No. 10-1259

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

ANTOINE JONES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, INSTITUTE ON THE CONSTITUTION, RESTORING LIBERTY ACTION COMMITTEE, U.S. JUSTICE FOUNDATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., DOWNSIZEDC.ORG, DOWNSIZE DC FOUNDATION, AND LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici*, Gun Owners of America, Inc., Gun Owners Foundation, Institute on the Constitution, Restoring Liberty Action Committee, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., DownsizeDC.org, and Downsize DC Foundation, the Lincoln Institute are educational organizations interested in the proper interpretation of the U.S. Constitution, most of whom have filed numerous *amicus curiae* briefs in prior litigation, including cases in this Court.

SUMMARY OF ARGUMENT

The Government's petition should be granted, but not for the reasons stated therein. Instead, the petition should be granted to resolve a split among the circuits on the Fourth Amendment's relevance and application to covert installations of global positioning systems ("GPS") on an American citizen's automobile by restoring the Fourth Amendment to its original text and purpose. The conflict among the circuits over the constitutionality of the installation of GPS is a product of this Court's rejection of a property-based Fourth Amendment jurisprudence — embraced initially by a

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

unanimous Court in Boyd v. United States, 116 U.S. 616 (1886), and adhered to for over 80 years — substituting therefor a new rationale based upon an emerging right of privacy by a vote of only five justices in Warden v. Hayden, 387 U.S. 294 (1967).

Relying on the Hayden rationale — that the Government may search and seize any person, place or thing if there is no reasonable expectation of privacy — the Government contends that the installation of a GPS on an automobile to gather information of the vehicle's movement on a public road was not even governed by the Fourth Amendment. Under the Boyd rule, the GPS installation would have been barred by the "mere evidence" rule, the Government having no property interest in the GPS data sought, namely, the automobile's movements. By rejecting the "mere evidence" rule in favor of a "privacy" rationale, Hayden (i) disregards the textual meaning of the Fourth Amendment's absolute prohibition against "unreasonable searches and seizures" that violated a person's common law property rights; (ii) undermines the Fourth Amendment's warrant requirement, having opened the door to general searches without probable cause, such as GPS monitoring; and (iii) weakens the Fifth Amendment's privilege against self-incrimination. Moreover, the Hayden approach to the Fourth Amendment invites open-ended judicial balancing of law enforcement interests against individual liberty in derogation of the sovereignty of the people.

ARGUMENT

I. THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS BY RESTORING THE FOURTH AMENDMENT TO ITS ORIGINAL TEXT AND PURPOSE.

These *amici curiae* file this brief in support of the Government's Petition for a Writ of Certiorari, but reject the Government's position that the covert installation of a global positioning system ("GPS") on an American citizen's automobile is not subject to the Fourth Amendment. These *amici* believe that the Government's position is erroneous, but not because such installation in this case violated defendant's "reasonable expectation of privacy," as held by the Circuit Court of Appeals below.

Rather, the petition should be granted because this and other recent cases involving GPS tracking devices demonstrate the complete inadequacy of current Fourth Amendment precedent to protect the inviolate "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Although there exists a significant conflict among the circuits regarding these GPS tracking devices which must be resolved, none of the circuits have based their opinion on a textual analysis of the Fourth Amendment, relying instead on Supreme Court decisions which have diverged from the constitutional text for over 40 years. As such, this case presents to this Court a historic opportunity to

reconsider the rationale for its current Fourth Amendment jurisprudence based upon reasonable privacy expectations, and to restore its earlier Fourth Amendment jurisprudence based upon protecting both the sanctity of private property and the civil sovereignty of the people. *Compare* Warden v. Hayden, 387 U.S. 294 (1967) and Katz v. United States, 389 U.S. 347 (1967) *with* Boyd v. United States, 116 U.S. 616 (1886) and Gouled v. United States, 255 U.S. 298 (1921).

