IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 13-3253

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

FRED ROBINSON,

Appellant.

Appeal from the United States District Court
Eastern District of Missouri
District Court No. 4:11CR361-AGF

The Honorable Audrey G. Fleissig,
United States Judge,
Presiding

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND TH

CORPORATE DISCLOSURE STATEMENT

No *c* have parent corporations or are publicly held corporations.

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STATEMENT OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil

Mo. 2012)—is mistaken, for two reasons. First, *M q ez*'s Fourth Amendment analysis was limited to the question whether targeted GPS tracking qualifies as a search, not the circumstances under which such a search might be reasonable. Second, the passage from *M q ez* relied upon by the district court is nonbinding dicta.

Furthermore, no exception to the warrant requirement applies in this case. The "automobile exception" does not extend to surveillance that reveals someone's movements over a prolonged period. And the other cases cited by the government to justify abandoning the presumptive warrant requirement for GPS surveillance are inapposite because they involve either "special needs" beyond the government's interest in law enforcement or reduced expectations of privacy.

A. Warrantless searches are presumptively unreasonable.

The Fourth Amendment protects against "unreasonable searches and

exceptions.'" *n* , 556 U.S. at 338 (quoting *z*, 389 U.S. at 357); *n ed e C de X*, 648 F.3d 599, 602 (8th Cir. 2011) (same).

Warrants are presumptively required because they "provide[] the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *n ed e C d c* , 433 U.S. 1, 9 (1977) (quoting *o n on n ed e* , 333 U.S. 10, 14 (1948)). The process of obtaining a warrant serves a crucial function in and of itself: It prevents the government from conducting searches solely at its discretion. *ee Coo d e Ne p e*, 403 U.S.

community hostility.'" *d* At 956 (Sotomayor, J., concurring) (quoting

In *M q ez*, this Court considered a defendant's motion to suppress evidence obtained from the warrantless installation and use of a GPS tracker to monitor his movements while he was a passenger in a car. 605 F.3d at 609-10. The court held that the defendant, Acosta, did not have standing to challenge the installation and use of the GPS tracker and further stated that "[e]ven if Acosta had standing [to challenge the GPS monitoring], we would find no error," because "no search has occurred" when "electronic monitoring does not invade upon a legitimate expectation of privacy." *d* At 609 (citing *n ed e no*, 460 U.S. 276, 285 (1983)).

Contrary to the district court's conclusion, *M q ez* did not establish that reasonable suspicion validates extended GPS surveillance, for two

(1984)). “Consequently,” *M q ez* concluded, “when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-inva

constitute a Fourth Amendment search or seizure, reasoning that the targeted use of GPS tracking is not materially different from tailing a suspect by car. *ee* 474 F.3d at 997-98. The court was careful to add, however, that "[i]t would be premature to rule that … a program of mass surveillance [GPS tracker] could not possibly raise a question under the Fourth Amendment." *d* At 998. The court concluded that it was not necessary to determine "whether the Fourth Amendment should be interpreted to treat such mass surveillance *e c* ," because the officers in *c* "do GPS tracking only when they have a suspect in their sights" and "had, of course, abundant grounds for suspecting the defendant." *d* At 998 (emphasis added). Similarly here, *M q ez* emphasized that the troubling constitutional concerns posed by "wholesale surveillance" of vehicular movements were not presented, because "there was nothing random or arbitrary about the installation and use of the [GPS] device" at issue. *ee* 605 F.3d at 610.

Second, *M q ez*'s merits analysis of the defendant's Fourth Amendment claim was dicta, because this Court's holding was clearly limited to the "standing" inquiry.[1] To be sure, a court may rest its decision

[1] Although courts "use the term 'standing' as a shorthand reference to the issue of whether defendants' Fourth Amendment interests were implicated by the challenged government actions[,] [t]echnically, the concept of 'standing' has not had a place in Fourth Amendment jurisprudence [] since .

merits analysis only as dicta. *ee n ed e z n*, 732 F.3d 187, 196, 201 n.9 (3d Cir. 2013) (characterizing *M q ez*'s Fourth Amendment merits analysis as dicta), *c d pend n en nc e* , Order, No. 12-2548 (3d Cir. Dec. 12, 2013).[3]

In short, *M q ez* concluded (in dicta) only that targeted GPS surveillance is not a Fourth Amendment search. All nine Justices in *one* rejected that conclusion, and five Justices rejected *M q ez*'s reasoning that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another." *d* At 609. As a result, *M q ez*'s rationale has been wholly eclipsed. Its reference to reasonable suspicion is an artifact of the pre- *one* legal environment and does not control the disposition of this case.

