No. ____

IN THE

Supreme Court of the United States

HASSAN EL-NAHAL,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,
Petitioner,

v.

DAVID YASSKY, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual whose location was tracked by a GPS device placed in his vehicle has Fourth Amendment standing to challenge that tracking if he was not in possession of the vehicle when the GPS tracking device was installed?

2. Whether there is a Fourth Amendment right against the government searching an individual's GPS tracking information to investigate criminal activity without a warrant?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Hassan El-Nahal, an individual. Petitioner was the plaintiff and appellant below.

The Respondents are:

David Yassky, the former chairman of the New York City Taxi and Limousine Commission ("TLC");

Matthew Daus, the former chairman of the TLC;

Michael Bloomberg, the former Mayor of the City of New York; and

The City of New York, a municipality of the State of New York. The TLC is an agency of the City of New York.

The Respondents were defendants and appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hassan El-Nahal respectfully petitions this Court for a writ of certiorari to review judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 835 F.3d 248, and is reproduced at page 1a of the appendix to this petition ("App."). The unpublished order of the court of appeals denying rehearing is reproduced at pages 47a–48a of the appendix. The opinion of the United States District Court for the Southern District of New York is reported at 993 F. Supp. 2d 460 and is reproduced at page 27a of the appendix.

JURISDICTION

The Second Circuit rendered its decision on August 26, 2016. El-Nahal filed a timely petition for rehearing en banc on September 9, 2016, and the court denied the petition on September 26, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes are set forth in the appendix to this petition. App. 49a–53a.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

INTRODUCTION

The Respondents electronically tracked the movements of taxi cab driver, Petitioner Hassan El-Nahal, and then baselessly—and unsuccessfully—administratively prosecuted him *four times*, alleging that he improperly charged customers on six rides out of 9,000. Nonetheless, the Second Circuit dismissed Hassan El-Nahal's § 1983 suit against various New York City authorities because El-Nahal did not own the taxicab and he was not operating it when the GPS tracking device was placed in the vehicle. According to the Second Circuit, El-Nahal has no Fourth Amendment right against this surveillance. This case thus directly presents the questions raised by the concurrences in *United States* v. *Jones*, and the confusion arising in the lower courts about a trespass-based right against government electronic tracking of movement.

To the extent this case could or should be decided on a trespass-based rationale, the Second Circuit created a division in the circuits when it determined—without any briefing on the issue—that that El-Nahal did not have standing to bring his suit because he did not possess the vehicle on which the GPS device was placed *at the time of installation*. App. 18a. In reaching its conclusion, the court disregarded the fact that El-Nahal later possessed the vehicle during the period when the GPS tracking was conducted and that the data obtained was used to bring repeated prosecutorial actions against El-Nahal—charges of which he was ultimately cleared. App. 6a–7a. This conflicts with the Eleventh Circuit, which ruled that standing to challenge a search by the physical

intrusion of placement of a GPS tracking device is not limited to individuals with possessory interest at the time of installation of the device; instead, an individual has standing to object to a search by GPS tracking whenever he has possessory interest at the time of the search.

The conflict between the circuits reflects a broader question: whether there is a Fourth Amendment right against the government searching an individual's GPS tracking information to investigate criminal activity without a warrant, regardless of whether such tracking involved physical trespass. While the circuits have followed the Court's reasoning in *Jones*, *Jones* does not address the mining of an individual's location data as a search triggering Fourth Amendment rights.

As a result, there are no defined boundaries as to an individual's right against the government, without a warrant, obtaining his GPS information from sources that do not require a physical trespass against the individual. Due to the ubiquity of GPS-equipped devices in everyday life and the vast amount of data these devices are able to offer, this lack of protective limits on government access poses risks of potential abuse by the government in collecting, aggregating, and using such data, just as the City of New York did here. Resolving these questions would provide needed guidance to the lower courts as to whether a search has occurred, and help them resolve the limits of the government's power to track individuals' movements on a minute-by-minute basis for potentially indefinite amounts of time without a warrant.

The Court should grant certiorari and resolve this conflict between the circuits, and to address the issues left open by *Jones*. By concluding that there had been

no search because El-Nahal did not possess the vehicle at the time of the installation, the Second Circuit improperly imposed a standard for determining whether a search has been conducted in violation of the Fourth Amendment that would prevent many individuals from vindicating their rights against warrantless searches in the future.

STATEMENT OF THE CASE

Factual Background: This case arises from New York City's policy of mandatory warrantless GPS tracking of all city medallion taxi drivers and its subsequent prosecution of taxi drivers based on the data obtained through the tracking. The Global Positioning System is comprised of a group of government-owned satellites that continuously transmit navigation data to Earth. *See* Global Positioning System, *What is GPS?*.[1] Any GPS receiver can then read the transmissions sent from the satellites, and the receiver uses that information to calculate the approximate position of the receiver to within a few centimeters. Global Positioning System, GPS Accuracy.[2] That location information can then be either stored in the receiver or sent continuously to another device remotely, as determined by the person who controls the receiver. *See* Dep't of Justice, Nat. Inst. of Justice, *Investigative Uses of Technology: Devices, Tools, and Techniques* 13 (2007).[3] Once the location information is collected, it can be used to create a visual depiction of the target's travels for the

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[1] Available at: http://www.gps.gov/systems/gps (last visited Dec. 17, 2016).

[2] Available at: http://www.gps.gov/systems/gps/performance/accuracy/ (last visited Dec. 17, 2015).

[3] Available at: https://www.ncjrs.gov/pdffiles1/nij/213030.pdf.

entire period during which the receiver was collecting the transmission signals from the satellites. Severin L. Sorensen, *SMART Mapping for Law Enforcement Settings: Integrating GIS and GPS for Dynamic, Near Real-Time Applications and Analysis*, in *Crime Mapping and Crime Prevention* 349 (David Weisburd & Tom McEwen eds., 1998).[4] GPS is thus able to give precise, global, three-dimensional position information on a continuous basis regarding whomever is targeted.

In 2004, the New York City Taxi and Limousine Commission (the "Commission"), the agency responsible for regulating the taxi and for-hire transportation industry, promulgated an agency regulation that required that every medallion taxicab (a/k/a yellow taxis) be equipped with a GPS tracking device, part of a Taxicab Technology System. App. 4a. Taxi drivers, who must be licensed by the Commission often do not own their own medallion, which is a license to operate a yellow taxicab. Instead, drivers may lease a taxicab and a medallion on a daily or weekly basis. Some lease a taxicab and medallion by the day. *See* 35 RCNY § 58-21(c)(1) (capping lease rates for single shift rentals of taxicab and medallions). Others may own or lease a taxicab and lease a medallion long-term. *See* 35 RCNY § 58-21(c)(4) (capping lease rates for weekly medallion rentals). The Commission's mandatory system consisted of a physical device located in the taxicab that would, among other things, transmit to the Commission electronic data about every trip made by a taxi driver gathered by means of GPS technology.