The Government's petition for certiorari is based upon what it views to be "confusing or inconsistent case law with respect to GPS tracking or other means of acquiring or aggregating data not normally thought of as a search [that] will hamper important law enforcement interests." Petition for Certiorari ("Pet."), p. 27. However, the Government seeks to further erode the Fourth Amendment. Relying on the premise that the Fourth Amendment protects only "reasonable expectation[s] of privacy," the Government hopes to convince this Court that, unless it is granted immunity from Fourth Amendment constraints upon the use of GPS monitoring, its ability to investigate crimes will be seriously impaired. *See* Pet., pp. 24-25. By parading a litany of law enforcement needs,[2] the

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[2] According to the Government, the rule laid down by the Court of Appeals below would: (a) "**stifle** the ability of law enforcement agents to follow leads at the beginning stages of an investigation"; (b) "**provide no guidance** to law enforcement officers about when a warrant is required before placing a GPS device on a vehicle"; and (c) "**call into question** the legality of various investigative techniques used to gather public information." Pet., p. 24 (emphasis added). Furthermore, the Government complains

Government seeks to shed any principled constraint imposed on it by the Fourth Amendment — hoping to lay the groundwork to persuade judges in future cases that a defendant's individual expectation of privacy is unreasonable when balanced against the interest of society to be protected against drug "traffick[ers], terrorist[s], and other crim[inals]." *See* Pet. p. 24.

This Court recently held in District of Columbia v. Heller, 554 U.S. 570 (2008) that "a constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.*, 554 U.S. at 634. But the Fourth Amendment's "reasonable expectation of privacy" test increasingly invites just such a judicial "freestanding 'interest-balancing' approach,"[3] as the litigation herein demonstrates. *Compare* Circuit Judge Ginsburg's analysis of the privacy issue (App. 26a-39a) *with* the analyses of Chief Judge Sentelle (App. 45a-49a), Circuit Judge Kavanaugh (App. 45a-52a), and District Court Judge Huvelle (App. 83a-85a).

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that to require "a warrant before placing a GPS device on a vehicle used for a 'prolonged' time period, has created **uncertainty** surrounding the use of an **important** law enforcement tool." *Id.* (emphasis added). Finally, the Government argues that "the court of appeals' legal theory that the aggregation of public information constitutes a Fourth Amendment search, even when short periods of surveillance would not, has the potential to **destabilize** Fourth Amendment law and to raise questions about a variety of **common law enforcement practices**." Pet., p. 25 (emphasis added).

[3] *See* Heller, 554 U.S. at 634.

To be sure, the Fourth Amendment prohibition is directed at "unreasonable" searches and seizures, but the meaning of "unreasonable" is contextual and unique — different from the meaning of that word as applied by juries to contending parties in tort cases, or by judges in suits for an injunction, where competing interests may be properly balanced *ad hoc*. Rather, the Fourth Amendment's meaning of "unreasonable" was designed as an objective, fixed rule to govern the relationship between the Government and its citizens — a direct product of specific historic events involving the abusive exercise of government power against the liberty and property of individual citizens. *See, e.g.,* Warden v. Hayden, 387 U.S. 294, 313-21 (1967) (Douglas, J., dissenting). As the Heller Court has reminded us, "[t]he very enumeration of the right takes out of the hands of Government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." Heller, 554 U.S. at 634. In short, there is no judicial balancing to be done — as the Fourth Amendment, like the Second and the First, "is the very product of an interest-balancing by the people." *See id.*

Even though the Court of Appeals below reached the right result — exclusion of the data produced by the Government-installed GPS system — it did not do so for the right reason. Instead, it issued a ruling based upon a subjective judicial assessment of the reasonable expectation of privacy of the Respondent in this case, thereby creating yet another Fourth Amendment conflict among the circuits, such a conflict can only be definitively resolved by a return to the

original text and purpose of the Fourth Amendment, as demonstrated *infra*.

