

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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No. SJC-11227

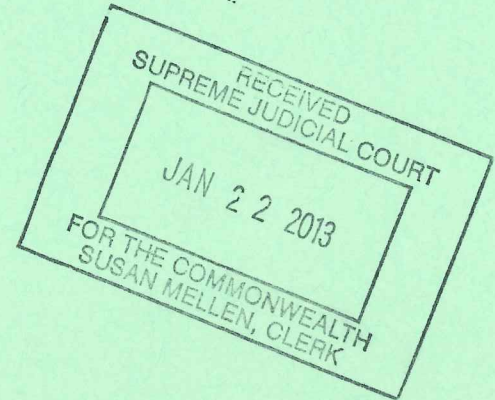
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COMMONWEALTH  
Plaintiff/Appellee

v.

JOHN ROUSSEAU  
Defendant/Appellant

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On Appeal From the Worcester Superior Court

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BRIEF OF ELECTRONIC FRONTIER FOUNDATION AS AMICUS  
CURRIAE IN SUPPORT OF DEFENDANT/APPELLANT

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CYBERLAW CLINIC  
BERKMAN CENTER FOR  
INTERNET AND SOCIETY  
HARVARD LAW SCHOOL

Kit Walsh (BBO#673509)  
23 Everett Street, 2nd Floor  
Cambridge, MA 02138  
Tel: (617) 495-7547 / Fax: (617) 495-7641  
Email: [cwalsh@cyber.law.harvard.edu](mailto:cwalsh@cyber.law.harvard.edu)

Of Counsel:

Hanni M. Fakhoury  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110  
Tel: (415) 436-9333 / Fax: (415) 436-9993  
Email: [hanni@eff.org](mailto:hanni@eff.org)

**STATEMENT OF AMICUS CURIAE**

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 Global Positioning System ("GPS") and cell phone tracking data. See e.g., *United States v. Jones*, 132 S. Ct. 945 (2012), *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304 (3d Cir. 2010).

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## INTRODUCTION

The Court has requested briefs from *amici* regarding whether a passenger in a vehicle to which a GPS device is attached has standing to challenge evidence seized as a result of surreptitious GPS monitoring and whether such a passenger is either "seized" or "searched" to the same extent as the driver or the vehicle itself. To protect people from invasive government surveillance, both of these questions must be answered in the affirmative.

GPS surveillance poses a serious threat to individual liberty given the breadth of information it provides to law enforcement:

Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.

*People v. Weaver*, 12 N.Y.3d 433, 441-42, 909 N.E.2d 1195 (2009). Persistent location tracking reveals "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), *aff'd sub nom. United States v. Jones*, 132 S. Ct. 945 (2012).



This level of government surveillance implicates the rights of every individual and the community at large, particularly if a passenger may be subjected to such surveillance merely by virtue of their association with a surveilled vehicle-owner. As Justice Sotomayor explained in her concurring opinion in *Jones*:

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may alter the relationship between citizen and government in a way that is inimical to democratic society.

*Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

With surveillance technology becoming more affordable, invisible, and pervasive, people are increasingly powerless to protect their own location privacy. Without practical barriers to surveillance, people are reliant upon the courts' vigilant application of constitutional safeguards against GPS tracking, "a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power and prevent 'a too

permeating police surveillance.'" *Id.* (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). Courts must ask "what limits are there upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). For the reasons that follow, this Court should hold a tracked passenger is searched to the same extent as a tracked vehicle owner, and therefore the passenger has standing to challenge the search.

First, a passenger has the same reasonable expectation of privacy in not having their location monitored for an extended period of time as the driver of a car. Second, a non-owner of a car is not deprived of standing to challenge GPS surveillance under the trespass theory of the Fourth Amendment solely on the basis of their lack of possessory interest in the car. Third, the same concerns that give defendants charged with possession crimes automatic standing under Massachusetts law applies to GPS surveillance. See *Commonwealth v. Frazier*, 410 Mass. 235, 242, 571 N.E.2d 1356 (1991). Providing passengers automatic standing protects them from having to make an incriminating admission that they have a connection to a place where contraband was found.

