

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellee,

v.

SUDINIA JOHNSON,

Defendant-Appellant.

Case No. 2013-1973

On Appeal from the
Butler County
Court of Appeals,
Twelfth Appellate District

Court of Appeals Case
No. CA2012-11-235

**MERIT BRIEF OF *AMICUS CURIAE*
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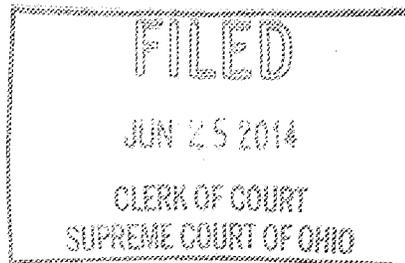


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INTRODUCTION

After receiving a tip from a known informant that Sudinia Johnson would soon be acquiring a large quantity of cocaine, law-enforcement officers attached a Global Positioning System (GPS) tracking device to his van. When monitoring of the device showed that Johnson had traveled from southwest Ohio to Chicago, the officers initiated in-person visual surveillance. On his return trip, Johnson committed a traffic violation, and officers pulled over his van and an accomplice's sedan. They discovered seven kilograms of cocaine in a hidden compartment in the sedan, and found in Johnson's possession a set of keys that unlocked the hidden compartment. Johnson later pleaded no-contest to drug-trafficking charges.

This familiar story shows the value of GPS technology to law enforcement. It allowed officers to track Johnson's public movements without diverting scarce resources to round-the-clock visual surveillance. They could also act on short notice, thereby minimizing the risk that Johnson could leave for Chicago before the police could initiate surveillance. That rapid response has particular value in narcotics cases, where traffickers regularly cross state lines, hampering the efforts of local law enforcement to track suspects. The use of GPS technology on automobiles produces these public-safety benefits without substantially invading individual privacy interests. The U.S. Supreme Court has long held that individuals driving on public roads have no constitutionally cognizable privacy interest in their movements from one place to another, because those movements are already exposed to the public. The use of GPS on automobiles does not reveal anything that is not already exposed to public view. And the tracking at issue here showed only Johnson's movements on public roads.

Johnson nevertheless argues that the use of a GPS device in this case was a violation of the Fourth Amendment and that any evidence obtained as a result of that alleged violation should be suppressed. He is wrong. In 2012, the U.S. Supreme Court held that the attachment of a GPS

device on a target's vehicle, and the monitoring of that device, constitutes a "search" within the meaning of the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945, 949 (2012). That decision left two related questions unanswered. It did not say whether reasonable suspicion or probable cause could justify GPS attachment and monitoring without a warrant. *See id.* at 954. And it did not say whether evidence traceable to the use of a GPS tracking device before *Jones* nevertheless falls outside the exclusionary rule because officers acted in good-faith reliance on then-existing case law. In this case, the Court granted review over a Proposition of Law by Johnson that addresses only the second, exclusionary-rule question and that entirely assumes the answer to the first question (that the use of GPS tracking in this case violated the Fourth Amendment because the police did not obtain a warrant for it). The Court should reject Johnson's exclusionary-rule argument both because (1) significant arguments can be made that the GPS tracking in this case did *not* violate the Fourth Amendment at all, and because (2) regardless, the officers acted in good faith when they undertook the GPS tracking in this case.

First, significant arguments exist that the attachment and monitoring of the GPS device on Johnson's vehicle was reasonable under the Fourth Amendment. The U.S. Supreme Court has long held that not every search requires a warrant. Instead, the justification necessary for a search depends on a balance between the degree to which the search is needed to promote legitimate government interests and the degree to which the search intrudes upon privacy. Here, the U.S. Supreme Court might ultimately conclude that no warrant is necessary in this context. As described above, the law-enforcement need to monitor the movements of suspected drug traffickers is high, and tracking a driver's movements on public roads does not invade on any substantial privacy interests that are recognized under the Fourth Amendment. With the balance ostensibly in one direction, the U.S. Supreme Court very well might hold that reasonable

suspicion (or, alternatively, probable cause) justifies GPS searches. In the alternative, the Court could apply the automobile exception to the warrant requirement and hold that GPS searches are justified when officers have probable cause that the monitoring will reveal evidence of wrongdoing. That these substantial arguments that no Fourth Amendment violation even occurred in this case continue to exist even after the U.S. Supreme Court's decision in *Jones* provides strong support for the conclusion that the exclusionary rule should not apply here.

Second, even assuming that the GPS attachment and monitoring violated the Fourth Amendment, the lower courts still acted properly in admitting the challenged evidence under the good-faith exception to the exclusionary rule. The U.S. Supreme Court has instructed courts not to suppress evidence obtained from an unlawful search when the search was authorized by then-existing case law. The only purpose of the exclusionary rule is to deter culpable police conduct. That purpose is not served by suppressing evidence obtained from searches that followed then-existing law, even if the legal rules later changed. As it existed when the officers here acted before *Jones*, the case law authorized the use of GPS technology to monitor an automobile's movements on public roads. In two cases, the Supreme Court approved the use of an electronic "beeper" to monitor a vehicle. And the Sixth Circuit approved tracking a suspect using cellular-telephone data. Taken together, those cases would have told an objectively reasonable officer before *Jones* that he could use an electronic tracking device to monitor the location of an automobile on public roads. Every federal court of appeals to have considered the question in a pre-*Jones* context agrees. Accordingly, the Court should not apply the exclusionary rule to this case.

For these reasons, the Court should affirm.

