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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-1259, United States v.
5 Jones.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Mr. Chief Justice, and may it
10 please the Court:

11 Since this Court's decision in Katz v.
12 United States, the Court has recognized a basic
13 dichotomy under the Fourth Amendment. What a person
14 seeks to preserve as private in the enclave of his own
15 home or in a private letter or inside of his vehicle
16 when he is traveling is a subject of Fourth Amendment
17 protection. But what he reveals to the world, such as
18 his movements in a car on a public roadway, is not.

19 In Knotts v. United States, this Court
20 applied that principle to hold that visual and beeper
21 surveillance of a vehicle traveling on the public
22 roadways infringed no Fourth Amendment expectation of
23 privacy.

24 CHIEF JUSTICE ROBERTS: Knotts, though,
25 seems to me much more like traditional surveillance.

1 You're following the car, and the beeper just helps you
2 follow it from a -- from a slightly greater distance.
3 That was 30 years ago. The technology is very
4 different, and you get a lot more information from the
5 GPS surveillance than you do from following a beeper.

6 MR. DREEBEN: The technology is different,
7 Mr. Chief Justice, but a crucial fact in Knotts that
8 shows that this was not simply amplified visual
9 surveillance is that the officers actually feared
10 detection in Knotts as the car crossed from Minnesota to
11 Wisconsin. The driver began to do certain U-turns and,
12 the police broke off visual surveillance. They lost
13 track of the car for a full hour. They only were able
14 to discover it by having a beeper receiver in a
15 helicopter that detected the beeps from the radio
16 transmitter in the can of chloroform.

17 CHIEF JUSTICE ROBERTS: But that's a good
18 example of the change in technology. That's a lot of
19 work to follow the car. They've got to listen to the
20 beeper; when they lose it, they've got to call in the
21 helicopter. Here they just sit back in the station, and
22 they -- they push a button whenever they want to find
23 out where the car is. They look at data from a month
24 and find out everywhere it's been in the past month.
25 That -- that seems to me dramatically different.

1 MR. DREEBEN: But it doesn't expose
2 anything, Mr. Chief Justice, that isn't already exposed
3 to public view for anyone who wanted to watch, and that
4 was the crucial principle that the Court applied --

5 JUSTICE KENNEDY: Well, under that
6 rationale, could you put a beeper surreptitiously on the
7 man's overcoat or sport coat?

8 MR. DREEBEN: Probably not, Justice Kennedy;
9 and the reason is that this Court in *Karo v. United*
10 *States* -- *United States v. Karo* -- specifically
11 distinguished the possibility of following a car on a
12 public roadways from determining the location of an
13 object in a place where a person has a reasonable
14 expectation of privacy.

15 JUSTICE KENNEDY: Oh, no. This is a special
16 device. It measures only streets and public elevators
17 and public buildings.

18 MR. DREEBEN: In that event, Justice
19 Kennedy, there is a serious question about whether the
20 installation of such a device would implicate either a
21 search or a seizure. But if it did not, the public
22 movements of somebody do not implicate a seizure.

23 JUSTICE KENNEDY: Well -- and on that latter
24 point, you might just be aware that I have serious
25 reservations that there wasn't -- that there -- about

1 the way in which this beeper was installed. But you can
2 get to that at -- at your convenience.

3 JUSTICE SCALIA: Mr. Dreeben, I'd like to
4 get to it now.

5 (Laughter.)

6 MR. DREEBEN: Happy to, Your Honor.

7 JUSTICE SCALIA: I have to give a little
8 prologue to my question. When -- when wiretapping first
9 came before this Court, we held that it was not a
10 violation of the Fourth Amendment because the Fourth
11 Amendment says that the -- the people shall be secure in
12 their persons, houses, papers, and effects against
13 unreasonable searches and seizures. And wiretapping
14 just picked up conversations. That's not persons,
15 houses, papers, and effects.

16 Later on, we reversed ourselves, and, as you
17 mentioned, Katz established the new criterion, which is,
18 is there an invasion of privacy? Does -- are you
19 obtaining information that a person had a reasonable
20 expectation to be kept private? I think that was wrong.
21 I don't think that was the original meaning of the
22 Fourth Amendment. But, nonetheless, it's been around
23 for so long, we're not going to overrule that.

24 However, it is one thing to add that privacy
25 concept to the Fourth Amendment as it originally

1 existed, and it is quite something else to use that
2 concept to narrow the Fourth Amendment from what it
3 originally meant. And it seems to me that when that
4 device is installed against the will of the owner of the
5 car on the car, that is unquestionably a trespass and
6 thereby rendering the owner of the car not secure in his
7 effects -- the car is one of his effects -- against an
8 unreasonable search and seizure. It is attached to the
9 car against his will, and it is a search because what it
10 obtains is the location of that car from there forward.
11 Now, why -- why isn't that correct? Do you deny that
12 it's a trespass?

13 MR. DREEBEN: It may be a technical
14 trespass, but it was equally a technical trespass in the
15 United States v. Karo, when a can of ether was
16 transferred to somebody that had -- and it had a radio
17 transmitter --

18 JUSTICE KENNEDY: Well, but the owner of the
19 can at the time it was installed consented, and that is
20 not this case. There is no consent by the owner of the
21 property to which this device was affixed. In fact, it
22 was done, as Justice Scalia indicated, surreptitiously.

23 MR. DREEBEN: But there was no consent to
24 the owner of the can once he acquired it to have it
25 contain a foreign item installed by the government.

1 And --

2 JUSTICE SCALIA: Well, that's too bad. That
3 doesn't make it a trespass. I mean --

4 MR. DREEBEN: Well, this Court thought that
5 it --

6 JUSTICE SCALIA: It may be a sneaky thing to
7 do, but -- but every sneaky thing is not a trespass.

8 MR. DREEBEN: Well, this Court thought that
9 it was a technical trespass in Karo and said that made
10 no difference because the purpose of the Fourth
11 Amendment is to protect privacy interests and meaningful
12 interferences with possessory interests, not to cover
13 all technical trespasses. And the case that I --

14 JUSTICE SCALIA: So, we've narrowed the
15 Fourth Amendment?

16 MR. DREEBEN: Well, I think the Court --

17 JUSTICE SCALIA: So, the -- the privacy
18 rationale doesn't expand it but narrows it in some
19 respects.

20 MR. DREEBEN: It changes it, Justice Scalia.
21 And I think the case that most clearly illustrates the
22 distinction between trespass and Fourth Amendment
23 protection is Oliver v. United States, the case that
24 reaffirmed the open fields doctrine. In that case,
25 there was absolutely no doubt that the police committed

1 a trespass under local law. They entered, they crossed
2 fences, they ignored big "no trespassing" signs; and
3 this Court held that the interests that are protected by
4 trespass law are distinct from the interests protected
5 by the Fourth Amendment.

6 JUSTICE SCALIA: Undoubtedly, but the
7 rationale of that case was that it was not an
8 unreasonable --

9 MR. DREEBEN: No, the rationale was that --

10 JUSTICE SCALIA: -- it was not an
11 unreasonable search.

12 MR. DREEBEN: -- there was no search,
13 Justice Scalia. The rationale of that case was that
14 open fields are not among the things that are protected
15 by the Fourth Amendment. And the Court was very
16 specifically focused on the distinction between trespass
17 law and Fourth Amendment law.

18 CHIEF JUSTICE ROBERTS: You think there
19 would also not be a search if you put a GPS device on
20 all of our cars, monitored our movements for a month?
21 You think you're entitled to do that under your theory?

22 MR. DREEBEN: The Justices of this Court?

23 CHIEF JUSTICE ROBERTS: Yes.

24 (Laughter.)

25 MR. DREEBEN: Under our theory and under

1 this Court's cases, the Justices of this Court when
2 driving on public roadways have no greater expectation
3 of --

4 CHIEF JUSTICE ROBERTS: So, your answer is
5 yes, you could tomorrow decide that you put a GPS device
6 on every one of our cars, follow us for a month; no
7 problem under the Constitution?