II. THE ORIGINAL OBJECTIVE, PROPERTY-BASED TEXT AND PURPOSE OF THE FOURTH AMENDMENT SHOULD BE REVIVED AND APPLIED.

In Heller, this Court found that "[t]he first salient feature of the operative clause [of the Second Amendment] is that it codifies a 'right of the people.'" *Id.*, 554 U.S. at 579. And as the Heller Court further observed, this "right of the people" is a term of art, referring to "all members of the **political community**." *Id.* 554 U.S. at 580 (emphasis added). As a right of the people in their **political capacity**, the Court concluded that the Second Amendment was calculated to preserve the right of self-defense so that the people would not be dependent solely upon the Government to protect their lives, their liberties and their property. Indeed, the right was secured so that the people would not be defenseless if their Government became tyrannical. *See id.*, 554 U.S. at 591-600.

Like the Second and First Amendments, the Fourth Amendment secures a "right of the people." *Id.*, 554 U.S. at 579. This right was specifically designed to secure the people from "unwarrantable intrusion[s] of executive agents of [the Government] into the houses and among the private papers of individuals, **in order to obtain evidence** of political offences either committed or designed." T. Cooley, A Treatise on Constitutional Limitations, p. 366 (5th ed., Little,

Brown: 1883) (emphasis added). The Amendment **also** was designed to stop the exercise of "prerogative at the expense of liberty," by means of "roving commission[s]" or "general warrants" threatening "the person and property of every man." *Id.*, at 366, n.1. Thus, the Fourth Amendment reads not only that "the people ... be secure in their persons, houses, papers and effects against unreasonable searches and seizures," but that "no warrants shall issue but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

A. Two Rights, Not One.

The plain text of the Fourth Amendment protects two distinct rights:

> (i) the right of the people to be secure in their persons, houses, papers, and effects, from **unreasonable** searches and seizures; and
>
> (ii) the right not to be subject to a **general search** or seizure, but only to one particularly describing the place, person, or thing to be searched and seized.

Such would not have been the case under the initial proposal submitted by James Madison of Virginia in the House of Representatives. That precursor of the Fourth Amendment protected only the second right, not the first. It read:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all

> unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized. [*See* Sources of Our Liberties, p. 423 (R. Perry & J. Cooper, eds., ABA Found.: 1978.]

But Madison's was a "one-barrelled [proposal] directed apparently only to the essentials of a valid warrant."[4] His proposed text was later amended so as to "contain *two* clauses"[5]:

> The right of the people to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures **shall not be violated, and no warrants shall issue** , but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. [Emphasis added.]

By separating the two clauses:

> The general right of security from unreasonable search and seizure was

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[4] N.B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, p. 103 (Johns Hopkins Press: 1937).

[5] *Id.*

> given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment. [*Id.*]

B. The Property Right Is Primary.

In the seminal case of Boyd v. United States, 116 U.S. 616 (1886), a statute authorized a court, on motion of the prosecuting attorney, to issue a subpoena requiring a defendant to produce books, invoices, and papers in a forfeiture proceeding against goods that had been allegedly imported without payment of the requisite duties. In opposition to this subpoena, Boyd interposed the Fourth Amendment. According to the Court, the threshold question was whether "a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws [is] an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution." *Id.* at 622. In response, the Court stated:

> The **search for and seizure of stolen or forfeited goods** or goods liable to duties and concealed to avoid payment thereof are **totally different things from a search for and seizure** of a

> man's private **books and papers for the purpose of obtaining information therein contained or of using them as evidence against** him. The **two things differ toto coelo**. In the **one case, the Government is entitled to the possession of the property; in the other it is not**. [*Id.* at 623 (emphasis added.]

The Boyd Court instructed that the Fourth Amendment's first freedom — from unreasonable searches and seizures — protected one's property from a Government search and seizure unless the Government demonstrated a **superior property right** to the thing to be seized, no matter how particularized the search and seizure, or how well supported by probable cause, even if authorized by a disinterested magistrate. *See id.* at 623-29. *See also* Hayden, 387 U.S. at 318-19 (Douglas, J., dissenting). In conclusion, the Boyd Court stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.... [T]hey apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his **indefeasible right of personal security, personal liberty, and private property**, where

> that right has never been forfeited by his conviction of some public offense. [*Id.* at 630 (emphasis added).]