STATEMENT OF AMICUS INTEREST

At stake in this case is the availability of evidence gathered as a result of GPS monitoring. As the chief law officer of Ohio, R.C. 109.02, the Attorney General has a substantial interest in the proper interpretation of the rules governing GPS tracking devices and the availability of evidence gathered by those devices. The Attorney General's interest is particularly compelling because the Bureau of Criminal Investigation (BCI) and the Ohio Peace Officer Training Academy (OPOTA) are parts of the Attorney General's Office. Like many other law-enforcement agencies, BCI uses GPS tracking technology to advance its mission of preventing, investigating, and solving crime. And OPOTA trains local law enforcement in the use of surveillance technology, including GPS. The Court's resolution of this case will therefore affect the operations of the Attorney General's Office, as well as all local law enforcement.

STATEMENT OF THE CASE AND FACTS

After he was indicted on charges of drug trafficking and drug possession, Sudinia Johnson filed a motion in the Butler County Court of Common Pleas to suppress all evidence obtained as a result of GPS monitoring of his van. The trial court denied his motion, and Johnson entered a no-contest plea. The court of appeals affirmed. While his request for discretionary review remained pending before this Court, the U.S. Supreme Court decided *United States v. Jones*, 132 S. Ct. 945 (2012). That case held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. *Id.* at 949 (footnote omitted). In this case, this Court remanded for the lower courts to apply *Jones*. Both lower courts again rejected Johnson's arguments for suppression, and this Court granted review.

A. After using a GPS tracking device to monitor his location, law-enforcement officers discovered seven kilograms of cocaine in Sudinia Johnson's possession.

On October 23, 2008, Detective Mike Hackney of the Butler County Sheriff's Office received a tip from a known informant that Sudinia Johnson had recently distributed roughly ten kilograms of cocaine and was preparing to acquire seven more. Tr. of Suppression Hearing in No. CR-2008-11-1919 (Butler Cnty. Ct. Com. Pl. Mar. 3, 2009), at 10, 46 (hereinafter "Tr.>"). This came as no surprise to Detective Hackney, who had been gathering information about Johnson's drug-trafficking activities for roughly six months. *Id.* at 34. Three confidential informants, working independently, had contacted Hackney more than ten times with information about Johnson. *Id.* at 34, 37. Because these informants had provided useful information in the past, *id.* at 32, the October tip spurred Hackney into action.

The day he received the tip, Detective Hackney and two other officers drove to Johnson's residence and collected his trash, which had been left on the curbside for pickup the following day. *Id.* at 11; *see California v. Greenwood*, 486 U.S. 35 (1988) (approving police collection of trash left for disposal at the curbside). Because the informant had specified that Johnson would be using a van to transport the cocaine, Detective Hackney also placed a small GPS tracking device on Johnson's van. Tr. at 11.

Testimony at Johnson's later suppression hearing described the appearance of the GPS device: It was "no bigger than a pager" and was sheltered inside a protective case. *Id.* Magnets allowed officers to attach the protective case to any metal part of an automobile. *Id.* at 11-12. Unlike some GPS units, the device was not wired to the electrical system of the vehicle. *Id.* Instead, an external battery powered the device. *Id.* at 49.

Later testimony also described the GPS device's operation. Once police attached the device to its external battery, it began transmitting information to the officers, who monitored its

location through a secure website. *Id.* at 14, 49. To save battery life, the device did not send a continuous signal to the website. *Id.* at 50. Instead, it transmitted information only in response to a signal sent by the officers to the device—a signal called a “ping.” *Id.* The officers controlled the frequency with which the device was “pinged” and therefore how often they would receive a report of the device’s location. *Id.* Watching the website allowed officers to monitor the device’s movements in real time, but the website also stored location information, allowing officers to view where the device had been in the past. *Id.*

Detective Hackney placed the device on Johnson’s van on a Thursday and began tracking it that night. *Id.* at 12-14. On the following Tuesday, Hackney saw that the van was in a shopping center in suburban Chicago. *Id.* at 14. In the hopes of conducting in-person surveillance, Hackney attempted to contact state and federal authorities in the vicinity. *Id.* When those attempts proved unsuccessful, he found a colleague he knew to be a Chicago native. *Id.* at 15. The colleague mentioned that his brother, Rudy Medellin, lived outside Chicago and was a retired United States Immigration and Customs Enforcement officer. *Id.* Hackney contacted Medellin, who agreed to locate the van. *Id.*

Having done so, Medellin followed the van a short distance to a residence, where Sudinia Johnson and his accomplice Otis Kelly went inside. *Id.* at 16. Shortly thereafter, Johnson left the residence and returned to the van with a package. *Id.* Separately, Kelly drove out of a garage in a sedan. *Id.* Medellin reported this back to Hackney, who had been monitoring Johnson’s movements on the secure website. *Id.* Medellin then tailed the van and the sedan as they headed south on Interstate 65 toward southwest Ohio. *Id.*

Detective Hackney contacted the Ohio State Highway Patrol and local law enforcement to inform them that two suspected drug traffickers would soon be entering Ohio. *Id.* at 17. He

then prepared to take over surveillance himself. When Johnson and Kelly entered Ohio, Hackney and a colleague started tailing them. *Id.* at 18. Hackney asked the assisting officers to stop the two vehicles if officers saw them commit traffic violations. *Id.* at 19. They pulled over Johnson after he made an illegal turn on surface roads in Fairfield, Ohio. *Id.* They also stopped Kelly's sedan. *Id.* at 98.