8 MR. DREEBEN: Well, equally, Mr. Chief
9 Justice, if the FBI wanted to, it could put a team of
10 surveillance agents around the clock on any individual
11 and follow that individual's movements as they went
12 around on the public streets, and they would thereby
13 gather --

14 JUSTICE ALITO: Well, that seems to get --
15 to me to get to what's really involved here. The issue
16 of whether there's a technical trespass or not is
17 potentially a ground for deciding this particular case,
18 but it seems to me the heart of the problem that's
19 presented by this case and will be presented by other
20 cases involving new technology is that in the
21 pre-computer, pre-Internet age, much of the privacy -- I
22 would say most of the privacy -- that people enjoyed was
23 not the result of legal protections or constitutional
24 protections; it was the result simply of the difficulty
25 of traveling around and gathering up information.

1 But with computers, it's now so simple to
2 amass an enormous amount of information about people
3 that consists of things that could have been observed on
4 the streets, information that was made available to the
5 public. If -- if this case is decided on the ground
6 that there was a technical trespass, I don't have much
7 doubt that in the near future, it will be possible -- I
8 think it's possible now in many instances -- for law
9 enforcement to monitor people's movements on -- on
10 public streets without committing a technical trespass.

11 So, how do we deal with this? Do we just
12 say, well, nothing is changed, so that all the
13 information that people expose to the public is -- is
14 fair game? There's no -- there's no search or seizure
15 when that is -- when that is obtained because there
16 isn't a reasonable expectation of privacy, but isn't
17 there a real change in -- in this regard?

18 MR. DREEBEN: I don't think, Justice Alito,
19 that there's a particularly dramatic change in this case
20 from what went on in the Karo and the Knotts cases.

21 It is possible to envision broader advances
22 in technology that would allow more public information
23 to be amassed and put into computer systems. But I
24 think that the remedy for that -- if this Court agrees
25 with the principles in Knotts and Karo and applies them

1 to this case, the remedy is through legislation, just as
2 when the Court held that amassing pen register data, all
3 of the numbers that you dial on your telephone, the
4 lengths of the times of the calls. The Court was
5 confronted in that case with Justice Stewart's view in
6 dissent, that --

7 JUSTICE GINSBURG: There was a third party
8 involved in the telephone -- in the pen register case.
9 And, here, it's the police. Essentially, I think you
10 answered the question that the government's position
11 would mean that any of us could be monitored whenever we
12 leave our homes. So, the only thing secure is the home.
13 Is -- I mean, that is -- that is the end point of your
14 argument, that an electronic device, as long as it's not
15 used inside the house, is okay.

16 MR. DREEBEN: Well, we're talking here about
17 monitoring somebody's movements in public. We're not
18 talking about monitoring their conversations, their
19 telephone calls, the interior of their cars, their
20 private letters or packages. So, there are enclaves of
21 Fourth Amendment protection that this Court has
22 recognized.

23 JUSTICE BREYER: What -- what is the
24 question that I think people are driving at, at least as
25 I understand them and certainly share the concern, is

1 that if you win this case, then there is nothing to
2 prevent the police or the government from monitoring 24
3 hours a day the public movement of every citizen of the
4 United States. And -- and the difference between the
5 monitoring and what happened in the past is memories are
6 fallible; computers aren't.

7 And no one, or at least very rarely, sends
8 human beings to follow people 24 hours a day. That
9 occasionally happens. But with the machines, you can.
10 So, if you win, you suddenly produce what sounds like
11 1984 from their brief. I understand they have an
12 interest in perhaps dramatizing that, but -- but maybe
13 overly. But it still sounds like it.

14 And so, what protection is there, if any,
15 once we accept your view of the case, from this slight
16 futuristic scenario that's just been painted and is done
17 more so in their briefs?

18 MR. DREEBEN: Justice Breyer, first of all,
19 this is exactly the argument that was presented to the
20 Court in Knotts. If you go back to 1983, the beeper
21 technology in that case seemed extraordinarily advanced,
22 and there was a potential for it to be used. The
23 Respondent --

24 JUSTICE BREYER: Of course, that's true.
25 And they do have a limit. In this case, they say Knotts

1 involved a single journey, or let's say it involved four
2 journeys. And let's say it involved four journeys in
3 2 days. This involves every journey for a month. So,
4 they say whatever the line is that's going to protect
5 us, it's short of every journey in a month.

6 So, I'm not asking -- I'm saying I accept
7 your point there. And what do you say is the limit?

8 MR. DREEBEN: I first want to address the
9 suggestion that you could draw a line somewhere between
10 a month and a trip and have a workable standard for
11 police officers to use. Police officers use a variety
12 of investigative techniques which in the aggregate
13 produce an enormous amount of information. Pen
14 registers, trash pulls. They look at financial records.
15 They conduct visual surveillance. And under a principle
16 of law that says 1 trip is okay but 30 trips is not,
17 there is absolutely no guidance for law enforcement in
18 how they are --

19 JUSTICE BREYER: Well, there is the same
20 kind of guidance that you have in any case of this Court
21 that uses the technique which is used sometimes, and I
22 think it's used for example in the bribing the judge
23 case, you know, with campaign contributions. You draw
24 an outer limit, you say you can't go beyond that. We
25 know within that, there is no standard. We'll leave it

1 for the lower courts to work out, and we'll review it
2 over time.

3 That's not necessarily desirable, but that
4 is a method this Court has sometimes used.

5 MR. DREEBEN: Well, I --

6 JUSTICE BREYER: But even if it's wrong, I
7 want to know, are you saying there is no limit or are
8 you suggesting one?

9 MR. DREEBEN: I'm suggesting that the Court
10 do the same thing that it did in Knotts. This case does
11 not involve 24-hour surveillance of every citizen of the
12 United States. It involves following one suspected drug
13 dealer as to whom there was very strong suspicion, for a
14 period of time that actually is less than a month,
15 because the beeper technology failed during --

16 CHIEF JUSTICE ROBERTS: Well, then you're --
17 you're moving away from your argument. Your argument is
18 it doesn't depend how much suspicion you have; it
19 doesn't depend on how urgent it is. Your argument is
20 you can do it, period. You don't have to give any
21 reason. It doesn't have to be limited in any way,
22 right?

23 MR. DREEBEN: That is correct, Mr. Chief
24 Justice.

25 CHIEF JUSTICE ROBERTS: Well, isn't the

1 normal way in these situations that we draw these limits
2 how intrusive the search can be, how long it can be, is
3 by having a magistrate spell it out in a warrant?

4 MR. DREEBEN: When you're talking about the
5 movements of a car on a public roadway, which even
6 Justice Breyer's question seems to concede could be
7 monitored for a day or perhaps 4 days, there is no
8 Fourth Amendment search, unless --

9 CHIEF JUSTICE ROBERTS: Well, you're talking
10 about the difference between seeing a little tile and
11 seeing a mosaic. The one gives you information; the
12 other doesn't.

13 MR. DREEBEN: So does a pen register. So
14 does a garbage pull. So does looking at everybody's
15 credit card statement for a month. All of those things
16 this Court has held are not searches. And the --

17 JUSTICE GINSBURG: Mr. Dreeben, this case
18 started out with a warrant. There was a warrant, and
19 the limits weren't followed. The warrant said 10 days,
20 do this in 10 days, and the police took 11. They were
21 supposed to do it in D.C. Instead, they did it in
22 Maryland.

23 So, the police could have gotten permission
24 to conduct this search. In fact, they had received it.
25 Now, I take it that the practice had been, because it's

1 in the electronic surveillance manual, better get a
2 warrant. Was there any problem about -- when this kind
3 of surveillance is wanted by the government, to get a
4 warrant? Were they encountering difficulty getting
5 warrants?

6 MR. DREEBEN: In this case, there would not
7 have been any difficulty getting a warrant, Justice
8 Ginsburg. And the warrant authorized things beyond just
9 monitoring the car. It authorized entering the car in
10 order to install it, which wasn't necessary here. It
11 also authorized monitoring the car in a location where
12 there was a reasonable expectation of privacy. This
13 case is only about monitoring a car on public streets.

14 But I think it's very important to keep in
15 mind that the -- the principal use of this kind of
16 surveillance is when the police have not yet acquired
17 probable cause but have a situation that does call for
18 monitoring. And I'd like to give an example.

19 If the police get an anonymous phone call
20 that a bomb threat is going to be carried out at a
21 mosque by people who work at a small company, the bomb
22 threat on an anonymous call will not provide even
23 reasonable suspicion under this Court's decision in
24 Florida v. J.L.