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[4] Available at: http://www.popcenter.org/library/crimeprevention/volume _08/12-Sorensen.pdf

App. 4a. This device could not be used by the driver as an aid in navigation. JA222.

A year earlier, the Commission discussed the use of GPS technology in medallion taxicabs within the New York City taxi industry and publicly. *Alexandre* v. *New York City Taxi and Limousine Comm'n*, No. 07-CV-8175 RMB, 2007 WL 2826952, at *3 (S.D.N.Y. Sept. 28, 2007). Certain "customer service enhancements," including the GPS devices, were considered in conjunction with a proposed increase in cab fares and as a response to "antiquated" methods of data collection and payment used at the time. *Id.* Prior to the GPS device mandate, regulations required taxi drivers to create and maintain their own trip records. App. 4a. The use of GPS technology would allow for the automatic and remote collection of data about every medallion taxicab's location at every moment the driver is on duty, *id.*—information and detail that would be impossible to gather with such accuracy through driver self-reporting. The system would also automatically record fares, pickup points and drop-off points. *Id.*

At that time, taxi drivers expressed privacy concerns that the GPS technology would be used for surveillance. A group of drivers sought to enjoin the proposed rule from taking effect. *Alexandre*, 2007 WL 2826952. Although this effort was not successful, during the *Alexandre* action and in response to driver concerns, the Commission assured the federal court, taxi drivers, and the public at large that the mandated GPS system and related technology would be used only for limited purposes and would not violate the drivers' expectations of privacy or result in prosecutions. *See*, *e.g.*, JA131–132. In a "Statement of Basis and Purpose" issued prior to the passage of the rule, the [Commission] indicated that the

technology would be used for research, policy, and customer service purposes: to allow for centralized data to permit the "complex analysis of taxicab activity" in the five boroughs, to "provide a valuable resource for statistical purposes," to enable passengers to follow their route on a map, and to aid in recovery of lost property. JA129. Further, on its website providing information to taxi drivers, the Commission disavowed any intention to use the GPS technology to track drivers for investigatory purposes. JA131–132.

The GPS device rule was approved, and mandated installation of the system in all taxicabs by mid-2007. App. 4a. Through the GPS devices, the Commission began to automatically and remotely collect detailed trip information from every medallion taxicab—more than 13,000 vehicles. *See* JA113.

In March 2010, the Commission announced in a press release that "using GPS technology installed in taxicabs," it had discovered that some taxicab drivers were abusing the taxi fare "rate code" system to overcharge passengers. App. 5a. The press release indicated that the illegal fare was charged in "0.5% of all trips," and that the alleged "scam was primarily perpetrated by a small number of drivers, with 3,000 drivers overcharging more than 100 times." *Id.* Two months later, the Commission issued a second press release reporting that the scope of the "scam" was larger than it reported originally. *Id.* The Commission's "completed analysis" alleged that "21,819 taxicab drivers overcharged passengers a total of 286,000 times . . . for a total estimated overcharge of almost $1.1 million." *Id.* The overcharges reflected by this data represented less than one percent of all trips. JA146. In response, despite the assurances given by the Commission to

the federal court and taxi drivers that no prosecutions would result from the data gathering, the Manhattan District Attorney's office arrested 59 drivers "for defrauding and stealing from their customers," and the Commission commenced administrative actions against thousands of drivers. *Id.*

El-Nahal, a taxi driver for more than twenty years, was among those prosecuted by the Commission in administrative actions. App. 6a. The Commission alleged that El-Nahal, a full-time taxi driver who completed more than 9,000 trips per year, overcharged passengers on 10 occasions between November 2009 and February 2010 based on information obtained via the mandatory GPS device that was investigated without a warrant and in the absence of any passenger complaint. JA23; JA178–179. El-Nahal, like many drivers, leased his taxicab and medallion from a fleet, so he was not in possession of the taxi in which he was tracked at the time the GPS was installed.

El-Nahal contested the allegations. In May 2012, an administrative law judge found, based on trip records Commission obtained via GPS, that El-Nahal violated Commission rules on six occasions. JA186. The administrative law judge imposed upon El-Nahal $550 in penalties and revoked El-Nahal's Commission license to drive taxicabs. *Id.* On appeal, the Office of Administrative Trials and Hearings Taxi and Limousine Tribunal Appeals Unit ("Appeals Unit") overturned the penalty, ruling that the administrative law judge's decision was "not supported by substantial evidence." JA187. The Commission then re-filed just one charge. JA189. This time, the administrative law judge found El-Nahal not guilty. *Id.* Undeterred, the Commission re-filed the remaining five charges against El-Nahal.

JA192. Still another administrative law judge found El-Nahal guilty, imposed a fine, and revoked his license. JA192–94. El-Nahal again appealed, and the Appeals Unit again overturned the administrative law judge's decision concluding the findings with respect to El-Nahal's alleged intent to overcharge were insufficient. JA194–95. Nonetheless, for a fourth time, the Commission re-filed the same charges against El-Nahal. JA211–13. An administrative law judge found El-Nahal guilty, based in part on GPS trip records and Google maps. The Appeals Unit reversed again and dismissed the charges, this time with prejudice. JA213–16. While El-Nahal ultimately prevailed in the administrative courts, his taxi driver's license, which is critical to his livelihood, was revoked at several points in the interim before it was restored.

Proceedings Below: In May 2013, El-Nahal filed this suit in the U.S. District Court for the Southern District of New York alleging a deprivation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983, among other claims, against Respondents David Yassky, then-chairman of the Commission, Matthew Daus, a former chairman of the Commission, Michael Bloomberg, then-mayor of the City of New York, and the City of New York.[5] El-Nahal alleged that the warrantless use of mandatory GPS tracking by the Commission constituted an unlawful search under the Fourth Amendment. Defendants moved to dismiss the case, and by order of the court the motion was converted to a motion for summary judgment. App. 32a. The district court granted Defendants' motion. App. 28a. The court held that the Commission's

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[5] The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4), and 1367.

collection of data regarding El-Nahal through the installation and use of the GPS device did not constitute a search for the purposes of the Fourth Amendment because under Second Circuit precedent El-Nahal had "no reasonable expectation of privacy in the [] data at issue." App. 35a; *see Buliga* v. *New York City Taxi and Limousine Comm'n*, 324 Fed. Appx. 82 (2d Cir. 2009). Regarding El-Nahal's claim that the mandatory installation of the GPS device was a search because it involved a physical intrusion for the purpose of obtaining evidence for prosecution, the district court rejected the claim because "taxi drivers are aware of the system, the system is installed pursuant to regulations, and the taxicabs in which the system is installed are not truly private vehicles." App. 40a. The district court further held that if the GPS tracking of taxi drivers was a search, it was reasonable as a matter of law, falling within the "special needs" exception to the warrant requirement. App. 41a–43a. Thus, the court dismissed El-Nahal's federal constitutional claim. App. 45a.