C. No exception to the warrant requirement applies.

Warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *z*, 389 U.S. at

[3] Pursuant to its internal operating procedures, when the Third Circuit grants a petition for rehearing en banc, it vacates the panel opinion as a matter of course. 3d Cir. I.O.P. 9.5.9 (2010). Nonetheless, this Court may look to the *z n* panel opinion as persuasive authority. *ee oe Ande on*, 134 F.3d 1400, 1404 (9th Cir. 1998); *e D on de Ne o nd Co* , No. 95-2152-CIV-GOLD, 2001 WL 36086589, at *6 (S.D. Fla. Mar. 27, 2001) ("[A] logical and well-reasoned decision, despite vacatur, is always persuasive authority, regardless of its district or circuit of origin or its ability to bind." (quoting *n e n ey e* , 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993))).

357. Because none of those exceptions apply here, the government violated

Under one rationale, the Supreme Court has allowed warrantless searches of vehicles because of "the exigent circumstances that exist in connection with movable vehicles." *C d e Le* , 417 U.S. 583, 590 (1974). "This [concern] is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened." *d* ; *ee o C o n ed e* , 267 U.S. 132 (1925). The exception is thus premised on the belief that "'an immediate intrusion is necessary if police officers are to secure the illicit substance.'" *n ed e O z*, 878 F. Supp. 2d 515, 535 (E.D. Pa. 2012). Put otherwise: The automobile exception was established to prevent contraband and physical evidence of a crime from absconding.

Attachment and use of a GPS device provides information about the location of a car, not its contents. But a car's location is neither contraband nor evidence that is at risk of disappearing. Indeed, GPS tracking is facilitated, not thwarted, by vehicles' mobility. To be sure, in cases of actual exigency—for example, where police have good reason to believe that the vehicle will disappear before a warrant can be obtained—no warrant may be required for the initial attachment of a GPS device. *ee e , M ncey A zon* , 437 U.S. 385, 393-94 (1978) (holding that a warrantless search is permissible where "the exigencies of the situation" make the search

"objectively reasonable"). Even then, however, no exigency would prevent law enforcement officials from promptly applying for a warrant to continue GPS tracking after the device is installed.

The Supreme Court's second rationale justifying warrantless searches of motor vehicles, reduced expectations of privacy, is equally inapplicable to GPS searches. The Court has explained that people have reduced expectations of privacy in their cars because of "pervasive regulation of vehicles capable of traveling on the public highways." *C fo n C ney*, 471 U.S. 386, 392 (1985). But GPS searches do not intrude upon expectations of privacy about cars; they intrude upon expectations of privacy about drivers' and passengers' locations over time.[6] *n ed e M yn d*, 615 F.3d 561-62 (D.C. Cir. 2010); *ee o one* , 132 S. Ct. at 955 (Sotomayor, J., concurring). And at least five Justices believe that technologically advanced tracking of a person's location can in fact violate reasonable expectations of privacy. *ee one* , 132 S. Ct. at 957, 964 (Alito, J., concurring in the judgment) ("Longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *d* At 955 (Sotomayor, J., concurring). Moreover, *one* held that attachment

[6] *ee* Tr.-Vol.-6 24-55 (Special Agent Comeau's testimony detailing *o n on* movements over the course of multiple days based on GPS tracking data).

and use of a GPS tracker constitutes a search because it is trespassory. *d* At 949. Under this view, it is irrelevant that vehicles are pervasively regulated; the physical trespass that constitutes the search also triggers the warrant requirement.

The automobile exception would have permitted police to enter Robinson's car to recover "evidence already present" in it; "[i]t would not (and, indeed, did not) permit them to leave behind an ever-watchful electronic sentinel in order to collect future evidence. . . . [T]o hold otherwise . . . would unduly expand the scope of the automobile exception well past its 'specifically established and well delineated' contours . . . ."

z n, 732 F.3d at 204.

2. GPS searches by law enforcement do not fall within a "special need."

The Supreme Court has recognized that certain searches outside 4(n)-5.23605(e)7.270

underlying justifications makes plain that they are inapplicable to GPioSo

In short, GPS searches of the kind at issue here are wholly unrelated to any of the special needs rationales recognized by the Supreme Court. Their purpose is to arrest and convict criminals, not to deter dangerous conduct. And they are directed not at discrete groups with reduced privacy expectations, but at any person suspected of a crime—the very class the First Congress and the People sought to protect by adopting the Fourth Amendment.