25 But you can hardly expect the FBI to ignore

1 a credible, detailed-sounding piece of information like
2 that. Now, the --

3 CHIEF JUSTICE ROBERTS: If you get an
4 anonymous tip that there's the same bomb in somebody's
5 house, do you get a warrant or do -- do you just go in?

6 MR. DREEBEN: You do neither, because
7 without probable cause you cannot enter the house.

8 CHIEF JUSTICE ROBERTS: Right. Well, why
9 are you asking for a different rule in this situation?

10 MR. DREEBEN: Because the -- the police in
11 this situation have the traditional means available to
12 investigate these sorts of tips. They could put teams
13 of agents on all the individuals who are within the pool
14 of suspicion and follow them 24/7. And that would
15 raise --

16 JUSTICE SOTOMAYOR: You're -- you're now
17 suggesting an answer to Justice Kennedy's question,
18 which is it would be okay to take the computer chip, put
19 it on somebody's overcoat, and follow every citizen
20 everywhere they go indefinitely. So -- under your
21 theory and the theory espoused in your brief, you could
22 monitor and track every person through their cell phone,
23 because today the smartphones emit signals that police
24 can pick up and use to follow someone anywhere they go.

25 Your theory is so long as the -- that all --

1 that what is being monitored is the movement of person,
2 of a person, they have no reasonable expectation that
3 their possessions will not be used by you. That's
4 really the bottom line --

5 MR. DREEBEN: I think that --

6 JUSTICE SOTOMAYOR: -- to track them, to
7 invade their sense of integrity in their choices about
8 who they want to see or use their things. That's really
9 argument you're making.

10 MR. DREEBEN: Well, Justice Sotomayor, I
11 think that that goes considerably farther than our
12 position in this case, because our position is not that
13 the Court should overrule United States v. Karo and
14 permit monitoring within a private residence. That is
15 off limits absent a warrant or exigent circumstances
16 plus probable cause. And monitoring an individual
17 through their clothing poses an extremely high
18 likelihood that they will enter a place where they have
19 a reasonable expectation of privacy.

20 JUSTICE SOTOMAYOR: Cars get parked in a
21 garages. It happened here.

22 MR. DREEBEN: Yes, but a car that's parked
23 in a garage does not have a reasonable expectation of
24 privacy as to its location. Anyone can observe --

25 JUSTICE SOTOMAYOR: Neither does the person.

1 MR. DREEBEN: Well --

2 JUSTICE SOTOMAYOR: A person goes home, and
3 their overcoat gets hung on a hanger. What's the
4 difference.

5 MR. DREEBEN: Once the -- once the effect is
6 in the house, under Karo there is an expectation of
7 privacy that cannot be breached without a warrant, and
8 we're not asking the Court to overrule that.

9 JUSTICE SOTOMAYOR: Tell me what the
10 difference between this and a general warrant is? I
11 mean --

12 MR. DREEBEN: A general warrant --

13 JUSTICE SOTOMAYOR: -- what motivated the
14 Fourth Amendment historically was the disapproval, the
15 outrage, that our Founding Fathers experienced with
16 general warrants that permitted police indiscriminately
17 to investigate just on the basis of suspicion, not
18 probable cause, and to invade every possession that the
19 individual had in search of a crime. How is this
20 different --

21 MR. DREEBEN: A warrant authorizes --

22 JUSTICE SOTOMAYOR: -- this kind of
23 surveillance where there's no probable cause, there's
24 not even necessarily reasonable suspicion in --

25 MR. DREEBEN: A warrant authorizes a search.

1 This authorizes the ability to track somebody's
2 movements in a car on a public roadway, a subject as to
3 which this Court said in Knotts that no individual has a
4 reasonable expectation of privacy because when they go
5 out in their car, their car is traveling on public
6 roads. Anyone can look. The police have no obligation
7 to avert their eyes from anything that any member of the
8 public --

9 CHIEF JUSTICE ROBERTS: What if we -- I give
10 you that, that it's in public. Does the reasonable
11 expectation of privacy trump that fact? In other words,
12 if we ask people, do you think it's -- it violates your
13 right to privacy to have this kind of information
14 acquired, and everybody says yes, is it a response that,
15 no, that takes place in public, or is it simply the
16 reasonable expectation of privacy regardless of the fact
17 that it takes place in public?

18 MR. DREEBEN: Well, something that takes
19 place in public isn't inherently off limits to a
20 reasonable expectation of privacy. That's essentially
21 the holding of Katz. You go into a phone booth, you're
22 in public; making your calls within the phone booth is
23 subject to a reasonable expectation of privacy.

24 But this Court, with full awareness of that
25 holding, in Knotts and in Karo recognized that

1 surveillance of a vehicle traveling on the public
2 roadways doesn't fit that description.

3 CHIEF JUSTICE ROBERTS: You can see, though,
4 can't you, that 30 years ago if you asked people does it
5 violate your privacy to be followed by a beeper, the
6 police following you, you might get one answer, while
7 today if you ask people does it violate your right to
8 privacy to know that the police can have a record of
9 every movement you made in the past month, they might
10 see that differently?

11 MR. DREEBEN: They probably would also feel
12 differently about being followed 24/7 by a team of FBI
13 agents, who gain far more information than a GPS device
14 produces. GPS only gives you the approximate location
15 of the car as it drives on the roads --

16 JUSTICE GINSBURG: And the speed as well.

17 MR. DREEBEN: The approximate speed, the
18 location traveled, the -- that -- that is what the GPS
19 provides. It doesn't show you where the car stopped.
20 It doesn't show you who was driving the car. It doesn't
21 show you who was --

22 JUSTICE GINSBURG: An easy way to pick
23 someone up for speeding when you suspect something far
24 worse but have no -- no probable cause.

25 MR. DREEBEN: Well, this Court held in Whren

1 v. United States that when the police have probable
2 cause to stop someone for a traffic violation, they can
3 do that. There are protections --

4 JUSTICE GINSBURG: That was -- that is when
5 the police came upon the violator. But this is -- it's
6 all in a computer. The police can say we want to find
7 out more about X, so consult the database, see if
8 there's an indication that he was ever speeding in the
9 last 28 days.

10 MR. DREEBEN: Justice Ginsburg, it's not
11 very hard for police to follow somebody and find a
12 traffic violation if they want to do that. But to
13 answer in part Justice Breyer's earlier concern about
14 limiting principles, this Court recognized in the Whren
15 decision that, although the Fourth Amendment is not a
16 restriction on discriminatory or arbitrary or oppressive
17 stops that are based on invidious characteristics, the
18 Equal Protection Clause is. The First Amendment also
19 stands as a protection. If this Court believes that
20 there is an excessive chill created by an actual law or
21 universal practice of monitoring people through GPS,
22 there are other constitutional principles that are
23 available.

24 JUSTICE GINSBURG: But the Fourth Amendment
25 protects us against unreasonable searches and seizures.

1 And if I were trying to explain to someone, here's the
2 Fourth Amendment, the Fourth Amendment says -- or it has
3 been interpreted to mean that if I'm on a public bus and
4 the police want to feel my luggage, that's a violation;
5 and yet, this kind of monitoring, installing the GPS and
6 monitoring the person's movement whenever they are
7 outside their house in the car, is not? I mean, it just
8 -- something about it that -- just doesn't parse.

9 MR. DREEBEN: I'm quite sure, Justice
10 Ginsburg, that if you ask citizens whether the police
11 could freely pick up their trash for a month and paw
12 through it, looking for evidence of a crime, or keep a
13 record of every telephone call that they made for the
14 duration and the number that it went through, or conduct
15 intense visual surveillance of them, that citizens would
16 probably also find that to be, in the word that
17 Respondents choose to use --

18 JUSTICE BREYER: But they won't -- they
19 won't and probably couldn't physically.

20 Start with the other end. Start -- what
21 would a democratic society look like if a large number
22 of people did think that the government was tracking
23 their every movement over long periods of time. And
24 once you reject that, you have to have a reason under
25 the Fourth Amendment and a principle. And what I'm

1 looking for is the reason and the principle that would
2 reject that, but wouldn't also reject 24 hours a day for
3 28 days.

4 MR. DREEBEN: I think --

5 JUSTICE BREYER: Do you see where I'm -- and
6 that's what I'm listening very hard to find.

7 MR. DREEBEN: All right. Justice Breyer,
8 two things on that. First of all, I think the
9 line-drawing problems that the Court would create for
10 itself would be intolerable, and better that the Court
11 should address the so-called 1984 scenarios if they come
12 to pass, rather than using this case as a vehicle for
13 doing so.