C. The Warrant Requirement Is Secondary.

The Boyd decision spawned what later became known as the "mere evidence" rule, namely, that search warrants may be:

> resorted to **only** when a **primary right** to search and seizure may be found in the interest which the public or the complainant may have **in the property to be seized**, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. [Gouled v. United States, 255 U.S. 298, 309 (1921) (emphasis added).]

Thus, Gouled, in turn, brought the Boyd "doctrine" into its "full flowering ... where an opinion was written by Justice Clarke for a unanimous Court that included both Justice Holmes and Justice Brandeis"[6]:

> The prosecution was for defrauding the Government under procurement contracts. Documents were taken from the defendant's business under a search

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[6] Hayden, 387 U.S. at 319 (Douglas, J. dissenting).

warrant and used at the trial as evidence against him. **Stolen or forged papers could be so seized....; so could lottery tickets; so could contraband; so could property in which the public had an interest....** **But** the papers or documents fell in none of those categories and the Court held that even though they had been taken under a warrant, they were inadmissible at trial as **not even a warrant, though otherwise proper and regular, could be used 'for the purpose of making search to secure evidence'** of a crime. [*Id.*, 387 U.S. at 319 (Douglas, J., dissenting) (emphasis added).]

III. THE CURRENT AD HOC, SUBJECTIVE, PRIVACY-BASED VIEW OF THE FOURTH AMENDMENT SHOULD BE REJECTED.

A. Privacy Interest Substituted for Property Rights.

Forty-six years after Gouled, however, this Court abandoned its well-established Fourth Amendment jurisprudence based upon "property rights" in favor of one rooted in an emerging right of "privacy." *See* Warden v. Hayden, 387 U.S. 294 (1967). Claiming dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts," Justice William J. Brennan — writing for a bare majority of five justices — jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable."

Id. at 295-97. Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits [of crime] and contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the Government to demonstrate that it has a "superior property interest"[7] in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from "irrational,"[8] "discredited,"[9] and "confus[ing]"[10] decisions of the past, and thereby would provide for a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property." *Id.* at 304.

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Earl Warren) stated that he could "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the warrant requirement,"[11] Justice Fortas sought to avoid what he

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[7] *Id.* at 303-04.

[8] *Id.* at 302.

[9] *Id.* at 306.

[10] *Id.* at 309.

[11] *Id.* at 312 (Fortas, J., concurring).

called "an **enormous and dangerous hole** in the Fourth Amendment"[12]:

> [O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "**writs of assistance**," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in **gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* at 312 (Fortas, J., concurring) (emphasis added).]

B. The Fourth Amendment Property Principle Erased.

Had the Hayden Court not thrown out the "mere evidence" rule, there would be no doubt that no warrant could lawfully have been issued to "covertly install and monitor a global positioning system (GPS) tracking device on Respondent's Jeep Grand

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[12] *Id.* (Fortas, J., concurring) (emphasis added).

Cherokee."[13] According to the Government, the sole purpose of such an installation was to gather evidence of the movement of the vehicle. *Id.*, Pet., pp. 3-5. Indeed, by introducing the data obtained by means of such a device, the Government was, in effect, forcibly collecting information about Respondent's movements for the sole purpose of using such data as evidence against him. Although some of the movements of the Respondent's jeep over a month-long surveillance period may have been seen by third parties, including Government investigating agents, the very purpose of the GPS tracking system was to chronicle only that which the Respondent himself would know — all of the Jeep's movements over that same period. By extracting that information by the GPS device, the Government, in purpose, and in effect, was **compelling the defendant to testify against himself.**

In Boyd, the Court "noticed the intimate relation between" the Fourth Amendment and the prohibition against compelled self-incrimination in the Fifth:

> For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of **compelling a man to give evidence against himself.** [Boyd, 116 U.S. at 633 (emphasis added).]

Thus, the Boyd Court's "mere evidence" rule

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[13] *See* Pet., p. 3.

protected the right against self-incrimination because, under that rule, search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding." Gouled, 255 U.S. at 309.