After a drug-sniffing dog gave a positive alert for narcotics, police discovered seven kilograms of cocaine in a hidden compartment in the trunk of Kelly's sedan. *Id.* at 22, 155. One of the keys on Johnson's key ring operated a lock on the hidden compartment. *Id.* at 22. At this point, Johnson was arrested. *Id.*

B. Johnson was convicted of drug trafficking and drug possession, and the Twelfth District affirmed his convictions.

A grand jury indicted Johnson on one count of trafficking in cocaine, one count of possession of cocaine, and one count of unlawful possession of a firearm. *State v. Johnson*, No. CA2012-11-235, 2013-Ohio-4865 ¶ 3 (12th Dist.) (hereinafter "App. Op."). He filed a motion to suppress the evidence obtained through the use of the GPS tracking device. *Id.* ¶ 4. Following a hearing, the trial court denied his motion. It started by analogizing to traditional, in-person surveillance, saying that "had the police simply staked out the van, and observed it from a distance," there would be no Fourth Amendment concerns. Tr. at 213-14. The question then became: Is GPS tracking "meaningfully different than the ability of a police officer to stake out a vehicle and manually do the surveillance?" Tr. at 214. In the trial court's view, no. In this case, the tracking "really doesn't go beyond anything that [officers] could have lawfully viewed by themselves" and therefore the use of a GPS device was just like using "binoculars." *Id.* at 215. The trial court was careful to note that the GPS tracking here occurred entirely while the car was in "public places" that could have been "viewed by the naked eye." *Id.* at 217. Police

did not monitor Johnson's movements anywhere that they could not have observed him had they used in-person surveillance. Following the denial of his motion, Johnson entered a no-contest plea, and the court sentenced him to 15 years' imprisonment. App. Op. ¶¶ 1, 4.

In 2009, the Twelfth District unanimously affirmed. *See State v. Johnson*, 190 Ohio App. 3d 750, 2010-Ohio-5808 (12th Dist.). Johnson raised largely the same issue that he raises here—that the Fourth Amendment exclusionary rule bars the introduction of evidence obtained as the result of GPS monitoring. The court of appeals held that the use of GPS in his case did not constitute a Fourth Amendment search. *Id.* ¶ 47.

C. After this Court remanded for application of the new rule in *United States v. Jones*, the lower courts again denied suppression.

This Court agreed to review the case. After briefing and oral argument concluded in this Court, however, the U.S. Supreme Court decided *United States v. Jones*, 132 S. Ct. 945 (2012). *Jones* held that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’” within the meaning of the Fourth Amendment. *Id.* at 949 (footnote omitted). But the Court expressly left open what the Fourth Amendment requires for this type of search. *Id.* at 954. In light of *Jones*, this Court vacated the court of appeals’ judgment and remanded for the lower courts to consider the implications of that decision. *State v. Johnson*, 131 Ohio St. 3d 301, 2012-Ohio-975 ¶ 1.

On remand, the trial court again denied Johnson’s motion to suppress. App. Op. ¶ 7. This time, the trial court ruled that officers violated the Fourth Amendment when they attached the GPS device to Johnson’s van, but held that exclusion was nevertheless inappropriate. *Id.* When officers act in good-faith reliance on binding appellate precedent, the Fourth Amendment exclusionary rule does not permit suppression of evidence. *Davis v. United States*, 131 S. Ct. 2419 (2011). Because precedent existing at the time authorized the use of electronic monitoring

of automobiles on public roads, the officers' actions did not warrant suppression. App. Op. ¶ 7. After the trial court denied his motion to suppress, Johnson entered a no-contest plea and was sentenced to ten years' imprisonment. *Id.* ¶ 8.

The Twelfth District Court of Appeals again unanimously affirmed the trial court's denial of the motion to suppress. The court of appeals did not address whether the attachment and monitoring of the GPS device was a violation of the Fourth Amendment. Instead, it held that this was not an appropriate case to apply the exclusionary rule. The court of appeals recognized that the exclusionary rule applies only where it will deter police from committing future Fourth Amendment violations *and* where the benefits of that deterrence outweigh the social costs of ignoring probative evidence of criminal activity. *Id.* ¶ 16 (quoting *Davis*, 131 S. Ct. at 2427). The court of appeals concluded suppression here would not yield deterrence. For starters, when the officers acted, "no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles that remained on public roadways was a violation of the Fourth Amendment." *Id.* ¶ 26. Furthermore, two cases from the U.S. Supreme Court approved monitoring an automobile's movements on public roads by tracking an electronic "beeper" in the car. *See id.* ¶ 26 & n.2 (citing *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984)). Because "the United States Supreme Court had sanctioned the use of beeper technology without a warrant in *Knotts*," the court of appeals held that the officers here "acted with an objectively reasonable good-faith belief that their conduct was lawful." *Id.* ¶ 30 (internal quotation marks and alterations omitted). As a result, the court affirmed the denial of Johnson's suppression motion.

Johnson appealed, and this Court accepted review. *Case Announcements*, 2014-Ohio-889 at 7 (Mar. 12, 2014).

ARGUMENT

Two years ago, the U.S. Supreme Court held that the attachment and monitoring of a GPS device to an automobile constitutes a “search” under the Fourth Amendment. *Jones*, 132 S. Ct. at 949. That decision left open two questions: First, is GPS use on automobiles constitutionally reasonable if police have reasonable suspicion (or, alternatively, probable cause) that it will reveal evidence of wrongdoing? *See id.* at 954. Second, if not, is evidence obtained as a result of GPS monitoring admissible under the good-faith exception to the exclusionary rule, provided that officers obtained the evidence before the Supreme Court decided *Jones*?