14 Second, if the Court --

15 JUSTICE SOTOMAYOR: This case is not that
16 vehicle.

17 MR. DREEBEN: If the Court --

18 JUSTICE SOTOMAYOR: The GPS technology today
19 is limited only by the cost of the instrument, which
20 frankly right now is so small that it wouldn't take that
21 much of a budget, local budget, to place a GPS on every
22 car in the nation.

23 MR. DREEBEN: Oh, I think that would be --

24 JUSTICE SOTOMAYOR: Almost every car has it
25 now.

1 MR. DREEBEN: Well, I think it would be
2 virtually impossible to use the kinds of tracking
3 devices that were used in this case on everyone
4 because --

5 JUSTICE SCALIA: Don't we have any
6 legislatures out there that can stop this stuff?

7 MR. DREEBEN: I think that -- Justice
8 Scalia, the legislature is a safeguard, and if the Court
9 believes that there needs to be a Fourth Amendment
10 safeguard as well, we have urged as a fallback position
11 that the Court adopt a reasonable suspicion standard
12 which would allow the police to conduct surveillance of
13 individuals in their movements on public roadways, which
14 they can do visually in any event, and would allow the
15 police to investigate leads and tips that arise under
16 circumstances where there is not probable cause.

17 JUSTICE GINSBURG: Who would be under your
18 test the judge of the reasonable suspicion?

19 MR. DREEBEN: As in most reasonable
20 suspicion cases, it's the police at the front end and
21 it's the courts at the back end if there are motions to
22 suppress evidence. But fundamentally, just as in the
23 pen register example and in the financial records
24 example, if this Court concludes, consistent with its
25 earlier cases, that this is not a search, yet all

1 Americans find it to be an omen of 1984, Congress would
2 stand ready to provide appropriate protection.

3 If I may save the rest of my time for
4 rebuttal.

5 CHIEF JUSTICE ROBERTS: Thank you. Your --
6 our questions have eaten into your rebuttal time. So,
7 we'll give you the full time.

8 Mr. Leckar.

9 ORAL ARGUMENT OF STEPHEN C. LECKAR

10 ON BEHALF OF THE RESPONDENT

11 MR. LECKAR: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 I want to talk about the one issue that the
14 United States didn't talk about, which is whether this
15 is a seizure. This case can be resolved on a very
16 narrow basis, a very narrow basis: What are the
17 consequences when the police without a warrant install a
18 GPS secretly on the car of any citizen of the United
19 States, and they want to use the evidence gained that
20 way in a criminal trial? Our position is that's a
21 seizure.

22 JUSTICE ALITO: What is the size of this
23 device?

24 MR. LECKAR: I'm sorry, Your Honor?

25 JUSTICE ALITO: What is the size of this

1 device?

2 MR. LECKAR: In -- the record doesn't show
3 in this case, but we know -- we learned last week,
4 Justice Alito, from the NACDL that there's now a GPS on
5 the market that weighs 2 ounces and is the size of a
6 credit card. Think how easy it would be for any law
7 enforcement agent of the 880,000 in the United States to
8 stick one of those on anybody's vehicle.

9 JUSTICE ALITO: And what if it was put on
10 the license place? Would that be a technical trespass?
11 Is that the property of the driver?

12 MR. LECKAR: Well, a license plate, as I
13 understand it, is the property of the State, and driving
14 is a privilege. But it's not a technical trespass in
15 this particular case. Mr. Jones had the --

16 JUSTICE SCALIA: Is that right? I don't own
17 my license plate? I didn't know that. How do you know
18 that?

19 (Laughter.)

20 JUSTICE SCALIA: How do you know that? I
21 paid for my license plate.

22 (Laughter.)

23 JUSTICE KENNEDY: We don't need to get into
24 it, but "Live Free or Die" was spelled on the license
25 plate.

1 (Laughter.)

2 MR. LECKAR: What I'm saying, Justice
3 Kennedy and Justice Scalia, is this: That the issue
4 insofar as the seizure is concerned is, is it
5 meaningful. Everybody agrees here that there is -- that
6 Antoine Jones had the right to control the use of his
7 vehicle. The question is, was the interference a
8 meaningful deprivation of his possessory interest?

9 CHIEF JUSTICE ROBERTS: I didn't -- I didn't
10 hear an answer to Justice Alito's question. What is
11 your position on the placement of the GPS device on the
12 State-owned license plate?

13 MR. LECKAR: They can't do it. They can't
14 do it, Your Honor. It's a seizure.

15 CHIEF JUSTICE ROBERTS: It's a --

16 MR. LECKAR: If -- I'm sorry. If the
17 installation --

18 CHIEF JUSTICE ROBERTS: My understanding is
19 correct that it's the State's license plate they require
20 you to have. So, your trespass theory, it would seem,
21 falls apart with respect to that particular scenario.

22 MR. LECKAR: Well, first of all, Justice --
23 Chief Justice Roberts, my -- you would probably see the
24 GPS, and in that case, you might have --

25 CHIEF JUSTICE ROBERTS: No. It's the size

1 of a credit card. You slip it behind the license plate.

2 MR. LECKAR: In that particular case, what
3 you have done is you have -- the installation of the
4 GPS, it is a seizure. What makes it meaningful is the
5 use of that GPS --

6 JUSTICE SCALIA: Well, this is ridiculous.
7 Look at -- you give the State permission to put the
8 license plate -- to carry -- to have your car carry the
9 State's license plate. You do not give anybody
10 permission to have your car carry a tracking device.

11 MR. LECKAR: That's correct.

12 JUSTICE SCALIA: And whether it's put
13 directly on the car or directly on something that the
14 car is carrying doesn't seem to me to make any
15 difference.

16 CHIEF JUSTICE ROBERTS: I thought it made a
17 difference under your theory, which focused on the
18 question of trespass, because it was attached to an
19 effect owned by somebody else. This is an effect not
20 owned by the individual.

21 MR. LECKAR: That's correct.

22 CHIEF JUSTICE ROBERTS: So, the trespass
23 theory anyway doesn't seem ridiculous to me.

24 MR. LECKAR: But it's an effect, Your Honor.
25 The Fourth Amendment protects effects. It protects

1 people. If you put it on somebody's briefcase, you put
2 it on somebody's car, you have affected their possessory
3 interest. Then the question becomes --

4 JUSTICE KAGAN: Mr. Leckar, I guess I'm not
5 sure I quite understand the argument, because a trespass
6 is accomplished no matter what you put on somebody's car
7 or somebody's overcoat or what have you. You could put
8 a nonworking device in somebody's car, and it would
9 still be a trespass, but surely the same constitutional
10 problem is not raised. So, how do you get from the
11 trespass to the constitutional problem?

12 MR. LECKAR: As I -- thank you, Justice
13 Kagan. As I said moments ago, what makes it meaningful,
14 what makes it a meaningful deprivation of a -- of a
15 possessory interest, is once the GPS gets activated. We
16 look at reality. We follow what *Silverman v.* --

17 JUSTICE SCALIA: That doesn't make it a
18 seizure. That doesn't make it a seizure. It makes it a
19 search.

20 MR. LECKAR: Your Honor --

21 JUSTICE SCALIA: I mean, you can say that
22 there's a trespass for the purpose of obtaining
23 information, which makes it a search. But I don't see
24 how it's a seizure. A seizure -- you have to bring
25 something within your control. You have to stop the

1 person or stop the vehicle. What has been seized when
2 you -- when you slap a tracking device on a car?

3 MR. LECKAR: What has been seized is
4 Antoine's data. Data is seized that is created by the
5 GPS. Antoine Jones had the right, Your Honor, to
6 control the use of his vehicle. And what the government
7 did was surreptitiously deprive him of the use of
8 that --

9 JUSTICE SCALIA: Do you have any case
10 involving seizure of data floating in the air as opposed
11 to papers?

12 MR. LECKAR: The closest case I could come,
13 Your Honor, would be Silverman, where the Court called a
14 Fourth Amendment violation where the spike mike just
15 touched -- touched the ventilator unit.