In explaining the property principle undergirding the first freedom, as protected by the Fourth Amendment, the Boyd Court warned that, although the evidence seized in that case complied with the warrant requirement:

> **[I]llegitimate and unconstitutional practices** get their first footing ... by **silent approaches and slight deviations** from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to a gradual depreciation of the right.... It is the **duty of courts to be watchful** for the constitutional rights of the citizen, and **against any stealthy encroachments** thereon. Their motto should be **obsta principiis**. [*Id.*, 116 U.S. at 635 (emphasis added).]

Ignoring this Court's admonition, Justice Brennan frankly admitted that, by erasing the property protection from the Fourth Amendment, his newly-

minted privacy-based Hayden rule "**does enlarge the area of permissible searches.**" Hayden, 387 U.S. at 309 (emphasis added). He apparently assumed that the newly-permitted intrusions for "mere evidence" would be checked by the warrant, probable cause, and magistrate requirements of the Amendment's second phrase. *See id.* However, as the instant case dramatically illustrates, Justice Brennan's Fourth Amendment revolution has actually undermined the warrant, probable cause, and magistrate requirements of the Amendment.

C. The Warrant Requirement Undermined.

Having abandoned the "mere evidence" rule for the "reasonable expectation of privacy" guideline, the Hayden Court opened the door not only to a search warrant authorizing the installation of a GPS device, but to the implantation of such a device **without a search warrant** on the theory that there is **no expectation of privacy** as to a person's movements on a public highway.[14] *See* Pet., p. 10. Under this view, if there were no such privacy expectation, then the Fourth Amendment would cease to apply altogether, the Government having no need for probable cause or even reasonable suspicion to place a

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[14] If the Government has the right to place a GPS device on a citizen's automobile to gather movement data because no citizen has any reasonable expectation of privacy, why should not a citizen have a reciprocal right to place a GPS on a government official's car? Surely the government official has no different expectation of privacy. No doubt, however, if any citizen were to be so bold, the Government would be quick to indict him, *inter alia*, for trespassing on government property.

tracking device on any automobile.

Just as Justice Fortas forecast, Justice Brennan's privacy rationale has undermined the "Fourth Amendment's prohibition against general searches." *See* Warden v. Hayden, at 312 (Fortas, J., concurring). In its Petition, the Government has: (a) informed this Court that "federal law enforcement agencies frequently use tracking devices **early** in investigations before suspicions have ripened into probable cause;" (b) argued that applying the Fourth Amendment would "prevent[] law enforcement officials from using GPS devices in an effort to **gather information** to *establish* probable cause;" and (c) asserted that, as a consequence, "the government's ability to investigate **leads and tips,**" will be "seriously impede[d]." Pet., p. 24 (italics original, bold added). In short, the Government demands this Court sanction its unbridled discretion to search suspected driving activities, seizing data as to the movement of vehicles on the public highways, in order to gather enough information to establish probable cause to institute criminal proceedings. The GPS technology, then, serves the Government in the same way as the discredited general warrant — legitimizing intrusions upon property without first having to demonstrate before a judicial magistrate that it has "probable cause." Indeed, if there is no reasonable expectation of privacy, as the Government has argued, then the warrant requirement would not even come into play, much less would the Government be required to have "probable cause," or even "reasonable suspicion" to

install a GPS on one's automobile.[15]

As the Boyd Court recalled, the Fourth Amendment's prohibition against "unreasonable searches and seizures" was the direct product of the government practice "of issuing **writs of assistance** to the revenue officers, empowering them, in their discretion, to search such suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, **the most destructive of English liberty and fundamental principles of law**, that ever was found in an English law book." Boyd, 116 U.S. at 625 (emphasis added). In his classic Treatise on Constitutional Limitations, renowned constitutional scholar, Thomas Cooley, ranked the Fourth Amendment guarantee of "citizen immunity in his home against the prying eyes of the Government, and protection in person, property, and papers against even the process of law" **next in importance to the constitutional ban on personal slavery.** T. Cooley, A Treatise on Constitutional Limitations, p. 365 (5th ed., Little, Brown: 1883) (emphasis added).