El-Nahal appealed, arguing that the district court erred by granting summary judgment on his Fourth Amendment claim because pursuant to *United States* v. *Jones*, 132 S. Ct. 945 (2012), physical placement of a GPS tracking device on a vehicle in order to obtain information is a search, so that El-Nahal's Fourth Amendment rights were violated when the Commission mandated the physical placement of tracking devices in privately owned taxicabs. App. 9a–10a. The Second Circuit affirmed the decision of the district court on a ground not raised by the Respondents on appeal or discussed in any of the parties' briefs. Specifically, the Court held that El-Nahal lacked prudential standing to assert a property-based Fourth Amendment claim because he

did not possess the vehicle at the time the GPS device was initially installed. App. 11a. In reaching its conclusion, the Second Circuit interpreted *Jones* to require that an individual challenging GPS tracking have possessory interest at the time of installation. App. 17a. In a separate opinion, Judge Pooler, concurring in part and dissenting in part, joined the majority's analysis of *Jones* but concluded that Respondents did not properly address El-Nahal's property interest in the taxicab at the time of the trespass at issue, and expressed that the case should have been vacated and remanded for further factual development on this issue. App. 26a. Further, Judge Pooler disagreed with the district court's determination that the surreptitious nature of the intrusion was a critical factor in *Jones* that would preclude the finding that the surveillance entailed a search in this case. App. 20a–21a. Judge Pooler instead concluded that the surveillance was a search—"an unlicensed physical intrusion on a constitutionally protected effect"—despite El-Nahal's awareness of the GPS or the fact that the GPS was installed pursuant to an administrative rule. App. 21a–24a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON THE EFFECT OF *UNITED STATES* v. *JONES* ON FOURTH AMENDMENT STANDING.

A. The circuits disagree on whether Fourth Amendment standing under *Jones* is limited to the victim of the initial trespass of placing a GPS device on a vehicle.

The standing principle in Fourth Amendment cases requires that the individual seeking to challenge the legality of a search be the victim of the search, as

distinguished from one who claims prejudice only through the use of evidence gathered during a search infringing on the Fourth Amendment interests of someone else. *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Fourth Amendment "standing" is distinct from Article III standing and is not jurisdictional. *Id.* at 139. Instead standing to contest a search or seizure is "within the purview of substantive Fourth Amendment law." *Id.* at 140.

Modern standing doctrine developed largely within the context of the "reasonable expectation of privacy" framework articulated by Justice Harlan in *United States* v. *Katz*. *See* 389 U.S. 347, 361 (1967). Under *Katz*, whether an individual has standing to object to a warrantless search is based on whether the government violated that individual's reasonable expectation of privacy. *See Rakas*, 439 U.S. at 143. Although standing does not hinge on a property right in the invaded place, a person's expectation of privacy is reasonable where it "has a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* at 143 n.12.

In *Jones*, the Court considered whether the attachment of a GPS tracking device to an individual's vehicle and its subsequent use of that device to monitor the vehicle's movements constituted a search within the meaning of the Fourth Amendment. 132 S. Ct. at 947. In answering that question in the affirmative, a majority of the Court applied a traditional property-based approach that pre-dated the *Katz* test. *Jones*, 132 S. Ct. at 950.

In *Jones*, the government, without a valid warrant, had attached a GPS tracking device to a

Jeep. 132 S. Ct. at 948. It used the device to monitor Antoine Jones's movements for 28 days. *Id.* The Court held that Jones's Fourth Amendment right—the right to be free from the government's physical intrusion on his property for the purpose of gathering information—was violated by the government's installation and use of the GPS tracking device. *Id.* at 949. The Court declined to question Jones's standing to challenge the installation of the device. *Id.* at 949 n.2. Though Jones did not own the car—his wife did—he was the "exclusive driver" so "he at least had the property rights of a bailee." *Id. Jones* did not address instances where possessory interest in a vehicle changes during the period of the government intrusion. Absent guidance from the Court, the circuit courts have employed disparate approaches to address that issue. The circuits' disagreement centers on whether Fourth Amendment standing is limited to individuals with possessory interest in the tracked vehicle at the time of the installation of the tracking device.

In *United States* v. *Gibson*, the Eleventh Circuit held otherwise. It held that an individual has standing to object to a search through GPS tracking whenever he has a possessory interest in the vehicle being tracked *at the time of the search*. *United States* v. *Gibson*, 708 F.3d 1256, 1277 (11th Cir. 2013). The defendant, James Gibson, had a bailee's interest in the vehicle at the time a GPS device was installed. *Id.* But Gibson had no such interest—he was neither the driver nor the passenger—during the subsequent period of tracking. *Id.* The court held that Gibson had standing to challenge the installation and use of the tracking device while the vehicle was in his possession, but not the use of the tracking device to locate the vehicle when it was moving on public roads

while he was neither the driver nor a passenger. *Id.* Thus, the Eleventh Circuit found that an individual has standing to object to GPS tracking by the government whenever he has a possessory interest in the tracked vehicle at the time of the search. *Id.* at 1278. Though the court referred to Gibson's "standing to challenge the installation," the court made it clear that this by itself had no significance with regard to whether he could challenge the state's tracking of the vehicle at a time when he no longer possessed it. *Id.*

The Second Circuit reached its decision by reasoning from *United States* v. *Hernandez*, in which the Fifth Circuit held that a lawful borrower of a vehicle at the time of its tracking had standing to challenge the use of the tracking device even though he had no possessory interest in the vehicle when the device was installed. 647 F.3d 216, 218 (5th Cir. 2011). In *Hernandez*, law enforcement attached a GPS tracking device to a vehicle owned and in the possession of Angel Hernandez. *Id.* Two days later, agents used the tracking device to locate the vehicle while defendant Jose Hernandez, who had borrowed the vehicle with Angel's consent, was in lawful possession. *Id.* In *Hernandez*, a pre-*Jones* decision, the Fifth Circuit concluded that neither the installation nor the monitoring of the GPS device was a search. But the court correctly determined that Jose had an interest in the vehicle sufficient to confer standing to challenge the use of the tracking device. *Id.*

In addition to *Gibson*, other circuits, in decisions following *Jones*, have not foreclosed the notion that the use of GPS tracking may violate a Fourth Amendment interest even when the individual tracked was not aggrieved by the initial installation. In *United States* v. *Davis*, the Tenth Circuit held that

the defendant Mark Davis lacked standing because he "did not own or regularly drive the car" to which law enforcement attached a GPS device. 750 F.3d 1186, 1190 (10th Cir. 2014). Davis, who was at most a passenger in the tracked vehicle, did not possess the car either at the time of installation or during the subsequent period when law enforcement monitored the movements of the car. *Id.* at 1188. When the court noted that Davis did not own or drive the car, it did not specify whether this was in reference to the time the device was installed or after, suggesting that possessory interest at either time could have been sufficient to confer standing. In *United States* v. *Barraza-Maldonado*, the Eighth Circuit assumed without deciding that the continued use of a GPS tracking device after the car came into the defendant's possession violated the defendant's Fourth Amendment rights as construed in *Jones*. 732 F.3d 865, 869 (8th Cir. 2013) (but holding that the evidence seized as a result of the monitoring was admissible under the good faith exception to the Fourth Amendment exclusionary rule).