16 JUSTICE BREYER: It's not a violation
17 unless, in addition to a search, it is an unreasonable
18 search. And since you already -- and the same is true
19 of seizure, isn't it?

20 MR. LECKAR: That's right.

21 JUSTICE BREYER: So, you already have --
22 everybody agrees it's at least a search. So, what do
23 you care whether there's the -- and there's a case
24 called Karo which says whether it's a trespass doesn't
25 really matter. The question is the reasonableness of

1 it. And that's what I think -- I mean, you can argue
2 trespass as much as you want, but I'll still have in
3 mind is it reasonable.

4 MR. LECKAR: That's right.

5 JUSTICE BREYER: And I think that's the
6 question we've been debating. And I would like to know
7 from you -- what they are saying is that the parade of
8 horrors we can worry with -- worry about when it comes
9 up; the police have many, many people that they suspect
10 of all kinds of things ranging from kidnappings of lost
11 children to terrorism to all kinds of crimes.

12 They're willing to go as far as reasonable
13 suspicion in a pinch. And they say at least with that,
14 you will avoid the 1984 scenario, and you will in fact
15 allow the police to do their work with doing no more
16 than subjecting the person to really good knowledge of
17 where he's going on the open highway. Now, I -- they
18 probably put it better than I did, but I'd appreciate
19 your views on that.

20 MR. LECKAR: Reasonable suspicion, Justice
21 Breyer, is something that the Court has adopted for
22 limited intrusions. And I refer you to the United
23 States v. Place. Every 10 seconds of the day for 28
24 days is by no person's lights a -- a limited intrusion.
25 That said, what -- what happened here, society does not

1 view as reasonable the concept that the United States
2 Government has the right to take a device that enables
3 them to engage in pervasive, limitless, cost-free --
4 cost-free surveillance -- that completely replaces the
5 human equation --

6 CHIEF JUSTICE ROBERTS: How do you know
7 that?

8 JUSTICE KENNEDY: Why does it have to be
9 cost-free? Suppose the police department says: We've
10 got two things; we can put 30 deputies on this route and
11 watch this person, or we can have a device with a
12 warrant. What difference does it make?

13 MR. LECKAR: What happens is the police have
14 the capacity with GPS to engage in grave abuse, grave
15 abuse of individual and group liberties, Your Honor.

16 JUSTICE KENNEDY: But suppose what they got
17 is nothing more than what they would have had if they
18 had 30 deputies staked out along the route. That's all.
19 They'd get the same from 30 deputies. A constitutional
20 violation?

21 MR. LECKAR: Yes, if they use a GPS, Your
22 Honor. Any placement of a GPS on anybody's car or this
23 car --

24 JUSTICE KENNEDY: Well, no. We're assuming
25 that there's no initial trespass, which is a problem in

1 this case.

2 MR. LECKAR: All right.

3 JUSTICE KENNEDY: You're saying it's -- it's
4 the quantity and -- of the information seized and the
5 time over which it's seized. And that's the proposition
6 we're testing. And it seems to me what you're saying is
7 that the police have to use the most inefficient
8 methods.

9 MR. LECKAR: No, Your Honor. I'm not
10 asking --

11 JUSTICE KENNEDY: I'm fully aware of the
12 1984 ministry of love, ministry of -- of peace problem.
13 But this -- your argument, it seems to me, has no
14 principled distinction from the case that I put.

15 MR. LECKAR: I think I can help you with
16 that. We're not asking to make the police less
17 efficient than they were before GPS came into effect.
18 We're simply saying that the use of GPS has grave
19 potential -- grave threats of abuse to privacy; that
20 people have an expectation, Justice Kennedy, that their
21 neighbor is not going to use their car to track them.
22 People have an -- under Rakas -- and I refer the Court
23 to footnote 12 in the Rakas case. Antoine Jones had
24 control of that car. Control of that -- of the vehicle
25 meant that he had a reasonable expectation that society

1 is prepared to view as objectively reasonable. The
2 government --

3 JUSTICE GINSBURG: But he -- he wouldn't be
4 protected against a surveillance camera that could get
5 information. And is this really different in kind from
6 the surveillance camera?

7 MR. LECKAR: Yes. First of all, you have a
8 physical invasion. That's *Bond v. United States*. You
9 have an invasion of his possessory interest, placement
10 on the car. Physical invasion of a possessory interest,
11 Justice Ginsburg, is more significant. It has always
12 been viewed by this Court as more invasive than mere
13 video -- mere visual surveillance.

14 And even with a camera, it depends on the
15 type of the video camera. We're not saying that the
16 police are prohibited from having individual video
17 cameras or several video cameras to surveil people.
18 What we're saying here is this device, this device that
19 enables limitless, pervasive, indiscriminate --

20 JUSTICE KAGAN: But what is the difference
21 really? I'm told -- maybe this is wrong, but I'm told
22 that if somebody goes to London, almost every place that
23 person goes there's a camera taking pictures, so that
24 the police can put together snapshots of where everybody
25 is all the time. So, why is this different from that?

1 MR. LECKAR: It's pretty scary. I wouldn't
2 want to live in London under those circumstances.

3 JUSTICE SCALIA: Well, it must be
4 unconstitutional if it's scary.

5 (Laughter.)

6 JUSTICE SCALIA: I mean, what is it, the
7 scary provision of what article?

8 JUSTICE BREYER: And, in fact, those cameras
9 in London actually enabled them, if you watched, I got
10 the impression, to track the bomber who was going to
11 blow up the airport in Glasgow and to stop him before he
12 did. So, there are many people who will say that that
13 kind of surveillance is worthwhile, and there are others
14 like you who will say, no, that's a bad thing. But that
15 isn't the issue exactly in front of us.

16 MR. LECKAR: That's correct, Your Honor.
17 What we have here is a physical --

18 JUSTICE BREYER: And what Justice Kagan
19 wanted to know is why not.

20 MR. LECKAR: Because you have a physical
21 invasion of property.

22 JUSTICE BREYER: Oh, my goodness. Here, I I
23 can read -- sorry, I just had that expression because
24 I'm reading: "The existence of a physical trespass is
25 only marginally relevant to the question of whether the

1 Fourth Amendment has been violated, however, for an
2 actual trespass is neither necessary nor sufficient to
3 establish a constitutional violation." That's Karo.

4 So, you can talk if you'd like. It's your
5 hour. But I would really be very interested in hearing
6 you on the assumption that the real issue here is
7 whether this is reasonable.

8 MR. LECKAR: It's not, Your Honor. This is
9 not a Karo case. First of all, in Karo the installation
10 was essentially consented to. You took -- the package
11 came in by virtue of somebody who was working for the
12 government. So, the installation was not unlike this
13 case -- was unlike this case, where it was surreptitious
14 and directly engaged in by a government agent.

15 JUSTICE KENNEDY: But you're --

16 JUSTICE SOTOMAYOR: Counsel --

17 JUSTICE KENNEDY: You're mixing -- you're
18 mixing two things. You're the one that -- I thought
19 your position was that the initial trespass is not
20 important. That's the narrow way to decide the issue.
21 You don't want us to do that. So, now we ask you about
22 Karo, and you say, oh, well, there was a trespass. So,
23 that's -- that's not -- that's not a responsive answer.

24 MR. LECKAR: Well, but technology, as you
25 observed, Justice Kennedy, is dramatically different

1 with GPS than was present in Karo.

2 JUSTICE SOTOMAYOR: But it's going to be
3 dramatically different in the next step. There are now
4 satellites that look down and can hone in on your home
5 on a block in a neighborhood. I don't see that far in
6 the future when those cameras are going to be able to
7 show you the entire world and let you track somebody on
8 the camera from place to place.

9 MR. LECKAR: Well --

10 JUSTICE SOTOMAYOR: So, if -- give us a
11 theory. Is that okay for the police to access those
12 cameras and look at you moving from place to place? And
13 if that's okay, then why is this not okay? What is your
14 theory of your case?

15 MR. LECKAR: Our theory, Justice Sotomayor,
16 with respect to video camera, if they're targeting an
17 individual -- this presents a grave question. It's a
18 question that need not be resolved given this case. But
19 if the Court wanted to address that question, once the
20 police target somebody, they want to engage in
21 individualized targeting for use of a pervasive network
22 of cameras, and GPS is like a million cameras. That's
23 the -- the New York Court of Appeals pointed that out,
24 and this --

25 JUSTICE SOTOMAYOR: I think there's about 28

1 satellites up there, but okay.