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[15] The Government has attempted to reassure the Court that it need not be concerned about its use of GPS without reasonable suspicion in this case, since it was not in this particular case part of a "**'dragnet'** surveillance ... conducted without any articulable suspicion" — the constitutionality of which law enforcement technique will need to be resolved in some future decision. *See* Pet., p. 15 (emphasis added).

But if an **individual driver** has no reasonable expectation of privacy while driving his automobile on a public road, why would **many drivers** cumulatively have such a privacy expectation?

While one's personal automobile has not yet achieved the exalted status of the home, the Fourth Amendment pronounces that "persons," "houses," "papers," and "effects" are equally secured from unreasonable searches and seizures. Each is a right of the people, and best protected by enduring, unchanging common law rules of private property, not by modern evolving chameleons invented by judges.

IV. THE FOURTH AMENDMENT PROTECTS NOT ONLY AGAINST THE SEIZURE OF DATA BY GPS DEVICES, BUT THE VERY USE OF SUCH DEVICES.

According to the laws of nature, "every Man has a property in his own person." J. Locke, The Second Treatise on Civil Government, Chap. V, sec., 27 (1690). For the Government to claim a right to stalk any person suspected to be engaged in criminal activity is tantamount to a claim that a concerned father might make to keep track of a young daughter simply to make sure that she behaves. In the American constitutional republic, founded by "We, the people," the Government's relationship with its citizens was never intended to be upended by this kind of state paternalism.

The Government attempts to excuse its covert GPS surveillance of respondent's automobile because "the GPS data introduced at trial related only to the movements of the Jeep on public roads." Pet., p. 5. But once installed, the GPS gathered data while the vehicle was on private property. *Id.* Under the privacy rationale of the Fourth Amendment, all of the

judges below agreed that the evidence gathered while the vehicle was on private property should be suppressed. They differed in opinion only on the question whether the evidence gathered while the vehicle was on public roads should be admitted. Yet, the intrusion on respondent's person was the same. The Government was surreptitiously tracking respondent's vehicular movements as if the Government has an inherent right to gather "immense amount[s] of information about a person's private life" — whether it be by "use of pen registers, repeated trash pulls, aggregation of financial data, [or] prolonged visual surveillance" — limited only by whatever technology and funds were at the Government's disposal in its absolute autonomous discretion. *See* Pet., pp. 24-26.

Unlike other nations in which the governing officials are Lords and Benefactors,[16] under the United States Constitution, the federal Government is the servant of a sovereign people. The Fourth Amendment, as originally designed and purposed, was to ensure that the Government honored that relationship, preserving the right of private property as the enduring barrier against a totalitarian State. As Professor Cooley so memorably wrote:

> The maxim that 'every man's house is his castle,'[17] is made a part of our

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[16] *See* Luke 22:25.

[17] This "maxim" may now be inoperative in Indiana where, last week, the State Supreme Court rejected the common law rule,

> constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen. [Cooley's Treatise at p. 365 (footnote added).]

And, the Amendment's express language stretches beyond one's home, to one's person, papers, and effects — including one's automobile — each of which is protected by the common law of private property. The prevailing Fourth Amendment jurisprudence based upon the malleable "reasonable expectation of privacy" is unworthy of this great liberty.

V. THE FOURTH AMENDMENT PROTECTS THE PEOPLE FROM TYRANNY.

These *amici curiae* represent organizations primarily concerned with First and Second Amendment matters. They are therefore aware of the history of the primary role that government searches and seizures have served in the enforcement of laws aimed at political dissenters. Indeed, it would be a "misread[ing] [of] history [to] relat[e] the Fourth Amendment primarily for searches for evidence to be used in criminal prosecutions." *See* Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J.,

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dating back to the 1215 Magna Carta, that a home owner has a right to resist an unlawful police entry on the ground that such a right is "against public policy and incompatible with modern Fourth Amendment jurisprudence." *See* Barnes v. Indiana, Sup. Ct. No. 82S05-1007-CR-343, 2011 Ind. LEXIS 353, p. 3.

dissenting). Rather, the Fourth Amendment was designed to protect the political and religious nonconformist from the use of general warrants to suppress the freedoms of religion and the press. *See id.*, 359 U.S. at 376-77 (Douglass, J., dissenting). Indeed, the general warrant was a primary tool employed by the Star Chamber not only in the area of trade and commerce, but in political and religious matters as well. *See* J. Scarboro & J. White, Constitutional Criminal Procedure, pp. 23-24 (Foundation Press:1977).