Under the Eleventh Circuit test, El-Nahal would have standing to challenge the use of the GPS tracking device because it was used to track a vehicle he leased and thus lawfully possessed. While the Eleventh Circuit determines Fourth Amendment standing based on whether there was a possessory interest at the time of installation of the GPS tracking device or during the time of the tracking, the Second Circuit's standing determination is limited to only the former inquiry.

In the Second Circuit, whether an individual has standing to challenge a search through GPS tracking under *Jones* depends on whether that individual can establish an adequate possessory interest at the time

of an alleged trespass or physical intrusion. App. 14a. The court reasoned that in *Jones*, Jones's possessory interest in the vehicle at the time the government installed the tracking device was dispositive to whether Jones could challenge the GPS search. App. 11a. The Second Circuit focused on the way the Court distinguished *United States* v. *Knotts*, 460 U.S. 276 (1983) and *United States* v. *Karo*, 468 U.S. 705 (1984) in *Jones*. App. 12a–14a.

In *Knotts* and *Karo*, the government installed beepers—battery operated radio transmitters that emit periodic signals that can be picked up by a radio receiver, *Knotts*, 460 U.S. at 277—into containers of chemicals that the government suspected were used to manufacture illegal drugs. *Id.* at 278–79; *Karo*, 468 U.S. at 708–09. The government then tracked the containers. *Id.* In both cases, the government installed the beepers in the containers at issue before they came into possession of the defendants, and with the consent of the then-owners of the containers, which defeated the defendants' Fourth Amendment claims. *Knotts*, 460 U.S. at 278; *Karo*, 468 U.S. at 708. Jones, by contrast, possessed the vehicle when the government trespassed and inserted the GPS device, putting him on a different footing than Knotts and Karo. *Jones*, 132 S. Ct. at 952.

Based on this reasoning, the Second Circuit concluded that *Jones* requires that an individual must own or possess the vehicle when a GPS device is installed to have standing to challenge tracking by that device. App. 17a. (noting that "the [g]overnment may have trespassed or physically intruded on someone's property does not necessarily entitle someone else who later acquires an interest in that property to claim that the [g]overnment trespassed or physically intruded on her property."). Because El-

Nahal did not produce evidence of a possessory interest in a taxicab when GPS tracking was installed, the Second Circuit determined he was precluded from challenging the later use of the device to gather information about him. App. 18a.

B. The Court's guidance is needed to resolve the conflict on this exceedingly important issue.

Standing under *Jones* should not be limited to individuals with possessory interest at the time of the initial trespass. First, the use of such a standard suggests that the government's intrusion only occurs at the moment of installation. As the Second Circuit pointed out, the Court in *Jones* instructed that pursuant to the property-based approach, a Fourth Amendment search "undoubtedly occur[s]" when the government acts to "obtain[] information by physically intruding on a constitutionally protected area." App. 12a (quoting *Jones*, 132 S. Ct. at 950 n.3). Certainly, the intrusion is not limited to the instant the government commits a trespass. Practically speaking, the physical intrusion is ongoing as long as the device is attached to the vehicle—the government is engaged in a continuing trespass. *See, e.g.*, 75 Am. Jur. 2d Trespass § 19 (2016) ("A continuing trespass requires an ongoing invasion of possession of property, and exists for the entire time during which one wrongfully remains on the property.").

Further, contrary to the Second Circuit's assertion, the way the Court distinguished *Knotts* and *Karo* in *Jones* does not establish that only victims of an initial trespass have a Fourth Amendment right where the government employs GPS tracking. *See Jones*, 132 S. Ct. at 952; App. 12a–13a. Although the consent to implant the beepers may have been sufficient to mitigate Fourth Amendment concerns in

Knotts and *Karo*, the same analysis should not apply to GPS tracking conducted on a broad scale. The Court in *Knotts* specifically stated that it was not considering "dragnet type" searches—high volume searches often conducted without articulable suspicion—but beeper technology with limited potential for widespread abuse. 460 U.S. at 284 (noting that "if such dragnet type law enforcement practices … should eventually occur, there will be enough time then to determine whether different constitutional principles may be applicable"). As discussed *infra* section II.2., GPS technology is fundamentally different from the beeper devices in *Knotts* and *Karo.* GPS tracking devices can produce a virtually unlimited stream of location data that can be transmitted remotely and stored indefinitely with minimal manpower once the device is installed. Thus, in the context of GPS tracking, which can be employed over very long periods, it is problematic to assume that one individual's initial "consent" to attaching a GPS renders subsequent users unable to challenge any later use of that device under a property-based theory. Additionally, it is worth noting that no one truly consented to the installation of the device in this case; rather its installation was required by the regulatory fiat.

In *Jones*, the Court had no occasion to consider the effect on standing where possession of a tracked vehicle changed during the monitoring. But if a state were to require monitoring on a wholesale basis, as with the Commission program at issue here, changes in possession would be likely, even inevitable. The Second Circuit's exclusive focus on the point of installation produces practically unfair results. Here, a taxicab driver who happened to own or lease a vehicle at the time when New York mandated GPS

installation (either when the regulation took effect or when a driver purchased or leased a new vehicle) would have standing. But a driver who rented or leased a vehicle with the devices already installed would lack standing—even though he could be tracked in exactly the same way and for the same reasons as an owner-driver. Owners could raise a Fourth Amendment claim, but renters could not. The Second Circuit rule disregards the fact that El-Nahal had no option to remove or disable the tracking device. *See* JA103–104. Such a device was, by law, physically attached to any and every licensed taxicab he could have used to do his job.

More broadly, the Second Circuit's interpretation of *Jones* would allow the government to order car manufacturers to install tracking devices in their cars, which the government could later use to track the movements of the cars' drivers. A state or local government could also demand access to the information stored by GPS devices pre-installed in vehicles that drivers purchase—the drivers expecting that the GPS devices will be used only for the owners' own benefit, such as to aid in navigation. These drivers would lack standing to challenge the government's command—because none would have owned the vehicles at the time the tracking devices were installed by the manufacturers.