The Court accepted review of a Proposition of Law that addresses only the *second* question (concerning the scope of the exclusionary rule) and that necessarily assumes the answer to the *first* question (concerning the scope of the Fourth Amendment)—namely, that every use of GPS tracking on automobiles requires a warrant under the Fourth Amendment. This *amicus* brief is being filed to illustrate the substantial arguments that the Fourth Amendment often might *not* even require warrants for GPS tracking of automobiles so long as officers have reasonable suspicion (or, alternatively, probable cause) that the automobile tracking will uncover illegal activity. Indeed, on that predicate question whether the GPS attachment and monitoring here violated the Fourth Amendment, Johnson presents *no* argument whatsoever. He instead states without analysis that “Hackney’s action violated the Fourth Amendment” and immediately jumps to whether the alleged violation warrants suppression. Johnson Br. at 5.

It is true that this case could be decided in favor of the *State* without deciding whether the officers violated Johnson’s constitutional rights; the Court could find that the government’s actions fall within the good-faith exception to the exclusionary rule and therefore decline to reach the question of whether the search was unconstitutional. *See United States v. Leon*, 468 U.S. 897, 924-25 (1984). That is what every federal court of appeals to consider the question has

done. *See United States v. Fisher*, 745 F.3d 200, 203-06 (6th Cir. 2014); *United States v. Aguiar*, 737 F.3d 251, 255, 261-62 (2d Cir. 2013); *United States v. Sparks*, 711 F.3d 58, 62-67 (1st Cir. 2013); *United States v. Andres*, 703 F.3d 828, 834-35 (5th Cir. 2013); *United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012); *see also United States v. Katzin*, 732 F.3d 187, 194-210 (3d Cir. 2013), *reh'g en banc granted and opinion vacated*, No.12-2548, 2013 WL 7033666 (3d Cir. Dec. 12, 2013). But this Court could not accept Johnson's argument—that the good-faith exception does not apply—without first determining that the officers' actions violated the Fourth Amendment. That the State retains significant arguments on that predicate question—arguments that suggest no Fourth Amendment violation even occurred here—bolsters the good faith of officers with respect to the exclusionary-rule Proposition of Law over which this Court granted review.

Amicus Curiae's Proposition of Law No. 1:

The U.S. Supreme Court might hold, and thus there is a good-faith basis for an officer to believe, that the attachment and monitoring of a GPS device on an automobile traveling on public roads is reasonable under the Fourth Amendment if police have reasonable suspicion (or, alternatively, probable cause) that it will reveal evidence of wrongdoing.

The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Although the U.S. Supreme Court held that the attachment and monitoring of a GPS device on a suspect's vehicle constitutes a “search” within the meaning of that language, the Court did *not* decide whether the warrantless use of GPS technology is always “unreasonable.” Substantial arguments suggest that the Court might ultimately conclude that it is not. First, because the government's interest in monitoring the movements of suspected drug traffickers far outweighs the privacy interests of a driver on public roads, reasonable suspicion

could justify GPS attachment and monitoring. Second, and in the alternative, the longstanding “automobile exception” to the warrant requirement might allow officers to search a vehicle without a warrant if they have probable cause to believe it contains contraband. All told, these substantial legal arguments illustrate that the easiest path for resolving this case is the only one that allows this Court to leave for another day what the Fourth Amendment requires—by holding that the exclusionary rule should not apply on the facts here. *See Leon*, 468 U.S. at 924-25.

A. The U.S. Supreme Court might ultimately hold that the attachment and monitoring of a GPS device on an automobile traveling on public roads is reasonable under the Fourth Amendment when it is supported by reasonable suspicion.

The U.S. Supreme Court has long held that not every Fourth Amendment search requires a warrant or probable cause. Instead, the general test is one of reasonableness. Derived from the Fourth Amendment’s text, the reasonableness test balances the intrusiveness of a search against the government’s need to conduct the search. Here, Johnson has little—if any—interest in concealing his location as he travels on public roads. On the other side of the equation, the government has a strong interest in monitoring the movements of suspected drug traffickers. Weighing these two interests, the U.S. Supreme Court could hold that GPS attachment and monitoring is constitutional if supported by reasonable suspicion.

1. The reasonableness of GPS attachment and monitoring should be assessed through a balancing of interests.

The Fourth Amendment’s text imposes the requirement that “all searches and seizures must be reasonable.” *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). Not every search requires a warrant or probable cause to be “reasonable” within the meaning of the Fourth Amendment. To the contrary, for at least 46 years, the Supreme Court has recognized that some searches are reasonable even though officers have neither a warrant nor probable cause. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (protective pat-downs); *Maryland v. Buie*, 494 U.S. 325 (1990)

(protective sweep incident to arrest); *Michigan v. Long*, 463 U.S. 1032 (1983) (weapons search of car).

To determine what degree of suspicion is required for a search, the Supreme Court has instructed courts to weigh “the degree to which [the search] intrudes upon an individual’s privacy” against “the degree to which it is needed for the promotion of legitimate governmental interests.” *United States v. Knights*, 534 U.S. 112, 118-19 (2001). This balancing “examin[es] the totality of circumstances” to determine reasonableness. *Id.* (citation omitted). Here, that balance favors the police officers.

2. When they are traveling on public roads, drivers retain no constitutionally cognizable privacy interests in avoiding disclosure of their locations.

The first task is to examine “the degree to which” a GPS search “intrudes upon an individual’s privacy.” *Knights*, 534 U.S. at 118-19. This analysis proceeds in two steps: (1) examining the degree to which the *attachment* of a GPS device intrudes upon Johnson’s privacy, and (2) examining the degree to which GPS *monitoring* intrudes upon his privacy.