Therefore, a car's passenger has standing to challenge the installation and use of GPS surveillance. As with other searches under the Fourth Amendment and Article 14, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967).

#### ARGUMENT

##### **I. A PASSENGER HAS FOURTH AMENDMENT STANDING TO CHALLENGE THE INSTALLATION AND USE OF LONG TERM GPS SURVEILLANCE.**

A Fourth Amendment "search" occurs when the government either violates a "reasonable expectation of privacy" or trespasses onto private property for the purpose of obtaining information. *Jones*, 132 S. Ct. at 949-950.

As this Court and the Supreme Court have made clear, under the Fourth Amendment "the question whether the defendant has standing to challenge the constitutionality of a search or seizure is merged with the determination whether the defendant had a reasonable expectation of privacy in the place searched." *Commonwealth v. Mubdi*, 456 Mass. 385, 391,

923 N.E.2d 1004 (2010) (citing *Rakas v. Illinois*, 439 U.S. 128, 138-39 (1978)).

A non-owner passenger travelling in a car containing a GPS device surreptitiously installed by law enforcement has been "searched" under both the reasonable expectation of privacy and trespass theories of the Fourth Amendment.

**A. A Passenger Has Standing to Challenge GPS Surveillance of their Movements Because Individuals Have a Reasonable Expectation of Location Privacy.**

An individual's expectation of privacy should not hinge on the arbitrary fact of whether they are in the driver's seat or the passenger seat of a car, or whether they own the car or not. When a person's location is tracked over an extended period of time, they have standing to challenge the collection of location evidence used against them regardless of whether they are the owner or a passenger in a tracked car.

1. Individuals Have a Reasonable Expectation of Privacy in their Movements.

The reasonable expectation of privacy test, originally formulated in *Katz*, protects against government intrusion when an individual has an "actual

(subjective) expectation of privacy" and that expectation is "one that society is prepared to recognize as 'reasonable.'" 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also *Bond v. United States*, 529 U.S. 334, 338 (2000).

The *Jones* majority opinion did not resolve the issue of whether the use of GPS to track Jones' movements over 28 days was a "search" under the Fourth Amendment's reasonable expectation of privacy test. *Id.* at 953. A majority of the justices, though, joined concurring opinions by Justice Alito and Justice Sotomayor, explaining that under *Katz's* "reasonable expectation of privacy" test, GPS monitoring constitutes a Fourth Amendment "search" because "longer term GPS monitoring . . . impinges on expectations of privacy." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in judgment); *id.* at 955 (Sotomayor, J., concurring).

Both concurrences explained that the nature and amount of data collected by GPS surveillance were incompatible with society's expectations of privacy. *Id.* at 956 (Sotomayor, J., concurring) ("I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that

enables the Government to ascertain . . . their political and religious beliefs, sexual habits, and so on."); *id.* at 964 (Alito, J., concurring) ("society's expectation has been that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period").

The D.C. Circuit, when it was earlier analyzing Jones's case under the *Katz* test, likewise agreed that long-term GPS monitoring is a Fourth Amendment search because it violates a reasonable expectation of privacy. *Maynard*, 615 F.3d at 563. Stressing that "prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have," the court concluded that the "expectation of privacy in his movements over the course of one month [was] reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation." *Id.* In the same vein, and as argued in more detail below, a person does not expect that their friends, family members or acquaintances are subject to such surveillance when they enter a vehicle with them.

Given the very private nature of the information that may be revealed by GPS monitoring, it is

especially important that there be appropriate judicial oversight to ensure that this new surveillance technology does not "alter the relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272 (7th Cir. 2011) (Flaum, J., concurring)).

GPS monitoring threatens to upset the traditional relationship between citizen and state by avoiding what has long been the "greatest protection[] of privacy": "practical" restraints such as cost or the difficulty of maintaining long-term, covert surveillance. *Jones*, 132 S. Ct. at 963 (Alito, J., concurring). "[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades 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)).