The government tips its hand when it argues that it should not be required to show probable cause to utilize GPS tracking, because it often must use GPS tracking to establish probable cause. Gov't's Resp. to Def.'s Mot. To Suppress 4-5, ¶ 8. That is not a "special need," but rather impermissible bootstrapping. *ee z n*, 732 F.3d at 199. Doubtless, the government would find it useful to employ warrantless wiretaps or home searches to establish probable cause for an arrest, but mere usefulness or expedience is not the standard for dispensing with the warrant requirement. No existing exception to the warrant requirement applies, and none can or should be created to cover GPS tracking.

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need beyond traditional law enforcement and because children in school have reduced expectations of privacy. *ee d* at 340.

II. The District Court Correctly Held That the Good-Faith Exception to the Exclusionary Rule Does Not Apply Because the FBI Agents Did Not Rely on Binding Appellate Precedent.

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

Faithfully applying *D n ed e* , 131 S. Ct. 2419 (2011), the district court properly held that the exclusionary rule is applicable to unconstitutionally obtained GPS evidence in this case. *D* is the latest in a line of cases that has examined whether the exclusionary rule applies when police rely in objective good faith on binding legal authority. After carefully considering the costs and benefits of exclusion, the Supreme Court determined that the exclusionary rule does not apply to "searches conducted in objectively reasonable reliance on binding appellate precedent." *d* at 2423-24. The government advocates for a broader exception—one that would permit reliance on any body of persuasive, unsettled law, or on inapposite cases addressing outdated technologies. This unjustified reading would subvert *D* 's clear holding, exceed the bounds of the exclusionary rule, and prove unworkable in practice.

In *D* , while the defendant's appeal was pending, the Supreme

Co(a)-1.290065(t)-4.58899( )10.2264(h)-5.23d05(e)-1.29307( )10.22c6(i)-4.59004(s)389]T3.

Eleventh Circuit decision in *n ed e onz ez*, 71 F.3d 819 (11th Cir. 1996), which relied on a broad reading of *Be on* in authorizing warrantless automobile searches even after the defendants were secured. *ee n* , 556 U.S. at 348. Davis conceded on appeal that the police had "fully complied with 'existing Eleventh Circuit precedent,'" namely *onz ez*. *D* , 131 S. Ct. at 2426. The Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *d* At 2423-24.

Applying *D* 's clear rule, the district court correctly held that the good faith exception does not apply when law enforcement agents were not acting in accordance with binding precedent. *o n on*, 903 F. Supp. 2d at 783-85. *D* is simply inapplicable where there was no binding circuit precedent authorizing a search at the time it occurred. Justice Alito's opinion for the Court refers to "binding" authority at numerous points, *ee D* , 131 S. Ct. at 2423, 2428, 2432, 2434, does not mention any source of law more permissive than "binding appellate precedent," and even implies a different result for "defendants in jurisdictions in which the question remains open." *d* at 2433; *ee o d* at 2435 (Sotomayor, J., concurring in the judgment) (clarifying that the "markedly different question" of whether the exclusionary rule applies when the law relied upon was unsettled was not

before the Court). Further confirming the clarity of *D* 's rule is the reasoning of the Eleventh Circuit panel, whose decision the Supreme Court affirmed:

> We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation. We have not forgotten the importance of the "incentive to err on the side of constitutional beh

yet to address the issue—it would be another four months before this Court would issue its opinion in *M q ez* Whether GPS tracking constituted a search was exactly the type of open and equivocal legal question that the *D* Court placed outside the good faith exception's scope.