The attachment of a GPS device to Johnson’s van was, at most, minimally intrusive. By itself, the attachment of a device to a car reveals nothing. *See Jones*, 132 S. Ct. at 958 (Alito, J., concurring) (“[I]f the device had not functioned or if the officers had not used it, no information would have been obtained.”). Indeed, until officers begin monitoring the device, it does not even reveal the automobile’s location. Furthermore, the particular device used here minimized the potential intrusion. The device was attached with magnets and was not wired to the van’s electrical system. Tr. at 11-12. There is no allegation that it disrupted the function of Johnson’s van or otherwise had any material effect on his property rights.

Nor does GPS monitoring meaningfully intrude upon a driver’s privacy. GPS devices do not reveal anything that is not already exposed to public view. They do not record audio or

video. They do not reveal the car's occupants or its contents. The only thing they record is the car's location, which the U.S. Supreme Court has said lacks privacy protection. "The exterior of a car, of course, is thrust into the public eye." *New York v. Class*, 475 U.S. 106, 114 (1986). And "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). As a result, "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983).

3. The State has a strong interest in monitoring the location of suspected drug traffickers.

On the other side of the balance, the government has a compelling interest in monitoring the movements of suspected drug traffickers. The Supreme Court has recognized that "traffic in illegal narcotics creates social harms of the first magnitude." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). The effects of the drug trade include urban blight, drug addiction, health problems, and the need for increased government expenditures on preventive and rehabilitative services. *See Austin v. United States*, 509 U.S. 602, 620 (1993). Combatting the drug trade also diverts public resources from socially constructive programs.

Beyond the social concerns, the "smuggling of illicit narcotics" has created a "veritable national crisis in law enforcement." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Traffickers employ a "seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics," *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 669 (1989), and law enforcement is always playing catch-up. Building cases against drug networks can be particularly challenging when targets employ countersurveillance techniques. *See Tr.* at 29-30. Officers run the risk of being detected before they can obtain enough evidence to arrest a suspect. Moreover, officers investigating interstate drug trafficking

also face the constant risk that probative evidence will be lost forever. When a drug trafficker employs an automobile to transport narcotics, there is a greater threat that officers will lose track of both suspects and contraband. And drugs create “myriad forms of spin-off crime,” compounding all of these challenges for law enforcement. *Edmond*, 531 U.S. at 42.

The value of GPS attachment and monitoring to law-enforcement officers cannot be overstated. It allows officers to detect patterns and build cases without the risk of countersurveillance. It also helps visual surveillance to be more efficient, because agencies can use in-person surveillance when it is most needed, while reserving valuable resources for other investigations when it is not. And it increases the likelihood of catching interstate trafficking because GPS devices can cross state lines more readily than local law enforcement can. *See Tr.* at 28-30.

Requiring officers to obtain a warrant or to have probable cause before employing a GPS device could severely hamper their ability to investigate crimes. As for a warrant, a target may be across state lines—and therefore outside the magistrate’s jurisdiction—before the officer can get to the courthouse. As for probable cause, GPS devices are commonly used to *establish* probable cause once officers have reasonable suspicion of drug trafficking. Imposing either of these heightened requirements as a matter of constitutional law would tie officers’ hands.

As these factors show, there is a strong argument that the Fourth Amendment balancing test here tips in favor of the government. The government’s compelling interest in investigating drug-trafficking offenses outweighs the limited privacy interests of drivers traveling on public roads. As explained above, the U.S. Supreme Court has held that “[a] person traveling in an automobile on public thoroughfares has *no* reasonable expectation of privacy in his movements from one place to another.” *Knotts*, 460 U.S. at 281 (emphasis added). The GPS device did not

reveal any more information than visual surveillance would have, and the fact that GPS technology is more efficient than in-person surveillance does not change the constitutional calculus. On the other side of the ledger, officers have a compelling need to track the movements of suspected drug dealers effectively. The U.S. Supreme Court might therefore ultimately hold that warrantless GPS attachment and monitoring is constitutional as long as it is supported by reasonable suspicion.

B. Alternatively, the U.S. Supreme Court might ultimately hold that the attachment and monitoring of a GPS device on an automobile traveling on public roads is reasonable under the Fourth Amendment when it is supported by probable cause.

Since 1925, the U.S. Supreme Court has held that law-enforcement officers may conduct a warrantless search of an automobile if they have probable cause to believe it contains contraband. *Carroll v. United States*, 267 U.S. 132, 149 (1925). This “automobile exception” to the warrant requirement recognizes that searches of automobiles are fundamentally different than searches of homes and offices. In the event that this Court believes that reasonable suspicion does not justify GPS attachment and monitoring, it might also conclude that the automobile exception to the warrant requirement does apply, and thus it might hold that GPS attachment and monitoring requires only probable cause (but not a warrant).

Recognizing the differences between automobiles and homes, the U.S. Supreme Court has long held that searching an automobile requires probable cause, but not a warrant. The Court has offered two justifications for the automobile exception. For starters, “the opportunity to search is fleeting since a car is readily movable,” making it more difficult for investigating officers to obtain a warrant. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). That mobility creates a “necessary difference” between a search of an automobile and “a search of a store, dwelling house or other structure.” *Carroll*, 267 U.S. at 153. Importantly, the automobile exception “has no separate exigency requirement,” meaning officers do not need to have

particularized suspicion that an automobile will in fact be moved. *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (per curiam). As long as the car is “readily mobile,” and officers have probable cause “to believe it contains contraband,” officers may search the automobile “without more.” *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam).