2 MR. LECKAR: All right. It's 28 cameras,
3 but the equivalent of a camera tracking you every street
4 corner you're on everywhere. Once you have
5 individualized suspicion like that, if a court wanted to
6 deal with it, I believe you would have to have a
7 warrant.

8 JUSTICE SCALIA: Mr. Leckar, your -- all of
9 this discussion -- you're going into it, but the
10 questioning leads you into it -- it seems to me leaps
11 over the difficult part of your case. The issue before
12 us is not -- not in the abstract whether this police
13 conduct is unreasonable. The unreasonableness
14 requirement or the unreasonableness prohibition does not
15 take effect unless there has been a search. And our
16 cases have said that there's no search when -- when you
17 are in public and where everything that you do is open
18 to -- to the view of people. That's the hard question
19 in the case, not whether this is unreasonable. That's
20 not what the Fourth Amendment says, the police can't do
21 anything that's unreasonable. They can do a lot of
22 stuff that's unreasonable without violating the Fourth
23 Amendment, and the -- the protection against that is the
24 legislature.

25 But you have to establish, if you're going

1 to go with Katz, that there has been an invasion of --
2 of privacy when all that -- all that this is showing is
3 where the car is going on the public streets, where the
4 police could have had round-the-clock surveillance on
5 this individual for a whole month or for 2 months or for
6 3 months, and that would not have violated anything,
7 would it?

8 MR. LECKAR: No.

9 JUSTICE SCALIA: Why? Because there's no
10 invasion of privacy. So, why is this an invasion of
11 privacy?

12 MR. LECKAR: Because it is -- it is a
13 complete robotic substitute. It's not a -- it's not a
14 tail. And interestingly enough, Your Honor. The
15 government only cited in its brief one instance of a
16 24-hour surveillance for all of 2 days. What you have
17 here, Justice Scalia, is -- I'm going to refer to your
18 dissent.

19 JUSTICE SCALIA: A hundred times zero equals
20 zero. If -- if there is no invasion of privacy for 1
21 day, there's no invasion of privacy for a hundred days.
22 Now, it may be unreasonable police conduct, and we can
23 handle that with laws. But if there's no invasion of
24 privacy, no matter how many days you do it, there's no
25 invasion of privacy.

1 MR. LECKAR: Justice Scalia, what -- I'm
2 going to refer to your dissent along with Justice Breyer
3 in Bond v. United States. A GPS in your car is like --
4 or anybody's car, is like -- without a warrant, is like
5 having an -- it makes you unable to get rid of an
6 uninvited stranger. That's what it is. Now, what --

7 JUSTICE SCALIA: So is a tail. So is a tail
8 when the police surveil -- surveil you for -- for a
9 month.

10 MR. LECKAR: The question we have to answer
11 in this case, Justice Scalia, is this: A tail -- if
12 they can -- if they want a tail, if they want to commit
13 the resources, that's fine. But what a GPS does, it
14 involves -- it allows the government to engage in
15 unlimited surveillance through a machine, through a
16 machine robotically. Nobody is even involved monitoring
17 it. The record in this case showed that many times the
18 police officers just let -- let the machine go on.

19 JUSTICE ALITO: Well, where would you draw
20 the line? Suppose that the GPS was used only to track
21 somebody's movements for 1 day or for 12 hours or for 3
22 hours. Would that be all right?

23 MR. LECKAR: Our position, Justice Alito, is
24 no circumstances should a GPS be allowed to be put on
25 somebody's car. But we recognize --

1 JUSTICE ALITO: Put aside -- put aside the
2 trespass question.

3 MR. LECKAR: I'm not addressing it purely as
4 a trespass. Our view is the -- the use of a GPS as a
5 search in and of itself should be -- is -- should be
6 viewed as unreasonable. But if the Court were
7 uncomfortable with that, if the Court had concerns with
8 that, we suggested in our brief some -- some
9 possibilities: One day, one trip, one person per day or
10 trip, or perhaps when you use it exactly as a beeper,
11 when you follow it, when you actually physically follow
12 it.

13 JUSTICE ALITO: Well, that sounds like a
14 legislative line. But what is the difference between
15 following somebody for 12 hours, let's say, and
16 monitoring their movements on a GPS for 12 hours? You
17 would say that the latter -- your first argument is
18 there's a problem with the latter but not with the
19 former. But what would the reason for that be?

20 MR. LECKAR: Because it's an unreasonable
21 invasion of privacy, Your Honor.

22 JUSTICE ALITO: There's no more -- what --
23 what is the difference in terms of one's privacy whether
24 you're followed by a police officer for 12 hours and you
25 don't see the officer or whether you're monitored by GPS

1 for 12 hours?

2 MR. LECKAR: Because -- because what you
3 have here is society does not expect that the police,
4 the human element, would be taken out of -- would be
5 taken out of the surveillance factor.

6 JUSTICE ALITO: You know, I don't know what
7 society expects, and I think it's changing. Technology
8 is changing people's expectations of privacy.

9 Suppose we look forward 10 years, and maybe
10 10 years from now 90 percent of the population will be
11 using social networking sites, and they will have on
12 average 500 friends, and they will have allowed their
13 friends to monitor their location 24 hours a day, 365
14 days a year, through the use of their cell phones. Then
15 -- what would the expectation of privacy be then?

16 MR. LECKAR: Well, the use of a cell phone,
17 there are two ways of looking at it. As Justice Kennedy
18 observed in Quon, cell phones are becoming so
19 ubiquitous, there may be privacy interests.

20 Our view is that currently the use of a cell
21 phone, that's a voluntary act. People nowadays
22 understand that there are ways to monitor by way of a
23 cell phone.

24 But I started my oral argument with this
25 basic precept, Justice Alito: This case does not

1 require us to decide those issues of emerging
2 technology. It's a simple case at the core: Should the
3 police be allowed surreptitiously to put these machines
4 on people's cars and either -- call it a seizure, call
5 it a search, call it a search and seizure in the words
6 of Katz, or call it a Fourth Amendment violation.

7 JUSTICE ALITO: Well, that -- maybe that's a
8 good way to decide the case. But I just wonder, would
9 Mr. Jones or anybody else be really upset if they found
10 that the police had sneaked up to their car and put an
11 inert device the size of a credit card on the underside
12 of the car? What would they say about that, other than
13 the fact that the police are wasting money doing this?

14 MR. LECKAR: If it were nothing more than a
15 note, say, or even a bumper sticker like you get at
16 South of the Border, probably nothing, but this --

17 JUSTICE ALITO: You don't even see it. It's
18 just a little wafer. They put it under the car. It
19 does nothing.

20 MR. LECKAR: It's a little wafer that's got
21 an enormous capacity. Look at the --

22 JUSTICE ALITO: No, but this one does
23 nothing, and you -- so you would go -- you would sue --
24 you would bring a trespass action.

25 MR. LECKAR: No, heavens, no, Your Honor.

1 If it did nothing, first, it wouldn't be a Fourth
2 Amendment problem.

3 JUSTICE ALITO: So, what's you're concerned
4 about is not this little thing that's put on your car.
5 It's not this invasion of your property interest. It's
6 the monitoring that takes place.

7 MR. LECKAR: The monitoring makes it
8 meaningful. Putting it on enables them to make --

9 JUSTICE KAGAN: But to ask Justice Alito's
10 question in a different way, suppose that the police
11 could do this without ever committing the trespass.
12 Suppose that in the future all cars are going to have
13 GPS tracking systems, and the police could essentially
14 hack into such a system without committing the trespass.
15 Would the constitutional issue we face be any different?

16 MR. LECKAR: If, as I assume, that's because
17 of manufacturers doing it, or because Congress has
18 legislated it, Justice Kagan? Under either
19 circumstance, people would know. They would know that
20 their privacy rights had been taken away. Whether that
21 would be possible to be -- to go through Congress, I
22 seriously doubt, but people would know.

23 In this particular case, Antoine Jones had
24 no idea whatsoever that his possessory interest in that
25 property was about to be deprived by the government in a

1 meaningful way to allow them to get information they
2 couldn't have otherwise have gotten.