Indeed, the Seventh Circuit has addressed this precise point, concluding that the good faith exception under *D* does not insulate the warrantless attachment of a GPS device carried out within the Eighth Circuit prior to issuance of the Circuit's opinion in *M q ez. n ed e M n*, 712 F.3d 1080, 1082 (7th Cir. 2013) (per curiam). In the course of investigating a bank robbery in Burlington, Iowa, police attached a GPS device to Martin's car without a warrant on November 19, 2009—six months before this Court issued its decision in *M q ez. n ed e M n*, No. 4:10-cr-40008, slip op. at 1-2 (C.D. Ill. Sept. 18, 2012), *e d*, 712 F.3d at 1082. Several days later, police tracked Martin's car as it travelled into Illinois, and a Henderson County, Illinois Sheriff's Deputy (working with two Burlington, Iowa detectives) stopped the car. *d* The district court held that the good faith exception applied because Iowa police could have reasonably relied on a single out-of-circuit opinion, *n ed e c* , 474 F.3d 994 (7th Cir. 2007), and on the Supreme Court's 1983 opinion concerning beeper technology in *no* , when they attached the

GPS tracker without a warrant. *d* At 8-11. The Seventh Circuit reversed, stating that *D* applies "only to 'a search [conducted] in objectively reasonable reliance on *nd n ppe e p eceden* .'" 712 F.3d at 1082 (quoting *D* , 131 S. Ct. at 2434) (alteration and emphasis in original). Rejecting the district court's reliance on out-of-circuit caselaw and on *no* , the court explained:

> [W]e are bound to continue applying the traditional remedy of exclusion when the government seeks to introduce evidence that is the "fruit" of an unconstitutional search. We reject the government's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where that amorphous opinion turns out to be incorrect in the Supreme Court's eyes. Here, as Martin points out in his supplemental brief, there was no binding

well-settled precedent should control" and would "burden district courts" with an amorphous and standardless case-by-case assessment of "how many circuits had addressed the police practice in question, what each one had said, whether the statements were mere dicta, and myriad other factors." *d* At 208-09. This critique is particularly compelling where, as here, only a small minority of circuits had spoken.[8] Because *D* only excuses objective good faith reliance on binding appellate precedent, the government's call for an extension to merely persuasive authority is unavailing.

The risks to privacy inherent in rapid technological change also show the prudence of refusing to extend *D* 's good faith exception. In its briefing below, the government repeatedly cited two cases involving decades-old technology in support of its argument that warrantless GPS tracking is constitutionally reasonable: *o*, 468 U.S. at 712 (upholding the conveyance by police of a beeper, which transmitted no information, to the

[8] That the D.C. Circuit had not yet decided *M yn d* at the time the GPS device was attached to Robinson's car does not change the calculus. The Second and Seventh Circuits have concluded that even when a search occurred before *M yn d* created a circuit split, only binding in-circuit or Supreme Court precedent will suffice to trigger the good faith exception under *D* . *n ed e A* , 737 F.3d 251, 261-62 (2d Cir. 2013) (reliance on out-of-circuit precedent not reasonable when GPS device attached more than 18 months before *M yn d* was decided); *M n*, 712 F.3d at 1082 (good faith exception not implicated by GPS search conducted more than seven months before *M yn d* was decided).

suspect); and *no* , 460 U.S. at 278 (approving following a suspect's car,

The circuits have split on whether *no* and *o* can constitute binding appellate precedent authorizing attachment of GPS devices The Seventh and Third Circuits reject the argument that it was reasonable to rely on the beeper cases to conduct warrantless GPS tracking. *M n*, 712 F.3d at 1082; *z n*, 732 F.3d at 206 ("[W]e find that the explicit holding from *D* is inapposite because *no* and *o* are both distinguishable given (1) the lack of a physical intrusion in those cases, (2) the placement by police of the beepers inside containers, and (3) the marked technological differences between beepers and GPS trackers."). The First and Second Circuits take the contrary position. *A* , 737 F.3d at 261-62; *n ed e p* , 711 F.3d 58, 66 (1st Cir. 2013).[9] As all of the Justices agreed in *one* , however, it was not necessary for the Court to overrule either *no* or *o* to conclude that attaching a GPS device to a car and monitoring the car's movements for 28 days was a search. *one* , 132 S. Ct. at 951-52 (majority opinion); *d* At 964 (Alito, J., concurring). The beepers

[9] The Fifth and Eleventh Circuits hold that police could reasonably rely on a Fifth Circuit opinion stating that warrantless attachment of an "electronic tracking device" to the exterior of a vehicle is not a search. *n ed e*
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in *no* and *o* were not installed pursuant to a physical trespass, were not used for long-duration tracking, and provided only limited, imprecise information. Given that the surveillance the officers carried out here is indistinguishable from that which took place in *one*, and *one* expressly did not overrule *no* or *o*, it cannot be that those cases constituted binding precedent authorizing the agents' conduct here.