The Supreme Court has also justified the automobile requirement by recognizing that individuals simply have less of a privacy interest in their cars than in their homes. This conclusion has several components. For one, “the physical characteristics of an automobile and its use result in a lessened expectation of privacy.” *Class*, 475 U.S. at 112. When a car travels on public roads, its exterior, “its occupants,” and “its contents are in plain view.” *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). For another, a car “seldom serves as one’s residence or as the repository of personal effects,” distinguishing it from a house. *Id.* For a third, automobiles are subject to “pervasive regulation by the State,” which diminishes an individual’s privacy interest in the automobile and its contents. *Class*, 475 U.S. at 113. Whether for emissions, noise, safety features, or other government regulations, automobiles are commonly stopped and inspected by law enforcement. *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). This regular intrusion creates a diminished expectation of privacy. *Id.*

In *Jones*, the Supreme Court held that the attachment and monitoring of a GPS device on an automobile constitutes a search. That raises the obvious question: Does the automobile exception apply to GPS searches in the same way that it applies to traditional automobile searches? The justifications underlying the automobile exception would support that conclusion. All of the reasons why traditional automobile searches are reasonable when supported by probable cause apply in the GPS context with equal force. In both contexts, there is a real risk that contraband will be lost due to the mobility of vehicles. In both contexts, there is also a

reduced expectation of privacy because automobiles traveling on public roads expose themselves to plain view. And in both contexts, the pervasiveness of automobile regulation reduces drivers' privacy interests while traveling on public roads.

In fact, there is reason to think that a traditional automobile search may be *more* intrusive than a GPS search. A reasonable person might prefer the tracking of his car's movements—which he is already exposing to the public—to a traditional car search. When police search a car's contents, they go through personal items, including those stored in a locked trunk or glove box. The Court has held that officers may even search “a container or package found inside the car when such a search was supported by probable cause.” *California v. Acevedo*, 500 U.S. 565, 570 (1991) (citing *United States v. Ross*, 456 U.S. 798 (1982)). If that degree of intrusion is justified by probable cause, it stands to reason that the lesser intrusion of monitoring movements on public roads may be justified by the same degree of suspicion.

C. Applying these standards here, the officers had probable cause (and so they also had reasonable suspicion) that the search at issue in this case would result in the discovery of illegal activity.

Here, the relevant officers acted with probable cause (and so *a fortiori* reasonable suspicion) that their GPS search would lead to the discovery of illegal activity. Both the quality and quantity of evidence was enough to justify the attachment and monitoring of a GPS device. As for the quality: Detective Hackney employed the GPS device based primarily on information supplied by a confidential informant. *See* Tr. at 34. Hackney had worked with that confidential informant several times over the previous six months. *Id.* It was also important that the informant's identity was known to Hackney: Unlike an anonymous informant, here the informant's “reputation [could] be assessed,” and he could “be held responsible if [his] allegations turn[ed] out to be fabricated.” *Florida v. J.L.*, 529 U.S. 266, 270 (2000).

As for the quantity: The informant gave Detective Hackney several details—not just general information—about Johnson’s drug-trafficking operations. Specifically, he told Hackney that Johnson had recently distributed ten kilograms of cocaine. Tr. at 46. He also told Hackney precisely how much cocaine Johnson would be transporting from Chicago—seven more kilograms. *Id.* at 10, 46. And the informant told Hackney that Johnson would be using a van to transport the cocaine, which was corroborated by the fact that Hackney knew Johnson owned a white Chevrolet van. *Id.* at 11. On this record, where Hackney had received several pieces of detailed information from a known, reliable informant, the officers had reasonable suspicion that tracking Johnson’s van would yield evidence of wrongdoing.

* * * *

But the Court need not resolve this weighty Fourth Amendment debate today. For present purposes, it is enough to say that the U.S. Supreme Court might ultimately conclude that no Fourth Amendment violation even occurs when police use GPS tracking without a warrant but based on reasonable suspicion (or probable cause). The serious arguments on that front all but confirm that, as described below, the exclusionary rule simply should not apply here because the officers acted in good faith even assuming a Fourth Amendment violation.

Amicus Curiae’s Proposition of Law No. 2:

Even assuming the attachment and monitoring of a GPS device on Johnson’s vehicle was unreasonable under the Fourth Amendment, the exclusionary rule does not apply, because law enforcement relied on legal precedent in good faith.

Even assuming the search of Johnson’s vehicle were unconstitutional, it would not follow that the evidence traceable to that search should be suppressed. To the contrary, exclusion is warranted only where the deterrent benefits of exclusion outweigh the substantial costs of suppressing probative evidence. Here, excluding evidence traceable to the GPS monitoring would serve no deterrent purpose because then-existing case law authorized it.

A. The exclusionary rule does not apply here because, at the time of the GPS monitoring, binding appellate precedent authorized the use of electronic monitoring devices to track automobiles on public roads.

The only goal of the exclusionary rule is deterring violations of the Fourth Amendment. *Davis*, 131 S. Ct. at 2426. That means exclusion does not necessarily follow from every unconstitutional search. Instead, exclusion is proper only when it will deter future Fourth Amendment violations *and* when those deterrence benefits outweigh the social costs of ignoring probative evidence of criminal activity. *Id.* at 2426-27.

The U.S. Supreme Court has concluded that there is no deterrent value in excluding evidence from searches that were proper when conducted, even if those searches turn out to be unlawful in light of later precedent. *Id.* at 2429. In the Supreme Court's words, "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 2423-24. Binding appellate precedent authorized the use of GPS monitoring when the law-enforcement officers here acted on October 23, 2008. Three cases are particularly relevant.

