarity of *Davis*'s rule is the reasoning of the Eleventh Circuit panel, whose decision the Supreme Court affirmed:

> We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation. We have not forgotten the importance of the "incentive to err on the side of constitutional behavior," and we do not mean to encourage police to adopt a "let's-wait-until-it's-decided approach" to "unsettled" questions of Fourth Amendment law.

United States v. Davis, 598 F.3d 1259, 1266-67 (11th Cir. 2010) (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982)), *aff'd* 131 S. Ct. 2434 (2011).

Whether GPS tracking constituted a search in the Third Circuit was precisely the type of open and equivocal legal question that the *Davis* Court placed outside of the exception's scope. When the FBI installed its tracker on Katzin's

automobile, the D.C. Circuit had just four months earlier disagreed with other appeals courts on the constitutional question whether GPS tracking is a search. *United States v. Maynard*, 615 F.3d 544, 557-59 (2010). A position that splits the other circuits, and on which the controlling circuit has not ruled, is quintessentially equivocal, so applying the exclusionary rule would permit the impermissible ad hoc approach that *Davis* and *Johnson* forbid. Law enforcement could effectively choose which circuit courts to listen to and which to ignore. Moreover, as the district court observed, "[t]he Third Circuit Court of Appeals and the Supreme Court were silent on the issue . . . when the authorities installed the GPS device . . . ." *Katzin*, 2012 WL 1646894, at *7. Because *Davis* only excuses objective good faith reliance on binding appellate precedent, the government's call for an extension to merely persuasive authority, amid a circuit split no less, is unavailing. The exclusionary rule must therefore apply.

The risks to privacy inherent in rapid technological change also show the prudence of refusing to extend *Davis*'s good faith exception. The government repeatedly cites two cases involving decades-old technology in support of its argument that warrantless GPS tracking is constitutionally reasonable: *United States v. Karo*, 468 U.S. 705, 712 (1984) (upholding the conveyance by police of a beeper, which transmitted no information, to the suspect); and *United States v. Knotts*, 460 U.S. 276, 278 (1983) (approving following a suspect's car, with the

help of a beeper that could perform no independent tracking and that required close distance to operate). Accepting this argument would both contradict the Supreme Court's views on changing technology and undermine the purpose of the good faith exception. In these cases and elsewhere, the Court has recognized that Fourth Amendment holdings authorizing certain technological tools should not be unduly extended. *See Kyllo v. United States*, 533 U.S. 27, 33 (2001) ("We have previously reserved judgment as to how much technological enhancement of ordinary perception . . . is too much."); *Knotts*, 460 U.S. at 283-84. Moreover, there is a special danger in recognizing good faith reliance on precedents as old as *Karo* and *Knotts*, when they are based on then-existing technological consideration. The integrity of the constitutional process that balances privacy and rapidly advancing technology via careful deliberation would be lost if such factually distant precedent could satisfy the good faith requirement. *See, e.g.*, *United States v. Robinson*, No. S2–4:11CR00361 AGF (DDN), 2012 WL 4893643, at *15 (E.D. Mo. Oct. 15, 2012) ("The need for caution in this age of developing technology should be clear. . . . [O]ne may not simply assume that prior case law authorizes conduct when it deals with different technology, is perhaps installed in a different fashion, or permits a different degree of intrusion.").

District courts nationwide, including some of those cited by the government, have adopted the proper view of how *Davis* applies to GPS searches conducted

before *Jones*. Many were in the same position as this Court, because no binding circuit law on GPS searches existed when police conducted them. They therefore declined to apply the good faith exception and excluded the evidence at issue. *See*, *e.g.*, *id.* at *12-15; *Lujan*, 2012 WL 2861546, at *3; *Ortiz*, 2012 WL 2951391, at *12-13; *United States v. Lee*, , 862 F. Supp. 2d 560, 570-71 (E.D. Ky. May 22, 2012). Other courts, where circuit law specifically authorized warrantless GPS tracking, applied *Davis* to deny motions to suppress the evidence. *See*, *e.g.*, *United States v. Amaya*, 853 F. Supp. 2d 818, 826 (N.D. Iowa 2012) (designating the existence of "binding appellate precedent" as the condition for the exception before applying it), *withdrawn in part on other grounds by* 853 F. Supp. 2d 835 (N.D. Iowa 2012); *United States v. Aquilar*, No. 4:11–cr–298–BLW, 2012 WL 1600276, at *2 (D. Idaho May 7, 2012) (same); *United States v. Nwobi*, No. CR 10–952(C) GHK–7, 2012 WL 769746, at *3 (C.D. Cal. Mar. 7, 2012) (same). Even this second set of cases undermines the government's position. They, too, adopt the plain language reading of *Davis,* because in those jurisdictions, unlike here, binding appellate precedent had authorized warrantless GPS tracking.[4]

[4] A handful of courts have disagreed. *See, e.g.*, *United States v. Rose*, Criminal Case No. 11–10062–NMG, 2012 WL 4215868, at *3-5 (D. Mass. Sept. 14, 2012); *United States v. Baez*, Criminal Action No. 10–10275–DPW, 2012 WL 2914318, at *1 (D. Mass. July 16, 2012). Both of these cases stretch *Davis* beyond its boundaries. *Baez* is readily distinguishable because its search occurred when *Maynard* had not yet split the circuits. *Rose* uses police efficiency as a justification for extending *Davis*, and exaggerates the effect on access to new technology by