Moreover, the *Jones* concurrences declined to extend the Supreme Court's prior reasoning about

location tracking in *United States v. Knotts*, 460 U.S. 276 (1983) to the GPS technology at issue. Thirty years ago, the *Knotts* Court considered whether the use of a primitive radio tracking beeper to monitor a suspect on a single car trip violated his reasonable expectation of privacy and decided that it did not. *Knotts*, 460 U.S. at 277. The technology at issue required police to remain relatively close to the beeper in order to pick up the tracking signal. *Id.* at 277-78.

Although the government argued in *Jones* that, under *Knotts*, there can be no reasonable expectation of privacy on public roads, five Justices rejected that argument and the majority opinion declined to reach it. See *Jones* 132 S. Ct. at 952; *id.* at 954-56 (Sotomayor, J., concurring) (discussing *Knotts*); *id.* at 963 (Alito, J., concurring) (distinguishing *Knotts*). As both Justice Alito and Justice Sotomayor noted in their concurrences, GPS monitoring poses a particularly acute risk to liberty precisely because its automated and surreptitious nature allows it to evade the traditional practical constraints on abusive law enforcement practices. See *id.* at 963 (Alito, J., concurring); *id.* at 956 (Sotomayor, J., concurring).



GPS monitoring is a remote and automated process that requires no active effort on the part of police officers to maintain tracking of a target for an extended period of time, unlike a beeper that requires a nearby police presence to monitor the beeps.

The *Maynard* court also recognized that *Knotts* could not apply to GPS surveillance, emphasizing that the *Knotts* holding was "not that such a person [one on public roads] has no reasonable expectation of privacy in his movements whatsoever, world without end." 615 F.3d at 557. The key inquiry for whether or not information is exposed to the public is not whether another person can possibly discover the information, but whether the defendant reasonably expects that another person might actually discover the information. *Id.* at 559. While portions of any person's daily travels are often exposed to some people, systematic surveillance has an entirely different character.

Both before and after *Jones*, other courts looking at GPS surveillance under the *Katz* expectation of privacy test have determined that GPS surveillance is

a "search" under the Fourth Amendment.<sup>1</sup> See *State v. Zahn*, 2012 S.D. 19, 812 N.W.2d 490, 496 (S.D. 2012) (use of GPS to track a car for 26 days was a "search" under *Katz*); *United States v. Lopez*, --- F.Supp.2d --- -, 2012 WL 3930317, \*7 (D. Del.) (defendant had "reasonable expectation that the vehicles he was using would not be tracked by electronic surveillance" for 17 days).<sup>2</sup> Since the GPS surveillance here lasted for

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<sup>1</sup> In addition, a number of state courts have found GPS surveillance to be a "search" under their state constitutions. See *Weaver*, 12 N.Y.3d at 882; *State v. Campbell*, 306 Or. 157, 759 P.2d 1040 (1988); *State v. Jackson*, 150 Wash.2d 251, 76 P.3d 217 (2003).

<sup>2</sup> Prior to the Supreme Court's decision in *Jones*, courts had also reached the opposite result, finding the use of GPS technology to track a person did not violate *Katz*'s "reasonable expectation of privacy" test. See, e.g., *Cuevas-Perez*, 640 F.3d at 272; *United States v. Pineda-Moreno*, 591 F.3d 1212, 1226 (9th Cir. 2010), vacated, 132 S. Ct. 1533 (2012). As the *Maynard* court explained, those Circuit Court opinions applying *Knotts* to GPS tracking were based either on a concession that *Knotts* controlled or on a misreading of the question reserved by *Knotts*. See *Maynard*, 615 F.3d at 557-58 (explaining that *Knotts* reserved the question of the constitutionality of long-term surveillance of an individual). Since *Jones*, many courts have applied its trespass holding with varying results because the exclusionary rule does not apply when police "conduct a search in objectively reasonable reliance on binding appellate precedent." *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011). As a result, post-*Jones* decisions have primarily hinged on whether "binding appellate precedent" existed at the time permitting the officer to install the GPS device. Compare *United States v. Ortiz*, --- F. Supp. 2d ---, 2012 WL 2951391, \*25 (E.D. Pa. July 20, 2012) (good faith exception did not apply and

30 days - longer than the surveillance in *Jones*, *Zahn*, and *Lopez* - this Court should find it triggers a reasonable expectation of privacy. In turn, individuals surveilled for this long a period of time have every right to question the validity of the warrant authorizing that search.