Finally, the Court in *Jones* provided no indication that use of the common-law trespassory test would require any significant shift in standing doctrine. At its core, the Fourth Amendment is concerned with privacy interests. *See Katz*, 389 U.S. at 351 ("[T]he Fourth Amendment protects people, not places."). Using the property-based approach should not alter this focus, and whether an individual has standing to assert a Fourth Amendment violation should remain

concerned with whose privacy interest is being infringed on by the government.

In the context of vehicle searches, whether an individual has Fourth Amendment standing should not depend on whether the individual has a lawful possessory interest in the vehicle when the search is under way. *See Rakas*, 439 U.S. at 143 ("capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"). Courts consistently find that interests less than ownership are sufficient to trigger a reasonable expectation of privacy. *See, e.g.*, *United States* v. *Pena*, 961 F.2d 333, 337 (2d Cir. 1992) ("It is not the law, however, that only the owner of a vehicle may have a Fourth Amendment privacy interest. . . Rather, the borrower of an automobile can possess such an interest."); *see also United States* v. *Lee*, 898 F.2d 1034, 1038 (5th Cir. 1990); *United States* v. *Baker*, 221 F.3d 438, 442 (3d Cir. 2000), as amended (Sept. 21, 2000) (collecting cases from other circuits).

Here, El-Nahal leased his taxi from a fleet. Although he did not possess the taxi he would later lease when the GPS device was initially installed, he surely had lawful possession at the time the government used the device to track his movements in order to gain evidence it would use in his prosecution. Thus, El-Nahal had a privacy interest at the critical time—the time of the GPS tracking. The Eleventh Circuit view properly protects this interest by considering the totality of the government's use of GPS tracking, *see Gibson*, 708 F.3d at 1277, while the Second Circuit's focus only on the point of installation arbitrarily excludes a potentially large class of

victims. Because El-Nahal had lawful possession of the taxicab during a period of continuing trespass, the *Jones* trespass-based framework should entitle him and others in similar circumstances to a Fourth Amendment right. The Court's guidance is needed to clarify the standing requirements under *Jones*.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE REGARDING MINING OF GPS DATA.

Regardless of physical trespass, there is no dispute that, in this case, the Commission mined GPS tracking data of El-Nahal for the purpose of rooting out purportedly criminal activity, and then used the information to attempt to discipline him—denying his ability to participate in his trade in the process. For that reason as well, the Court should grant a writ of certiorari to resolve whether the government may mine a person's GPS location data without a warrant, regardless of physical trespass.

While the Court decided *Jones* based on the fundamental Fourth Amendment right against government trespass for the purpose of obtaining information, the Court noted that this property-based approach did not foreclose the use of the "reasonable expectation of privacy" test when considering GPS tracking in other circumstances. *Jones*, 132 S. Ct. at 950. The Court clarified that it was not making trespass "the exclusive test," but was preserving the *Katz* analysis for application in cases of transmission of electronic signals that did not require the physical trespass present in *Jones*. *Id.* at 953. Further, the Court noted that "[i]t may be that achieving the same result," continuous remote surveillance, "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy," even if the

Court did not have occasion to reach that question in *Jones*. *Id.* at 954.

The concurring opinions in Jones discussed the possible problems posed by reverting to a property-based approach to the Fourth Amendment. Those opinions posited that applying the *Katz* analysis could potentially avoid Fourth Amendment questions created by GPS tracking that does not require a trespass. While recognizing that the "trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum," Justice Sotomayor, in her concurrence, also recognized that the transmission of electronic signals without such a trespass would remain subject to the *Katz* analysis and that advances in technology would affect the societal expectations of privacy. *Id.* at 955 (Sotomayor, J. concurring). While previewing potential issues that have attended changes in GPS technology, such as the low cost and high availability of GPS technology and the necessary nature of offering data to third parties, Justice Sotomayor concurred, recognized the inevitability of the Court being presented with the question of whether there is a reasonable expectation of privacy against long-term use of GPS tracking even without a physical trespass. *Id.* at 956–57.

Justice Alito's concurring opinion raised other concerns about applying the property-based test in GPS cases and asserted that the proper test was "whether [an individual's] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." *Id.* at 958 (Alito, J., concurring). Justice Alito pointed to the evolution of the Court's Fourth Amendment jurisprudence away from the property-based approach, highlighting that the Court has "decoupled

violation of a person's Fourth Amendment rights from trespassory violation of his property." *Id.* at 960 (quoting *Kyllo*, 533 U.S. at 32 (2001)). Pointing out that the societal expectation has long been that the government will not "secretly monitor and catalogue every single movement of an individual's car for a very long period," Justice Alito's concurring opinion underscored the importance of applying the *Katz* analysis to GPS tracking. *Id.* at 964.

Thus, the majority opinion in Jones left open the question of whether warrantless GPS tracking of an individual's vehicle constitutes a violation of the individual's Fourth Amendment rights if there was no initial physical trespass. However, the majority and the concurrences all recognized that the question was likely on the horizon and would need to be answered. That day has arrived. As noted by Justice Sotomayor's concurrence, the majority opinion in *Jones* offers little guidance "[i]n cases of electronic or other novel modes of surveillance that do not depend upon physical invasion on property." *Id.* at 955 (Sotomayor, J., concurring). Here, regardless of whether there was a physical invasion that El-Nahal has standing to assert, El-Nahal certainly was tracked, and this case raises the question of the necessary limits on the government's power to engage in such tracking without a warrant.

GPS-equipped devices are ubiquitous. *See* Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, PEW RESEARCH CENTER (June 6, 2013).[6] They are able to provide massive amounts of data regarding day-to-day activities of users. *See* Neema Singh Guliani,

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[6] Available at: http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/ (noting that more than 90% of American adults have a cellphone).

Written Testimony of Neema Singh Guliani on behalf of the American Civil Liberties Union Before the U.S. House of Representatives Committee on Oversight and Government Reform, Hearing on "Geolocation Technology And Privacy, American Civil Liberties Union (Mar. 2, 2016), 2–3.[7] Many cars now come with built-in GPS devices to aid in everyday navigation. *See generally* Derek S. Witte, *Bleeding Data in a Pool of Sharks: The Anathema of Privacy in a World of Digital Sharing and Electronic Discovery*, 64 S. C. L. Rev. 717 (2013) (detailing the common nature of GPS technology built into cars and the information that can be gleaned therefrom). Cell phones are equipped with GPS capability in order to allow users to find everything from directions to the nearest coffee shop to the location of nearby friends, as well as to allow public safety officers to identify the location of 911 callers. *See* Guliani *supra*. Other drivers who do not have GPS pre-installed may use detachable in-car navigation systems to guide them from one place to the next. *See, e.g.*, *Products, Automotive*, GARMIN.[8] Health buffs use personal-use GPS devices on their person to measure the distance and location of physical activity. *See, e.g.*, *Surge*, Fitbit.[9] Whether

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[7] Available at: https://www.aclu.org/legal-document/aclu-testimony-house-oversight-and-Government-reform-committees-hearing-geolocation.