In the first, *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court held that monitoring an automobile's movements on public roads by tracking an electronic "beeper" in the car did not violate the Fourth Amendment. *Knotts* involved a battery-operated device that emitted periodic radio signals. *Id.* at 277. Officers monitored the defendant's location by tracking the radio signals and through visual surveillance. *Id.* at 278-79. The Supreme Court rejected the claim that using the beeper violated the Fourth Amendment because, "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. Because the target's movements were "voluntarily conveyed to anyone who wanted to look," no search occurred. *Id.*

Second, the Supreme Court built on its holding in *Knotts* the following year by concluding that the installation of a beeper in a container with the original owner's consent did not violate the reasonable expectation of privacy of a subsequent owner. *United States v. Karo*, 468 U.S. 705 (1984). In that case, officers placed a beeper in a can of ether and tracked the device's movements on-and-off for five months. *Id.* at 708-10. The Court held that the installation of the tracking device was not a search, because it "conveyed no information that [the target] wished to keep private." *Id.* at 712. The Court noted that while there may have been "a technical trespass on the space occupied by the beeper," the "existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated." *Id.* at 712-13.

In the third case, the Sixth Circuit held that officers did not violate the Fourth Amendment when they intercepted cellular-telephone data that revealed the defendants' location as they traveled on public roads. *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004), *vacated on other grounds sub. nom. Garner v. United States*, 543 U.S. 1100 (2005). Relying on *Knotts*, the court concluded that the target "had no legitimate expectation of privacy in the cell-site data because the DEA agents could have obtained the same information by following [the target's] car." *Id.* at 951. As a result, the tracking did not constitute a "search" within the meaning of the Fourth Amendment.

These three cases, taken together, established that law-enforcement officers could use electronic tracking devices to monitor the location of an automobile traveling on public roads without implicating the Fourth Amendment. Importantly, they also held that a "technical trespass" will not suffice to establish a Fourth Amendment search, because "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *Karo*, 468 U.S. at 712-13

(emphasis added); *see also Oliver v. United States*, 466 U.S. 170, 183 (1984) (“The law of trespass . . . forbids intrusions upon land that the Fourth Amendment would not proscribe.”). From the perspective of officers in October 2008, binding appellate precedent had approved the attachment and monitoring of a GPS tracking device to a vehicle traveling on public roads, and the “trespass” doctrine did not materially affect the analysis.

Proving the reasonableness of this view, two federal courts of appeals had considered whether the attachment and monitoring of a GPS device on an automobile traveling on public streets was a Fourth Amendment search, and both answered “no.” In 1999, the Ninth Circuit relied on *Knotts* and *Karo* to hold that the placement of a GPS tracking device on a vehicle traveling on public roads was neither a search nor a seizure. *United States v. McIver*, 186 F.3d 1119, 1126-27 (9th Cir. 1999). Eight years later, in an opinion written by Judge Posner, the Seventh Circuit came to the same conclusion. *See United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007). The court approved warrantless GPS monitoring by analogizing in part to the Supreme Court’s “beeper” cases. *See id.* at 998. By October 2008, no federal court of appeals had come down the other way.

B. Because law enforcement relied on binding appellate precedent in good faith, the exclusionary rule does not permit suppression of evidence in this case.

Under these precedents, law-enforcement officers here acted in an objectively reasonable manner when they attached a GPS tracking device to Johnson’s van and monitored his movements with that device. The legal backdrop against which the officers acted told them three things: It told them that the *attachment* of the GPS device would not be a search, because “existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated.” *Karo*, 468 U.S. at 712-13. It also told them that *monitoring* an automobile traveling on public roads would not be a search, because the driver

would have “no reasonable expectation of privacy in his movements from one place to another.” *Knotts*, 460 U.S. at 281. And it told them that *electronic* monitoring did not change the constitutional calculus, because “agents could have obtained the same information by following [the target’s] car.” *Forest*, 355 F.3d at 951.

An objectively reasonable officer on October 23, 2008, would have done what the officers did here. Upon receiving a tip from a reliable informant that Johnson would soon be transporting seven kilograms of cocaine in a particular vehicle, officers attached a GPS device to that vehicle. Tr. at 46. That tip squared with other information officers had received about Johnson over the previous six months. *Id.* at 34. The officers used a GPS device that attached to Johnson’s van with magnets, rather than a more intrusive device that would be wired to the van’s electrical system. *Id.* at 11-12. They did not limit themselves to the GPS tracking, but instead also engaged in other investigatory tactics, such as collecting his trash. *Id.* at 11. Upon discovering that Johnson was in Chicago, the officers began in-person surveillance to supplement the GPS tracking. *Id.* at 15. All of that behavior squared with *Knotts*, *Karo*, and *Forest*, and none of it was contrary to binding precedent that existed at the time. This is how society wants its law-enforcement officers to act, and the fact that the U.S. Supreme Court later changed the rules of electronic monitoring should not exclude the evidence here.