2. There Is No Substantive Difference Between a Driver and Passenger under the *Katz* Test.

This Court has noted a passenger's expectation of privacy can be at least as legitimate as that of a vehicle owner. *Commonwealth v. Podgurski*, 386 Mass. 385, 392, 436 N.E.2d 150 (1982) (noting that the ownership factor has "minimal significance" for a passenger's expectation of privacy). It has long been the law in Massachusetts that a passenger of a vehicle is not "deprive[d] . . . of standing to object to a search where, but for [the passenger's] lack of a property interest in the vehicle, [the passenger's] situation is otherwise identical to that of the owner,

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suppressing GPS evidence) *with United States v. Rosas-Illescas*, 872 F. Supp. 2d 1320, 1326 (N.D. Ala. 2012) (denying suppression because of good faith exception). But to the extent courts have looked at the issue under the "reasonable expectation of privacy test," many have found pervasive GPS surveillance to be a "search" under *Katz*. See *Zahn*, 812 N.W.2d at 496; *Lopez*, 2012 WL 3930317, at \*7.

who has the requisite standing." *Mubdi*, 456 Mass. at 394-95 (internal quotation marks omitted) (citing *Commonwealth v. King*, 389 Mass. 233, 240, 449 N.E.2d 1217 (1983)) (quoting *Podgurski*, 386 Mass. at 392). In *Podgurski*, this Court rejected the argument that a non-owner occupant of a vehicle lacked standing where the "distinction . . . between the two defendants turn[s] solely on [the] lack of an ownership or possessory interest." 386 Mass. at 391.

When a passenger rides in a surveilled vehicle, the only difference between their situation and the vehicle owner's situation is the lack of possessory interest in the vehicle. Both the passenger and the driver are tracked by the same GPS device, which discloses both of their locations and evidence about their common activities. The privacy of a passenger is compromised as deeply as that of the vehicle owner when authorities observe that the vehicle stops at the passenger's house and then at a by-the-hour hotel, for example. Because the evidence collected by the GPS surveillance discloses information about both the driver and the passenger, they are in the same situation in all ways but one: the possessory interest in the vehicle. This is not enough under *Podgurski* to

deprive the passenger of standing to challenge the search.

While addressing an analogous situation, the Supreme Court has explained a "homeowner takes the risk that his guest will cooperate with the Government but not the risk that a trustworthy friend has been bugged by the Government without his knowledge or consent." *United States v. Karo*, 468 U.S. 705, 716 n.4 (1984). The *Karo* Court was very concerned with the erosion of Fourth Amendment rights that would occur if such a homeowner were to lose his reasonable expectation of privacy merely because he welcomed a guest inside. *Id.* Similarly, this Court should not hold that passengers lose their reasonable expectation of privacy in their movements merely because they entered someone else's car.

It would be absurd - and against the spirit of *Katz* - to make a person's expectation of privacy hinge on property based possessory interests. The Supreme Court "has emphatically rejected the notion that concepts of property law should determine one's ability to claim Fourth Amendment protection." *Podgurski*, 386 Mass. at 391 (1982) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980), *United States v.*

*Salvucci*, 448 U.S. 83, 91-91 (1980) and *Rakas*, 439 U.S. at 143).<sup>3</sup> But denying standing to passengers makes the reasonable expectation of privacy test hinge solely on property rights. Under such a regime, a passenger could reclaim their right to privacy by taking a turn at the wheel and assuming the obligations of a bailee, but would have no right to privacy without doing so. A person's privacy rights should not turn on such a trivial fact.