3 Justice Alito, what happens here, GPS
4 produces unique data. When you and I drive down the
5 street, we don't emit GPS data. What makes GPS data
6 meaningful is the act -- is the use and placement of the
7 GPS device, that was in this case, in this case,
8 unconsented to by Antoine Jones, unknowingly. And the
9 government knew that. That's why they went and did it
10 surreptitiously, because they couldn't get it any other
11 way.

12 JUSTICE KENNEDY: Lots of communities have,
13 including Washington, cameras on -- at intersections on
14 stop lights. Suppose the police suspected someone of
15 criminal activity, and they had a computer capacity to
16 take pictures of all the intersections that he drove
17 through at different times of day, and they checked his
18 movements and his routes for 5 days. Would that be
19 lawful?

20 MR. LECKAR: I think that would be
21 allowable, Your Honor. I don't think --

22 JUSTICE KENNEDY: You think it would be?

23 MR. LECKAR: I think that would be
24 permissible, Your Honor. First of all, you don't have
25 an invasion of -- you don't have a physical intrusion,

1 unlike this case. People nowadays --

2 JUSTICE KENNEDY: You have -- you have a
3 targeted invasion. It's over a period of time. It's
4 over a long -- it's over a wide space, and it seems to
5 me that -- it seems to me you have to answer my question
6 "yes" to be consistent with what you've said earlier.

7 MR. LECKAR: No, Your Honor. As I said
8 earlier, you can have an -- you can have an occasional
9 video camera out there. People understand nowadays that
10 there may be video cameras out in public space. The --
11 but we don't have any -- society does not expect -- view
12 it as reasonable to have the equivalent of a million
13 video cameras following you everywhere you go.

14 A few video cameras, people know. They've
15 cropped -- they've cropped up, and they've been
16 accepted. But this is a horse of an entirely different
17 color. This is a small device that enables the
18 government to get information of a vast amount of --

19 JUSTICE SOTOMAYOR: What an --

20 MR. LECKAR: The camera is one site, one --

21 JUSTICE SOTOMAYOR: What an unworkable rule
22 with no -- tethered to no principle.

23 MR. LECKAR: I'm sorry.

24 JUSTICE SOTOMAYOR: What an unworkable rule
25 tethered to no principle. A thousand video cameras may

1 or may not be okay, depending on how large the city is?

2 MR. LECKAR: No, Justice Sotomayor. I think
3 the workable rule and the simplest rule that should be
4 adopted is this: I think the Court should say to the
5 law enforcement agency you came here looking for a rule;
6 we're going to give you a rule. If you want to use GPS
7 devices, get a warrant, absent exigent circumstances or
8 another recognized exception to the Fourth Amendment;
9 because of their capacity for -- to collect data that
10 you couldn't realistically get, because of the
11 vanishingly low cost, because of their pervasive nature,
12 that you should get a warrant any time -- you must get a
13 warrant any time you're going to attach a GPS to a
14 citizen's effect or to a citizen's person.

15 CHIEF JUSTICE ROBERTS: Well, that gets back
16 to Justice Scalia's question, which is you've got to
17 determine that there has been a search first before you
18 impose the warrant requirement. And it seems to me that
19 your -- the warrant requirement applies only with
20 respect to searches, right?

21 MR. LECKAR: And seizures.

22 CHIEF JUSTICE ROBERTS: Okay. And seizures.
23 So, while it might seem like a good idea to impose the
24 requirement on this particular technological device, you
25 still have to establish that it's a search.

1 MR. LECKAR: But if you know, if you the
2 police agents know -- this is the deliberative process.
3 These devices aren't used for just quick one-off
4 surveillance. They're used to track people over time,
5 as witness this case, every 10 seconds of the day for 28
6 days.

7 If you know you're going to do that and you
8 know, Justice Roberts, that this device -- this device
9 has an amazingly invasive power and capacity. If you
10 know you're going to do that and you're a law
11 enforcement agent, then you do what they did originally.
12 You get a warrant.

13 CHIEF JUSTICE ROBERTS: Now, we pushed your
14 -- we pushed your friend to the limits of his theory.
15 Your theory, I take it, would apply if you're going to
16 do it for 3 minutes, right? Where's the car? You push
17 a button; it's 3 minutes. You say that's still a Fourth
18 Amendment violation?

19 MR. LECKAR: Yes --

20 CHIEF JUSTICE ROBERTS: Okay. Well, then
21 don't talk to me about how long they're going to be
22 doing it or all the information. We have to test the
23 validity of your theory on the proposition that it
24 violates the Fourth Amendment to do this for 3 minutes.

25 MR. LECKAR: I -- I think it does, Your

1 Honor, because of the -- society does not expect --
2 society views it as objectively reasonable not to
3 expect --

4 CHIEF JUSTICE ROBERTS: You have said that
5 several times. How do we tell? I mean, I don't know
6 what society expects. I suppose if you ask people do
7 you think it's a violation of privacy for the police to
8 do this for no reason for a month, maybe they'd come out
9 one way. If you asked the people do you think the
10 police have to have probable cause before they monitor
11 for 5 minutes the movements of somebody they think is
12 going to set off a huge bomb, maybe you get a different
13 answer.

14 MR. LECKAR: You look to -- you look to the
15 common law. You look to well-established case law. You
16 look to statutes in several jurisdictions. I think
17 there are seven or eight that said this sort of practice
18 should be prohibited.

19 JUSTICE SCALIA: Excellent. Yes. Of
20 course, a legislature can take care of this, whether or
21 not there is an invasion of privacy. And they can pick
22 5 days out of the air. You can't do it for any more
23 than 5 days, or you can't do it to more than -- than 50
24 people at a time. They can take care of all of that
25 stuff.

1 We can't do that in a decision under the --
2 under the Fourth Amendment.

3 MR. LECKAR: We have --

4 JUSTICE SCALIA: Why isn't this precisely
5 the kind of a problem that you should rely upon
6 legislatures to take care of?

7 MR. LECKAR: That's the same -- that's the
8 same -- same problem that the United States advanced
9 before this Court in the United States v. District
10 Court; give it to Congress. And what this Court there
11 did, it held a Fourth Amendment violation so far as
12 domestic security is concerned and gave Congress
13 suggestions. In this particular case, I could probably
14 give you 535 reasons why not to go to Congress --

15 (Laughter.)

16 MR. LECKAR: -- but let me suggest
17 something, Justice Scalia. What happened was the United
18 States has adopted a shifting position. They came to
19 this Court, and they said we want a workable rule; give
20 us a workable rule. You either overrule the D.C.
21 Circuit, which you should not do, or give us a workable
22 rule. Now they've said in their brief, oh, let's take
23 it to the legislature. They can't have it both ways.

24 JUSTICE BREYER: Can you take it to Congress
25 the other way? I mean, can you say that a general

1 search of this kind is not constitutional under the
2 Fourth Amendment, but should Congress pick out a subset
3 thereof, say, the -- terrorism or where there is
4 reasonable cause or like the FISA court or special
5 courts to issue special kinds of warrants, that that's a
6 different question which we could decide at a later
7 time?

8 That's a negative way of -- I mean, that way
9 favors you in the result, but I've -- I've been looking
10 for -- if there is a way of going to Congress to create
11 the situations where they can do it, rather than the
12 situations where they can't.

13 MR. LECKAR: Justice Breyer, that was
14 exactly what Congress -- what happened when the foreign
15 intelligence surveillance courts were created. You hit
16 it right on the nail. All this Court has to do is
17 decide the narrow question before it, which I've
18 articulated several times.

19 JUSTICE SCALIA: I don't see why it's any of
20 Congress's business if it's a -- if it's a purely
21 intrastate operation. Congress can control police
22 practices that don't violate the Fourth Amendment
23 throughout the country? I mean, maybe interstate,
24 interstate beepers and interstate tracking devices, yes,
25 but so long as you track within -- within the State

1 isn't that okay?

2 MR. LECKAR: No, Your Honor. First of all,
3 let me refer to Chief -- to Justice Frankfurter's
4 comments a long time ago in *Watts v. Indiana*: Justices
5 are not ignorant of the law, of what they know to be
6 true as men and women.

7 But other legislatures would follow
8 Congress. But what we have here -- what we have here is
9 a live case of controversy in which Antoine Jones'
10 control of his vehicle was usurped and his car was
11 converted into an electronic GPS transceiver serving the
12 government.