[8] Available at: https://buy.garmin.com/en-US/US/cOnTheRoad-cAutomotive-p1.html (last visited Dec. 17, 2016) (detailing various GPS devices for use in vehicles).

[9] Available at https://www.fitbit.com/surge (last visited Dec. 17, 2016) (detailing the Fitbit Surge, "the #1 selling GPS watch in the U.S.," which utilizes GPS tracking to allow users to "[s]ee distance, pace, split times and elevation claimed [and] review routes").

the technology is in your pocket, on your wrist, or in your car, GPS technology is everywhere.

While these GPS devices may be helpful and convenient, the data from the devices may also be used to create a full portrait of a person's life, habits, and associations by providing an up-to-date account of an individual's location for the entire time tracking is conducted. The data gathered from these devices can offer a "precise, comprehensive record" of an individual's comings and goings that can reflect a larger picture of "familiar, political, professional, religious, and sexual associations." Jones, 132 S. Ct. at 955 (Sotomayor, J., concurring). What one may have considered a private trip to "the psychiatrist, the plastic surgeon, the abortion clinic . . . the union meeting, the mosque" is suddenly readily accessible and verifiable through the use of GPS data. *See, e.g.*, *People* v. *Weaver*, 12 N.Y.3d 433, 441–442 (2009) (holding placement of a GPS tracking device, and subsequent monitoring of car's location, constituted a search requiring a warrant under the Constitution of the State of New York). These patterns of data are capable of creating a context for understanding a person's actions at large and creating patterns to predict what the person may do in the future. *See, e.g.*, *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.").

It is also important to note that the advances in GPS technology allow real-time tracking that was previously unavailable with earlier iterations of technology, such as the beepers addressed in *Knotts*, 460 U.S. 276 (1983), and *Karo*, 468 U.S. 705 (1984). While "GPS devices permit significantly more

surveillance than beepers," through "monitoring with much greater detail, less cost, less oversight, and over a longer period of time," Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476, 500 (2011), beepers are merely radio transmitters that are able to transmit signals to a receiver if it is sufficiently nearby. *Knotts*, 460 U.S. at 277. The two types of technology are worlds apart in capabilities, as the beeper only allows somewhat enhanced surveillance of what a person would normally be capable of witnessing first hand, *Knotts*, 460 U.S. at 277, while GPS tracking is capable of monitoring in a way that far outstrips what one person, or several persons, would be able to accomplish for extended periods of time. See Kerr, *supra*, at 500.

The advances in GPS tracking technology allow the government to collect more data of a highly detailed quality relatively cheaply and with minimal effort. The ability to access preexisting GPS devices removes a large cost to the government because no additional equipment or surveillance teams are required. GPS tracking does not require any visual surveillance and may be monitored remotely and continuously over an extended period of time, as receivers automatically recalculate their position. Additionally, GPS devices can give the government information that would formerly be protected, such as location information within a home, because the GPS device emits the same signal and data regardless of where it is located. See Kerr, *supra*, at 499. This sort of data harvesting also raises the potential for aggregation of data on a mass scale for an extended period of time, as the "[g]overnment can store such records and efficiently mine them for information

years into the future." *See United States* v. *Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010).

This information is already being stored by car manufacturers, cell phone service providers, and the myriad of other service providers that rely on GPS tracking in order for their products to function. Potentially, the government could surveil targets by "enlisting factory or owner-installed vehicle tracking devices or GPS-enabled smartphones." *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring). Large scale tracking on a widespread basis would thus be possible on demand by simply accessing the data already collected by service providers. The Court has previously cautioned against high volume searches conducted without any articulable suspicion, or "dragnet" searches. *See*, *e.g., Florida* v. *Bostick,* 501 U.S. 429, 441 (1991); *Cupp* v. *Murphy,* 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in *Davis* v. *Mississippi,* 394 U.S. 721 (1969)); *Berger* v. *New York,* 388 U.S. 41, 65 (1967). This is not an amorphous fear about the future, as demonstrated by the facts of this case. The GPS tracking in this case was conducted over all New York city medallion taxi drivers in a "dragnet" fashion and raises the broader concerns about mass suspicionless monitoring that the Court mentioned in *Knotts. See* 460 U.S. at 283–84.

As noted by Justice Sotomayor's concurrence in *Jones*, its lower cost and surreptitious nature allows GPS tracking to "evade[ ] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004)). The Court has recognized the importance of placing outside safeguards on law enforcement in order to ensure that

technological progress will not be abused while advancing the government's interests at the expense of citizens' rights. *See, e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450 (1971) ("[P]rosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise that must rightly engage their single-minded attention.'") (quoting *Mancusi* v. *DeForte*, 392 U.S. 364, 371 (1968)). The potential for easily accessible, vast amounts of intrusive data that may be aggregated long-term by the government creates impending constitutional problems that could be avoided by checking the government's power to access this information at the outset through a mandatory warrant procedure prior to accessing a target's GPS data. *See, e.g.*, *Jones,* 132 S. Ct. at 956 ("[T]he [g]overnment's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.") (Sotomayor, J., concurring)). If a warrant is not required, it leaves open the possibility that round-the-clock monitoring of an individual—the data from which may be compiled into a permanent record—may be done at any time based on the unfettered discretion of the state. What is more, because of the widespread nature of this technology, the government could surveil a virtually unlimited number of people for an indefinite amount of time.

Here, the City of New York did exactly what the Court left for another day in *Maryland* v. *King*—it asserted a justifiable and limited use of the gathered data, and then secretly expanded its use of the gathered data far beyond the scope of what it had originally promised. 133 S. Ct. 1958, 1979 (2013). The Court in *King* found solace in the fact that DNA tests of arrestees were, by law, only to be analyzed for the

purpose of generating a match that could be tested against future samples from crime scenes. *Id.* And the Court acknowledged that if the government analyzed the samples for reasons outside the scope of creating the match, there would be additional privacy concerns raised. *Id.* Here, the government asserted that it was collecting the GPS information for research, policy, and customer service purposes, but then used the information to prosecute taxi drivers for alleged offenses. The warrant requirement is the most effective safeguard for preventing government intrusion on privacy to conduct criminal investigations into data purportedly obtained for benign uses.