District courts in multiple circuits where there was no binding circuit law on GPS searches when police conducted them have adopted the proper view of how *D* applies to GPS searches conducted before *one*, declining to apply the good faith exception to the exclusionary rule. *ee*, *e*, *n ed e* *en*, No. 10-0770, 2013 WL 1455278, at *21 (D. Md. Apr. 8, 2013); *n ed e L n*, No. 2:11-CR-11, 2012 WL 2861546, at *3 (N.D. Miss. July 11, 2012); *O z*, 878 F. Supp. 2d at 539-43;

ee, e ,

with law enforcement officers who gambled on their choice not to seek a warrant to conduct an invasive search. *ee D* , 131 S. Ct. at 2428.

The rule that *D* set forth promotes clear, system-wide knowledge of what is permissible and what is not, eliminating the constitutional violations that result from erroneous guesswork. Suppressing the evidence in this case will result in "'appreciable deterrence'" of unconstitutional searches, thus serving the central goal of the good faith exception cases. *Leon*, 468 U.S. at 909.

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

A clear rule not only deters police misconduct and negligence, it is also far more practicable for law enforcement and efficient for the courts. The muddled standard proposed by the government would complicate the work of police and prosecutors, for whom bright-line rules provide great benefits. *ee e o n on n ed e* , 541 U.S. 615, 620-24 (2004) (reasoning tha toSules re mucw U30057(e)-u

review."). The Supreme Court has already drawn this bright line; this Court should decline the government's invitation to muddy it.

For example, *D* 's clear rule relieves courts and police of the difficult line drawing problem rooted in the depth and breadth of potentially relevant sources of law available under a standard requiring only a good faith guess at what unsettled law will later become. *ee* *z n*, 732 F.3d at 209-10. The systemic risk posed by leaving these questions to retrospective adjudication of good faith unguided by any specific touchstone, such as a warrant, statute, or binding appellate precedent, would "yield[] an unworkable framework," *o n on*, 903 F. Supp. 2d at 784, and undermine the very foundations of the Fourth Amendment.

(1983) (White, J., concurring) (citing *O Conno Don d on*, 422 U.S. 563 (1975)). This is just such a case. GPS devices have become a favored tool of law enforcement, and their highly intrusive nature cries out for clear judicial regulation.

In *n ed e* , the Sixth Circuit explained the value of addressing important Fourth Amendment issues even when the good faith exception will ultimately apply:

> Though we may surely do so, we decline to limit our inquiry to the issue of good-faith reliance. If every court confronted with a novel Fourth Amendment question were to skip directly to good faith, the government would be given *c e nc e* to violate constitutionally protected privacy rights, provided, of course, that a statute supposedly permits them to do so. The doctrine of good-faith reliance should not be a perpetual shield against the consequences of constitutional violations. In other words, if the exclusionary rule is to have any bite, courts must, from time to time, decide whether statutorily sanctioned conduct oversteps constitutional boundaries.

631 F.3d 266, 282 n.13 (6th Cir. 2010).

The Sixth Circuit's logic is not novel. Courts frequently decide whether there has been a Fourth Amendment violation before applying the good faith exception. For example, this Court recently analyzed whether officers' search of the defendant's vehicle violated the Fourth Amendment pursuant to *A zon n* , and only then applied the good faith exception to the exclusionary rule. *n ed e C ee* , 717 F.3d 635, 646 (8th Cir. 2013). This approach is no less appropriate in the GPS-tracking context.

ee n ed e o d, No. 1:11-CR-42, 2012 WL 5366049, at *7-11 (E.D. Tenn. Oct. 30, 2012) (determining that warrantless GPS tracking violates the Fourth Amendment, and then applying the good faith exception).

The *one* court was unable to rule on the applicability of the presumptive warrant requirement to GPS searches because the government had forfeited its position on the issue. 132 S. Ct. at 954. The issue is now before this Court. Addressing it would yield much needed clarity in this Circuit.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision denying Robinson's motion to suppress.

Respectfully submitted,

Dated: February 19, 2014

/s/ Anthony E. Rothert

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Dated: February 19, 2014

/s/ Anthony E. Rothert
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CERTIFICATE OF SERVICE

I, Anthony E. Rothert, do hereby certify that I have filed the foregoing Appellants' Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on February 19, 2014. I further certify that one true and correct paper copy of the Brief, upon receiving notification from the Court that the electronic version of the Brief has been accepted and docketed, will be sent via first-class mail to counsel of record.

/s/ Anthony E. Rothert