13 So, that case is here, and it -- it needs to
14 be decided. One doesn't need to address technologies
15 that aren't here before the Court today. You could; we
16 could venture down that road. We could discuss drone
17 surveillance. We could discuss balloon surveillance and
18 other types of surveillance. But we don't have to.
19 It's a narrow --

20 JUSTICE ALITO: There was a warrant -- there
21 was a warrant in this case. This is a puzzling aspect
22 of the case to me, and maybe there -- it's irrelevant
23 for present purposes. There was a warrant, and the two
24 violations are violations of a statute and a rule,
25 neither of which may carry an exclusionary rule sanction

1 with them or an exclusionary rule penalty with them.

2 It's not clear at all that there was a
3 violation of the Fourth Amendment. So, it's a little
4 strange that we're deciding whether a warrantless search
5 here would have been unconstitutional, when there was a
6 warrant.

7 MR. LECKAR: They had the choice. They
8 could have easily -- they could have gone back to the
9 district judge and said -- given the district judge
10 reasons --

11 JUSTICE ALITO: No, that's not my point.
12 The point is that the violation of the 10-day rule and
13 the violation of the statutory prohibition on -- or
14 maybe it's in the rule -- the prohibition on the judge
15 in the District ordering the installation only in the
16 District are not Fourth Amendment requirements.

17 MR. LECKAR: No. That's correct, Your
18 Honor, but what we have -- what we have here is a
19 warrantless intrusion. When -- when the warrant --

20 JUSTICE ALITO: It is not a warrantless
21 intrusion; there was a warrant.

22 MR. LECKAR: But the warrant was not in
23 effect. At the -- at the time the -- the GPS was
24 placed, Justice Alito, there was no warrant. There's a
25 case this Court decided in the --

1 JUSTICE GINSBURG: I think that's conceded
2 by both sides, and that's accepted by both sides. The
3 warrant expired. There was no warrant. The government
4 certainly could have gone back and said, judge, we
5 didn't make it; we need a little more time; give us 10
6 more days.

7 MR. LECKAR: They could -- they could
8 conceivably have gone back there and explained to the
9 district judge why they couldn't have installed it in
10 that period of time. The --

11 JUSTICE ALITO: I think if you look at the
12 lower court case law, you will find that a violation of
13 the 10-day rule is not necessarily a violation of the
14 Fourth Amendment. And --

15 MR. LECKAR: I understand that.

16 JUSTICE ALITO: -- it doesn't vitiate the
17 warrant. The warrant doesn't necessarily dissolve or
18 evaporate when the 10 days expire.

19 MR. LECKAR: Your --

20 JUSTICE ALITO: Maybe those cases are wrong.

21 MR. LECKAR: There's a 1920 Supreme Court
22 decision decided during the Prohibition era that
23 specifically said that when a warrant expires, there is
24 no warrant. When the 10-day rule in that case had
25 expired, there's no warrant. We have a warrantless

1 intrusion here. The government didn't have to do a
2 warrantless intrusion. I ask --

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. LECKAR: -- the Court to affirm.

5 CHIEF JUSTICE ROBERTS: Mr. Dreeben, 5
6 minutes.

7 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Mr. Chief Justice, advancing
10 technology cuts in two directions. Technological
11 advances can make the police more efficient at what they
12 do through some of the examples that were discussed
13 today: Cameras, airplanes, beepers, GPS. At the same
14 time, technology and how it's used can change our
15 expectations of privacy in the ways that Justice Alito
16 was alluding to. Today perhaps GPS can be portrayed as
17 a 1984-type invasion, but as people use GPS in their
18 lives and for other purposes, our expectations of
19 privacy surrounding our location may also change. For
20 that --

21 JUSTICE KAGAN: Mr. Dreeben, that -- that
22 seems too much to me. I mean, if you think about this,
23 and you think about a little robotic device following
24 you around 24 hours a day anyplace you go that's not
25 your home, reporting in all your movements to the

1 police, to investigative authorities, the notion that we
2 don't have an expectation of privacy in that, the notion
3 that we don't think that our privacy interests would be
4 violated by this robotic device, I'm -- I'm not sure how
5 one can say that.

6 MR. DREEBEN: Justice Kagan, I think the
7 Court should decide that case when it comes to it. This
8 was my fundamental point: This case does not involve
9 universal surveillance of every member of this Court or
10 every member of the society. It involves limited
11 surveillance of somebody who was suspected of drug
12 activity --

13 JUSTICE KENNEDY: You probably haven't had
14 the opportunity to go into the cases. A hypothetical.
15 Suppose exactly these facts, only the police aren't
16 involved. A neighbor does it to another neighbor in
17 order to see where that neighbor is going, and when he
18 finds out, he tells his wife and other neighbors. Do
19 you think that in most States, that would be an invasion
20 of privacy?

21 MR. DREEBEN: I'm willing to assume that it
22 might be, Justice Kennedy, but I don't think that this
23 Court measures the metes and bounds of the Fourth
24 Amendment by State law invasions of privacy. The Court
25 has --

1 JUSTICE KENNEDY: We measure it by
2 expectations of privacy under the Katz test if -- that
3 may or may not be controlling.

4 MR. DREEBEN: Yes, but in Greenwood, the
5 Court dealt with a case where California had outlawed
6 taking somebody's garbage, and this Court said that did
7 not define an expectation of privacy for purposes of the
8 Fourth Amendment --

9 JUSTICE KENNEDY: It found that there was no
10 expectation of privacy.

11 MR. DREEBEN: Correct.

12 JUSTICE KENNEDY: I am asking you about this
13 case, whether there would be an expectation of
14 privacy --

15 MR. DREEBEN: Oh --

16 JUSTICE KENNEDY: -- as a general matter
17 under tort law.

18 MR. DREEBEN: No, I don't think so. And --
19 and the fact that something may be a tort for a private
20 person doesn't mean that it's a problem for the police
21 to do it. For example, in the Dow Chemical case, where
22 the police used -- EPA in that case actually used
23 cameras to surveil an industrial plant. There was a
24 claim that it would have violated trade secret law for
25 anybody else to do that. And the Court accepted that

1 and said tort law doesn't define the boundaries of the
2 Fourth Amendment.

3 In Knotts, the Court was very careful to
4 reserve the possibility of 24-hour surveillance of every
5 citizen in their persons and in their residences, saying
6 we haven't seen that kind of abuse. If that kind of
7 abuse comes up, the legislature is the best-equipped to
8 deal with it, if in fact our society regards that as an
9 unreasonable restriction on --

10 JUSTICE SOTOMAYOR: Do you have any idea of
11 how many GPS devices are being used by Federal
12 Government agencies and State law enforcement officials?

13 MR. DREEBEN: The Federal Government I can
14 speak to, and it's in the low thousands annually. It's
15 not a massive universal use of an investigative
16 technique. The FBI requires that there be some
17 reasonable basis for using GPS before it installs it.
18 And as a result, this is a technique that basically
19 supplements visual surveillance rather than supplanting
20 it all together.

21 There was visual surveillance that was
22 directed at Respondent. The GPS allowed it to be more
23 effective. As Justice Kennedy and, I think, Justice
24 Scalia's hypotheticals illustrated, Respondent is
25 essentially conceding that around-the-clock visual

1 surveillance through teams of agents would not have
2 invaded any expectation of privacy.

3 This Court said in Knotts that police
4 efficiency has never been equated with police
5 unconstitutionality. The fact that GPS makes it more
6 efficient for the police to put a tail on somebody
7 invades no additional expectation of privacy that they
8 otherwise would have had. The technology doesn't make
9 something private that was previously public. When we
10 go out in our cars, our cars have driver's licenses that
11 we carry. We have license plates on the car. These are
12 for the purpose of identification --

13 JUSTICE SOTOMAYOR: You don't seriously
14 argue that there isn't a possessory interest in who puts
15 something on your car and who -- like a -- a sign of
16 some sort.

17 MR. DREEBEN: Oh, I think there would
18 probably be some sort of State law possessory interest
19 -- Mr. Chief Justice, may I finish? But there is no
20 seizure for the very reason that Justice Breyer
21 described under the Katz case. This Court has said that
22 trespass is neither necessary nor sufficient to create a
23 Fourth Amendment violation.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Dreeben, counsel.

1 The case is submitted.

2 (Whereupon at 11:10 a.m., the case in the
3 above-entitled matter was submitted.)

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