It also seems that most people have an expectation that the government will not access their GPS data before obtaining a warrant. California, Indiana, Illinois, Maine, Maryland, Minnesota, Montana, New Hampshire, Utah, Virginia, Washington, and Wisconsin have all passed statutes requiring warrants for this type of information.[10] Additionally, six of those states have also adopted laws requiring that law enforcement obtain warrants before obtaining historical cell site information.[11]

It is the Fourth Amendment's "goal to curb arbitrary exercises of police power … and prevent 'a

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[10] Cal. Penal Code § 1546; 16 Maine Rev. Stat. § 648; Md. Code, Criminal Procedure 1-203.1(b)(1); Minn. Stat. §§ 626A.28(3)(d), 626A.42(1)(d); Mont. Code § 46-5-110(1)(a); N.H. Stat. § 644-A; Va. Code § 19.2-56.2; Wash. Rev. Code § 9.73.260.725; Ill. Comp. Stat. 168/10; Ind. Code § 35-33-5-12; Wis. Stat. § 968.373(2); Utah Code § 77-23c-102.

[11] Cal. Penal Code § 1546; 16 Maine Rev. Stat. § 648; Minn. Stat. §§ 626A.28(3)(d), 626A.42(1)(d); Mont. Code § 46-5-110(1)(a); N.H. Stat. § 644-A; Utah Code § 77-23c-102.

too permeating police surveillance.'" *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *United States* v. *Di Re*, 332 US 581, 595 (1948)). The combination of the advanced nature of GPS technology and potential for abuse by the government creates an opportunity for such arbitrary exercises of police power. The knowledge that the government is capable of tracking one's comings and goings from sensitive places such as political meetings or religious gatherings may chill the desire of people to associate with others. Handing the government the ability to access the information at "its unfettered discretion … may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" Id. (quoting *United States* v. *Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)). Furthermore, if people stop using GPS-equipped devices because of the fear that the data produced may be used without a warrant, this may discourage technological pioneers from developing future technologies, thereby slowing scientific progress. The risks posed by warrantless GPS tracking are a danger to the constitutional freedoms integral to American society and must be limited by judicial oversight.

As aptly discussed by Justice Brandeis in his dissent in *Olmstead* v. *United States*, "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a … capacity of adaptation to a changing world." 277 U.S. 438, 472 (1928). If the Fourth Amendment is to retain legitimacy in its ability to protect Americans against unlawful intrusions by the government, the law needs to reflect the potential for abuse of GPS technology and appropriately guard against it.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-405-cv

Appeal from the United Stated District Court
for the Southern District of New York

Argued: December 11, 2014
Decided: August 26, 2016

HASSAN EL-NAHAL, individually and on behalf of all others similarly situated, *Plaintiff-Appellant*,

v.

DAVID YASSKY, COMMISSIONER MATTHEW DAUS, MICHAEL BLOOMBERG, THE CITY OF NEW YORK, *Defendants-Appellees*.

Before: POOLER, LIVINGSTON, and DRONEY, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Forrest, *J.*), granting summary judgment to Defendants-Appellees, the City of New York and various of its employees, on Plaintiff-Appellant Hassan El-Nahal's 42 U.S.C. § 1983 claim that Defendants-Appellees violated his Fourth Amendment rights by mandating the installation of

tracking systems in taxicabs, thereby trespassing or physically intruding upon property for the purposes of gathering information. Because we find no genuine issue of material fact as to whether a trespass or physical intrusion occurred with respect to any property of El-Nahal, we conclude that summary judgment was appropriate, and therefore **AFFIRM** the judgment of the district court.

Judge POOLER concurs in part and dissents in part in a separate opinion.

DANIEL L. ACKMAN, Law Office of Daniel L. Ackman, New York, N.Y., *for Plaintiff-Appellant*.

ELIZABETH S. NATRELLA, for Zachary W. Carter, Corporation Counsel of the City of New York (Richard Dearing, Pamela Seider Dolgow, *on the brief*), New York, N.Y., *for Defendants-Appellees*.

DEBRA ANN LIVINGSTON, Circuit Judge:

Plaintiff-Appellant Hassan El-Nahal ("El-Nahal"), a New York City taxi driver, brought a 42 U.S.C. § 1983 suit in the United States District Court for the Southern District of New York (Forrest, *J.*), principally alleging that the New York City Taxi and Limousine Commission ("TLC")—through Defendants-Appellees Matthew Daus, a former chairman of the TLC; David Yassky, then- chairman of the TLC; Michael Bloomberg, then-Mayor of New York City; and the City of New York (collectively, "Defendants")—had deprived him of his Fourth Amendment rights in various ways. As relevant to this appeal, El-Nahal argued that the TLC's mandate

that all New York City taxicabs install technology systems equipped with Global Positioning System ("GPS") tracking abilities amounted to a property-based search pursuant to *United States v. Jones*, 132 S. Ct. 945 (2012), and that this search violated his Fourth Amendment rights. The District Court granted summary judgment to Defendants on all of El-Nahal's Fourth Amendment claims, including his *Jones* claim, which is the only issue before us on appeal. Because the record is devoid of evidence as to whether El- Nahal had any interest in a taxi at the time of an alleged trespass or physical intrusion, El-Nahal failed to make a sufficient showing on an essential element of his property-based Fourth Amendment claim and Defendants were entitled to summary judgment. Accordingly, we **AFFIRM** the district court's grant of summary judgment to Defendants.

I.

A. Background

The TLC is an agency of the City of New York that is tasked with the "regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city." N.Y.C., N.Y., Charter ch. 65, § 2303a. Its duties include the regulation of "rates," "standards and conditions of service," "[r]equirements of standards of safety and . . . efficiency in the operation of vehicles and auxiliary equipment," and the "establishment of . . . [a] uniform system of accounts," which entails "the right . . . to inspect books and records and to require the submission of such reports as the commission may determine." *Id.* § 2303b. Pursuant to the New York City Administrative Code, the TLC may promulgate

rules as necessary to implement its authority. N.Y.C., N.Y., Code § 19-503(a).

In 2004, the TLC promulgated a rule requiring that all New York City taxicabs begin to use a Taxicab Technology System ("TTS"), a physical device located in the backseat of taxicabs that would, among other things, provide credit and debit card payment services for customers, as well as transmit to the TLC electronic data about trips made by taxi drivers gathered by means of GPS. *See* N.Y.C., N.Y., Rules tit. 35, § 1-01 (2010). Through the TTS, the TLC would collect—only when drivers were on duty—"the taxicab license number; the taxicab driver's license number; the location of trip initiation; the time of trip initiation; the number of passengers; the location of trip termination; the time of trip termination; the metered fare for the trip; and the distance of the trip." *Id.* § 3- 06(b). Prior to the implementation of the TTS rule, the TLC required drivers to provide this same information in the form of handwritten trip records. The TTS rule mandated that taxicab medallion owners procure TTSs in their taxis by August 1, 2007. *Id.* § 1-11(g).