Privacy for passengers is particularly important because it implicates associational rights between members of the community, and because a passenger may have their movements tracked without being suspected of any crime when they unwittingly enter a surveilled vehicle.

Denying standing to passengers would undermine the courts' ability to protect individual and

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<sup>3</sup> Of course, the majority opinion in *Jones* makes clear property rights still have some role to play in the Fourth Amendment. *Jones*, 132 S. Ct. at 952 (the "reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.") (emphasis in original). What *Podgurski* and the Supreme Court cases it cites emphasizes is that a person's reasonable expectation of privacy does not depend on an interference with their possessory interest in their property since *Katz* makes clear the "the Fourth Amendment protects people, not places." 389 U.S. at 360.

associational privacy. Given the particularly acute risks that GPS surveillance poses and its already strong insulation from the practical pressures that have historically curtailed abusive police practices, courts must vigilantly guard against invasions of privacy that threaten the fundamental privacy rights necessary to a democratic society.

**B. A Lack of Possessory Interest in the Car Is Not Enough By Itself to Defeat Standing Under the Trespass Theory of the Fourth Amendment.**

Similarly, a person's lack of ownership or possessory interest in the car does not defeat his standing to challenge the installation of a GPS device under the trespass theory of the Fourth Amendment either.

In *Jones*, the Supreme Court ruled that the physical attachment of a GPS tracking device to a car was a "search" under the Fourth Amendment because it was a trespass done for the purpose of obtaining information. 132 S. Ct. at 949.

The majority opinion in *Jones* provides an avenue to establish standing based on violation of a possessory interest. 132 S. Ct. at 950-51. But the converse is not true: there is no automatic denial of

standing resulting from a lack of possessory interest. In *Jones* itself, the Supreme Court found a Fourth Amendment violation despite the fact the car was actually registered to Jones' wife. *Id.* at 948.

In *Lopez* the district court rejected the government's arguments that the defendant did not have standing to challenge GPS surveillance because he was not the registered owner of some of the surveilled cars. 2012 WL 3930317, at \*5. Instead, consistent with *Jones*, the court in *Lopez* ruled that a non-owner defendant has standing to raise a "property-based" claim when he is either the "exclusive driver" of the car and assumes the property rights of a bailee, or when "they are using or occupying the vehicle 'at the time the government trespassorily insert[s] the information-gathering device.'" *Lopez*, 2012 WL 3930317, at \*6 (quoting *Jones*, 132 S. Ct. at 953). In these instances, a non-owner has as much of a right as the car's owner "to exclude it from 'all the world.'" *Commonwealth v. Connolly*, 454 Mass. 808, 823, 913 N.E.2d 356 (2009) (quoting *Karo*, 465 U.S. at 729 (Stevens, J., dissenting)).

As a result, the physical installation of a GPS device on a car can result in a continued impairment



of a non-owner's possessory interest in the car while he is using it. As this Court explained in *Connolly*, "[i]t is a seizure not by virtue of the technology employed, but because the police use private property (the vehicle) to obtain information for their own purposes." 454 Mass. at 823. Ultimately, a court cannot automatically reject a non-owner's standing to challenge GPS surveillance solely on the basis of his lack of possessory interest in the car. Indeed, a passenger has standing by virtue of occupying a vehicle in which the government has trespassed against ownership rights to gather information.

**II. FOR THE SAME CONCERNS JUSTIFYING AUTOMATIC STANDING IN POSSESSION CASES, A PASSENGER ALSO HAS AUTOMATIC STANDING UNDER ARTICLE 14 TO CHALLENGE GPS TRACKING.**

Under Article 14 of the Massachusetts Declaration of Rights, defendants charged with crimes of possession are granted automatic standing. *Mubdi*, 456 Mass. at 392; *Frazier*, 410 Mass. at 241-42; *Commonwealth v. Amendola*, 406 Mass. 592, 600-01, 550 N.E.2d 121 (1990). While federal courts have abandoned this rule, it persists in Massachusetts as required by Article 14 of the Massachusetts Declaration of Rights. *Amendola*, 406 Mass. at 600-01 ("the automatic standing

rule survives in Massachusetts as a matter of State constitutional law").