Even after the Star Chamber was abolished in 1648, the English crown attempted to suppress political dissent, utilizing the general warrant to confiscate whole libraries of authors of "seditious papers." Such practices endured well into the 18th Century when Lord Camden issued his opinion in Entick v. Carrington, 19 How. St. Trials 1030 (1765), establishing both the property principle and the warrant requirement of the Fourth Amendment, as articulated and embraced in Boyd. *See id.,* 116 U.S. at 625-30.

While this case involves a matter of quite a different genre, the Fourth Amendment jurisprudence applied here impacts upon the increasingly intrusive administrative enforcement of regulations governing various aspects of modern life, including, for example, air travel. Indeed, in the administrative state that the United States increasingly resembles, the Fourth Amendment's warrant and probable cause standards have already been weakened in such cases as Camara v. Municipal Court, 387 U.S. 523 (1967) (authorizing

warrants to be issued without probable cause to inspect homes by city housing inspectors) and United States v. Biswell, 406 U.S. 311 (1972) (upholding a firearms statute authorizing warrantless searches of Federal Firearms Licensees). Such diminutions in liberty are inevitable if Fourth Amendment rights are protected by a test that turns on current societal privacy expectations, rather than on historic and enduring rights of private property. As Justice Douglas so wisely observed: "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *See* Frank, 359 U.S. at 380 (Douglas, J., dissenting).

While even rules based on the right to private property are no guarantee of the people's liberty, this was the approach chosen by the founders as the best way that the people can protect themselves from a Government that it feared could someday seize the same type of tyrannical powers claimed by King George. The founders probably could not have anticipated how far we have fallen, with bureaucrats enforcing unnumbered incomprehensible regulations, physically patting down men, women and children before being allowed the privilege to travel, and even prying into how the people eat, drink, speak, and maintain their physical health. As the Government extends its dominion over historically sacrosanct areas of individual discretion, one's "reasonable expectation of privacy" correspondingly shrinks. Although all constitutional provisions should be understood by their text, and authorial intent, the modern method of determining its meaning from what people presumably now think or expect, renders clear terminology

meaningless and the Constitution powerless.

With an emasculated Fourth Amendment, why would the Government refrain from generalized stealth surveillance? Undeterred by this Court's rulings in cases like United States v. Knotts, 460 U.S. 276 (1983), the Government operates under no Fourth Amendment disincentive from using virtually any sophisticated surveillance device, yet undisclosed or unimagined. Such technology may be deployed — without a warrant — against anyone as long as it gathers at least some evidence where there is no "privacy expectation." As a result, only a slight fraction of one's waking hours may be afforded protection from these all-seeing eyes of Government. The judicial abandonment of the mere evidence rule fosters this movement toward warrantless surveillance. Such government surveillance is enough to make the most devoted Orwellian swell with pride. Most assuredly, however, it would have fomented an insurrection by America's founders.

CONCLUSION

The Hayden opinion does not advance the cause of liberty. Rather, its privacy expectation approach to the Fourth Amendment has created an inverse relationship between the growth of Government and the protections of that Amendment. Bluntly put, if Hayden is left standing, it encourages tyranny, not freedom. Only by embracing the foundational principles of private property enshrined in the Fourth Amendment will the people's liberties be restored.

For the reasons stated, this Court should grant the Government's petition for a writ of certiorari, and invite the parties to submit briefs and argument addressing the question whether Warden v. Hayden should be overruled, and the textually-faithful rules of Boyd and Gouled be restored.

Respectfully submitted,

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May 16, 2011