C. Johnson’s contrary arguments lack merit.

Johnson offers several reasons why the Court should apply the exclusionary rule in this case, but all of them lack merit. His primary argument is that no binding case law at the time of the search expressly authorized GPS monitoring, even though precedent authorized *other* forms of electronic monitoring. Johnson Br. at 6-8. He seems to believe that the earlier precedent needs to bless the particular technology for officers to rely on it in good faith. Johnson reads the good-faith exception too narrowly. *Knotts*, *Karo*, and *Forest* stand for two principles relevant to

this case. First, electronic monitoring of a vehicle did not implicate the Fourth Amendment because a person has no privacy interest in his location as he travels on public roads. *See Knotts*, 460 U.S. at 281. Second, the physical trespass of installing the electronic device was too minimal to implicate the Fourth Amendment. *See Karo*, 468 U.S. at 712-13. These principles have nothing to do with the particular technology at issue. They applied broadly to all electronic tracking on public roads. Put another way, nothing in those three cases suggests that the outcome would have been different had officers employed a GPS tracking device instead of a beeper (in *Knotts* and *Karo*) or cellular-telephone data (in *Forest*). And nothing would have put an objectively reasonable officer on notice that GPS is different than other electronic monitoring.

Johnson offers only one distinction between the technology here and the technology in *Knotts*, *Karo*, and *Forest*. In those cases, he says, the officers did not commit a trespass when they employed the technology, whereas here the officers did commit a trespass. *See Johnson Br.* at 11-12 (citing *Jones*, 132 S. Ct. at 952). An objectively reasonable officer at the time of the GPS monitoring here would not have read the case law that way. *Karo* stated that “[a]t most, there was a technical trespass” when officers used the beeper, yet still found no Fourth Amendment violation. 468 U.S. at 712. The Court went on to clarify that [t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated,” because “an actual trespass is neither necessary nor sufficient to establish a constitutional violation.” *Id.* at 712-13. An officer reading those words on October 23, 2008, would not have worried about whether GPS use was a trespassory intrusion.

Johnson also justifies his narrow reading of the good-faith exception on the ground that it creates an incentive for officers to err on the side of protecting individual privacy by obtaining a warrant. *Johnson Br.* at 12. But that accounts for only half of the relevant equation. Whether a

search is “reasonable” under the Fourth Amendment requires a balance between individual privacy and government need. *Knights*, 534 U.S. at 118-19. As explained above, the privacy interest of a driver in avoiding disclosure of his location on public roads is minimal, while the government’s need to track suspected drug traffickers is great. A substantial argument exists that no warrant was required.

Johnson next argues that Detective Hackney “had all the time in the world to present his case to a judge” and obtain a warrant. Johnson Br. at 5. But that is irrelevant, because the reasonableness of a warrantless automobile search has nothing at all to do with the imminence of the automobile’s departure. *See Dyson*, 527 U.S. at 466-67. Johnson’s car was “readily mobile” and officers had sufficient suspicion to believe GPS monitoring would yield evidence of wrongdoing. *Labron*, 518 U.S. at 940. Police could therefore attach the tracking device “without more.” *Id.*

The only appellate case law that Johnson cites in support of his position is *United States v. Katzin*, 732 F.3d 187 (3d Cir. 2013). Johnson Br. at 11. In that case, a panel of the Third Circuit held that the attachment and monitoring of a GPS tracking device violated the Fourth Amendment and that the good-faith exception did not apply. Since Johnson filed his brief, however, the Third Circuit has vacated the panel’s decision and granted rehearing en banc. *See* No. 12-2548, 2013 WL 7033666 (3d Cir. Dec. 12, 2013). With the panel’s decision off the books, now every federal court of appeals to have considered the question has held that the good-faith exception applies to circumstances like these, even in jurisdictions without case law specifically authorizing GPS tracking. *Fisher*, 745 F.3d at 203-06; *Aguiar*, 737 F.3d at 255, 261-62; *Sparks*, 711 F.3d at 62-67; *Andres*, 703 F.3d at 834-35; *Pineda-Moreno*, 688 F.3d at 1091.

The most notable of these cases is the Sixth Circuit's decision in *United States v. Fisher*, 745 F.3d 200. In *Fisher*, the Sixth Circuit held on very similar facts that law-enforcement officers acted in an objectively reasonable manner when, before the Supreme Court decided *Jones*, they attached a GPS device to a suspect's vehicle without a warrant, and used that device to monitor the vehicle's movements. *Id.* at 206. Even though the Sixth Circuit did not have GPS-specific case law, the officers' actions were consistent with "the relevant Supreme Court case law" at the time, as well as "circuit authority" from the Sixth Circuit and all other federal courts of appeals that had considered the question. *Id.* Accordingly, the evidence obtained as a result of the GPS monitoring was admissible under the good-faith exception to the Fourth Amendment exclusionary rule. *Id.*

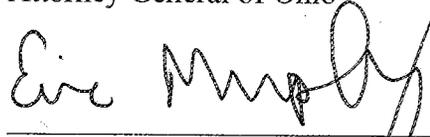
Because that decision governs federal courts in this state, accepting Johnson's argument in this case would create conflicting rules in Ohio. Evidence obtained as a result of pre-*Jones* GPS monitoring would be *admissible* against a defendant prosecuted in federal court, but would be *inadmissible* against a defendant prosecuted in state court. That difference would be particularly perverse for defendants like Johnson, whose crimes could be prosecuted in either system. R.C. 2925.03(A) (criminalizing drug-trafficking under state law); 21 U.S.C. § 841(a) (criminalizing drug-trafficking under federal law). Whether such defendants spend years in prison or walk free would depend on what sovereign happened to prosecute him. That practical consequence further supports affirming the Twelfth District's judgment.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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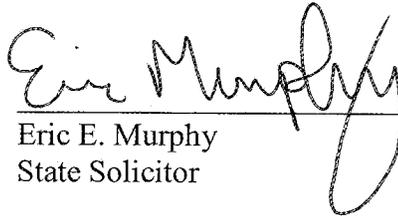
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio was served by U.S. mail this 25th day of June, 2014, upon the following counsel:

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