This rule remains valid at least in part because of two principal concerns that urge automatic standing where the defendant is charged with possession of contraband found in a vehicle - concerns that apply with equal force in the context of location tracking. First, this Court has noted the inconsistency inherent in a prosecutor's argument that a defendant "possessed" certain contraband, when that contraband was found by searching a place that the prosecutor argues is not sufficiently connected with the defendant in order for them to have standing to challenge the search. *Frazier*, 410 Mass. at 242 (citing *Amendola*, 406 Mass. at 600). Second, the Court was concerned that without automatic standing, defendants will be deterred from asserting their rights against unreasonable search and seizure, as their testimony to show standing could impeach any later testimony they present in their defense that they were not in possession of the contraband. *Id.*

These two primary concerns apply with equal force to using location evidence collected by a GPS device against the passenger of a vehicle. First, the

Commonwealth must argue that the location evidence collected by the GPS can be imputed to the defendant's location, while at the same time also arguing that the defendant lacks standing to object to the evidence because the defendant is not sufficiently associated with the vehicle. Second, defendants will be deterred from exercising their rights under Article 14, since arguing that they are tied closely enough to the vehicle to have standing to object to the evidence may impeach any further testimony that they were not associated with the vehicle and not present where the GPS data indicates the vehicle was present.

Evidence that shows a defendant's location always potentially implicates their rights against unreasonable search and seizure, particularly when the evidence was gathered by tracking a vehicle the defendant does not own. A defendant, therefore, should enjoy automatic standing to challenge the collection and use of such data.

#### **CONCLUSION**

Considering the breadth of personal information that GPS monitoring reveals about individuals and their associates in the community, as well as the fact that many of the traditional and practical constraints

on government surveillance do not apply as GPS surveillance becomes cheaper and easier, this Court should take care to carefully scrutinize and limit police use of this intrusive technology.

There is no constitutional difference between a driver and a passenger in a car that gives one the right to challenge the government's long term collection of their location history, but not the other. A passenger has a reasonable expectation of privacy in their movements and GPS monitoring of their location is a "search" under the Fourth Amendment and Article 14. As a result, a passenger has legal standing to challenge GPS surveillance.

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

BY ITS COUNSEL<sup>4</sup>

DATED: January 22, 2013



Kit Walsh (BBO#673509)  
Clinical Instructional Fellow  
Cyberlaw Clinic  
Berkman Center for Internet and Society  
Harvard Law School  
23 Everett Street, 2nd Floor  
Cambridge, MA 02138  
Tel: (617) 495-7547 / Fax: (617) 495-7641  
Email: cwalsh@cyber.law.harvard.edu

Of Counsel:

Hanni M. Fakhoury  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110  
Tel: (415) 436-9333 / Fax: (415) 436-9993  
Email: hanni@eff.org

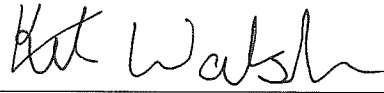
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<sup>4</sup> Amicus thanks Harvard Law School Cyberlaw Clinic students James Ren and Matt McCullough for their valuable contributions to this brief.

CERTIFICATE OF COMPLIANCE

I, Kit Walsh, hereby certify pursuant to Mass. R. App. P. 16(k) that the instant brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16(a)(6), (b), (e), (f), and (h), 18, and 20.

Dated: January 22, 2013

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CERTIFICATE OF SERVICE

I, Kit Walsh, hereby certify that on January 22, 2013, I caused two true and correct copies of the above document to be served on counsel of record for each other party by mailing the document by first-class mail, postage pre-paid, to the following:

Brandon L. Campbell  
262 Essex Street  
Salem, MA 01970

Eileen M. O'Brien  
Assistant Attorney General  
One Ashburton Place  
Boston, MA 02108

Dated: January 22, 2013

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