In an attempt to avoid this clear result and justify an extension, the government retreats to the broader line of exclusionary rule cases. *Davis* grew out of two other good faith exception cases. *See Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (exempting searches conducted in reliance on later overturned statutes); *United States v. Leon*, 468 U.S. 897 (1984) (doing the same for later invalidated warrants).[5] But these cases share a common element that the government's interpretation of *Davis* cannot sustain: All involve sources of law that "specifically *authorize[]* a police practice." *Davis*, 131 S. Ct. at 2429 (emphasis in original); *Katzin*, 2012 WL 1646894, at *9 ("[The] exceptions generally involve reliance on unequivocally binding legal authority . . . ."). None of the cases cited in the government's brief specifically authorized warrantless physically attached GPS

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contemplating that "police . . . would be forced to wait decades to implement new technology . . . ." 2012 WL 4215868, at *5. The court should have qualified its prediction by acknowledging that such implementation would need to be warrantless. Police face no risk of suppression with a valid warrant. Moreover, the Fourth Amendment has never been primarily an instrument of police efficiency; instead, it is first and foremost a safeguard of privacy. *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., concurring); *id.* at 961-63 (Alito, J., concurring in the judgment).

[5] The government raises *United States v. Duka* in an attempt to extend the good faith exception for persuasive statutory interpretations to unsettled constitutional ones. 671 F.3d 329 (3d Cir. 2011). *Duka*, however, stands much closer to *Krull*'s statutory good faith exception, as confirmed by this Court's reasoning. *See id.* at 347 ("Thus, under *Krull*, the exclusionary rule plainly does not apply . . . ."). (citations omitted). Simply put, a statute enacted by Congress is not analogous to an unanswered question on the frontier of constitutional law.

tracking at the time of the search, so the exclusionary rule must apply to the evidence that it produced.

Exclusion is the proper way to deter violations wrought by selectively favorable interpretations of Fourth Amendment law while it remains unsettled. The rule that *Davis* plainly set forth promotes clear, system-wide knowledge of what is permissible and what is not, eliminating the constitutional violations that result from erroneous guesswork.

B. A Clear Rule is Constitutionally Superior to a Murky One.

A clear rule not only deters police misconduct and negligence, it is also far more practicable for law enforcement and efficient for the courts. The muddled standard proposed by the government would complicate the work of police and prosecutors, for whom bright-line rules provide great benefits. *See, e.g., Thornton v. United States*, 541 U.S. 615, 620-24 (2004) (reasoning that rules requiring ad hoc determinations by police are impracticable); *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations . . . lest every discretionary judgment . . . be converted into an occasion for constitutional review."). The Supreme Court has already drawn this bright line; this Court should decline the government's invitation to muddy it.

For example, *Davis*'s clear rule relieves courts and police of the difficult line drawing problem rooted in the depth and breadth of potentially relevant sources of law available under a standard requiring only a good faith guess at what unsettled law will later become. *See Katzin*, 2012 WL 1646894, at *9 ("Is . . . reliance on a significant minority, or somewhat better, a bare majority . . . enough . . . ? Does it matter *which* circuits . . . support or condemn the investigatory practice . . . [or] how many circuits have squarely addressed the issue?") (emphasis in original). The systemic risk posed by leaving these questions to retrospective adjudication of good faith unguided by any specific touchstone, such as a warrant, statute, or binding appellate precedent, would "sharpen[] the instruments that can effectively eviscerate the exclusionary rule entirely." *Katzin*, 2012 WL 1646894, at *9.

Ultimately, the government argues that police should be able to rely in good faith on judicial precedents, even if the Supreme Court and the courts of the jurisdiction in which they are located are silent on the question, and even if the legal proposition is highly contested and has divided the courts that have considered it. The justifications advanced by the government to support this strained interpretation of *Davis* are contrary to both law and policy. The single source of developing law on which officers should be allowed to rely without risking exclusion is binding appellate precedent. For the reasons discussed above, this Court should affirm the judgment of the district court.

C. The Court Should Reach the Fourth Amendment Question Regardless Whether the Exception Applies.

The Court should decide whether a GPS search requires a probable cause warrant irrespective of its decision on the proper scope of *Davis*. When cases present a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates, there is sufficient reason for the Court to decide the violation issue *before* turning to the good-faith question." *Illinois v. Gates*, 462 U.S. 213, 264 & n.18 (1983) (White, J., concurring in the judgment) (emphasis in original) (citing *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (finding a constitutional violation and remanding for consideration of the good faith defense)). This is just such a case. GPS devices have become a favored tool of law enforcement, and their highly intrusive nature cries out for clear judicial regulation. The *Jones* court was unable to rule on the applicability of the presumptive warrant requirement to GPS searches, because the government had forfeited its position on the issue. 132 S. Ct. at 954. The issue is now before this Court, and addressing it would yield much needed clarity in this circuit.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

DATED: November 13, 2012

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CERTIFICATES

Catherine Crump, one of the attorneys for *Amici*, hereby certifies that:

1. I caused true and correct copies of the foregoing Brief of *Amici* to be served upon the following counsel of record this 13th day of November, 2012, via this Court's ECF system, with two copies sent by first class mail to:

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2. Ten copies of the Brief of *Amici* were filed with the Court by hand delivery on November 13, 2012, in accordance with Rule 31.0 of the Local Appellate Rules.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 6202 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Brief of *Amici* filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Brief of *Amici* filed with the Court was virus checked using AVG Antivirus version 10.0.1424 on November 13, 2012, and was found to have no viruses.

DATED: November 13, 2012

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