Around the same time as the TLC promulgated the TTS rule, the TLC also established a new system for taxi fare "rate codes," corresponding to different types of fares a taxi driver may charge. Rate Code 1, for instance, is the standard New York City rate and is used for fares from point-to-point within New York City. Rate Code 4, meanwhile, doubles the fare for each additional unit driven, and may be engaged by a taxi driver only under certain circumstances upon entering Nassau or Westchester County.

In March 2010, the TLC issued a press release announcing that it had discovered that some taxicab drivers were using the Rate Code 4 setting to overcharge passengers. "Using GPS technology installed in taxicabs," the press release explained, the "TLC has discovered 1,872,078 trips where passengers were illegally charged the higher rate" by 35,558 drivers for a total of $8,330,155 in alleged overcharges. J.A. 135. The press release qualified this finding by noting that "there were 361 million taxi trips during that time period, so the illegal fare was only charged in 0.5% of all trips," and that the alleged "scam was primarily perpetrated by a small number of drivers, with 3,000 drivers overcharging more than 100 times." *Id.*

Two months later, in May 2010, the TLC issued a second press release that modified its initial findings, announcing that the "TLC's completed analysis" revealed that "21,819 taxicab drivers overcharged passengers a total of 286,000 times . . . for a total estimated overcharge of almost $1.1 million." J.A. 146. The press release added that the TLC believed that 13,315 out of the 21,819 drivers had "engaged in overcharging just one or two times," but that it expected "to be able to prove that some drivers engaged in 1,000 or more overcharges." *Id.* In response to the scandal, the Manhattan District Attorney's office arrested 59 drivers "for defrauding and stealing from their customers," J.A. 150, and the TLC programmed passenger screens to display "a highly visible alert that advises riders when the higher, out of town rate is activated," J.A. 151. The TLC also brought administrative actions against many drivers.

Among those who faced administrative charges was El-Nahal, who at that point had been a taxi driver for more than twenty years. On January 3, 2012, the TLC sent El-Nahal a letter directing him to appear for a settlement conference in reference to allegations that he overcharged passengers on 10 occasions between November 20, 2009 and February 22, 2010 by improperly using the Rate 4 code. El-Nahal contested the allegations. On May 7, 2012, an administrative law judge found, based on trip records the TLC allegedly obtained via GPS, that El-Nahal violated the TLC's rules on six occasions. The administrative law judge thus imposed upon El-Nahal $550 in penalties and revoked El-Nahal's TLC license to drive taxis. On appeal, the Office of Administrative Trials and Hearings Taxi and Limousine Tribunal Appeals Unit ("Appeals Unit") overturned the penalty, ruling that the administrative law judge's decision was "not supported by substantial evidence." J.A. 187. The TLC then re-filed regarding one violation, and the administrative law judge found El-Nahal not guilty. Undeterred, the TLC re-filed five other charges against El-Nahal, and a different administrative law judge once again found El-Nahal guilty, imposed a fine, and revoked his license. El-Nahal again appealed, and the Appeals Unit again overturned the administrative law judge's decision on the ground that the administrative law judge's findings with respect to El-Nahal's alleged intent to overcharge were insufficient. Nonetheless, the TLC re-filed charges against El-Nahal once more. An administrative law judge yet again found El-Nahal guilty, based in part on GPS trip records and Google maps, and the Appeals Unit yet again reversed the decision on appeal. In reversing, the Appeals Unit dismissed the

charges with prejudice and emphasized that the GPS evidence used to convict El-Nahal could not, by itself, show that El-Nahal "intended to overcharge, only that he did overcharge." J.A. 216.

B. Procedural History

On May 31, 2013, El-Nahal filed his complaint.[12] As relevant here, the complaint alleged that "[t]he installation and use of [the] GPS device [through the TTS] . . . constitutes a[n unlawful] search under the Fourth Amendment." J.A. 34. The complaint also alleged violations of the New York Constitution, Article 78 of the New York Civil Practice Laws and Rules, the New York City Charter, and New York common law.

On August 21, 2013, Defendants moved to dismiss El-Nahal's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Attached to the motion were seventy-two pages of exhibits. At an initial pretrial conference held on September 13, 2013, Judge Forrest converted Defendants' motion to dismiss into a motion for summary judgment and directed El-Nahal to file his opposition to Defendants' motion for summary judgment and his own motion for summary judgment by September 24, 2013. On September 24, 2013, El-Nahal cross-moved for partial summary judgment with respect to his § 1983 and New York Constitution claims, and opposed Defendants' motion for summary judgment.

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[12] Although El-Nahal filed the complaint on behalf of himself and similarly situated individuals, he at no point in the district court proceedings sought class certification.

By order dated January 29, 2014, the district court granted Defendants' motion for summary judgment on El-Nahal's § 1983 claim, and dismissed the state claims for lack of supplemental jurisdiction. *El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 469–70 (S.D.N.Y. 2014). The district court held that the installation and use of the TTS did not constitute a search for the purposes of the Fourth Amendment. As to whether the challenged conduct intruded on El-Nahal's reasonable expectation of privacy, the district court, citing our decision in *Buliga v. N.Y.C. Taxi & Limousine Comm'n*, 324 F. App'x 82, 82 (2d Cir. 2009) (affirming a district court's ruling that the TLC rule requiring the installation of a TTS in all taxis did not invade the plaintiff's reasonable expectation of privacy), concluded that El-Nahal had no "reasonable expectation of privacy in any of the information collected" by the TTS. *El-Nahal*, 993 F. Supp. 2d at 465. Regarding El-Nahal's claim that the mandatory installation of the TTS was a search because it involved a physical intrusion for the purpose of obtaining information, the district court rejected the claim on the grounds that "taxi drivers are aware of the system, the system is installed pursuant to regulations, and the taxicabs in which the system is installed are not truly private vehicles." *El-Nahal*, 993 F. Supp. 2d at 467. The district court further reasoned that even assuming, *arguendo*, that the mandatory installation of the TTS did constitute a search for Fourth Amendment purposes, the search was justified pursuant to the "special needs" doctrine. *Id.* at 469. El-Nahal timely appealed.

II.

"We review an award of summary judgment *de novo*." *F.D.I.C. v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994). Upon proper motion, Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 743 (2d Cir. 2003) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322–23 (quoting Fed. R. Civ. P. 56(c) (1963) (current version at Fed. R. Civ. P. 56(a) (2010))). Thus, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323 (quoting Fed. R. Civ. P. 56(c) (1963) (current version at Fed. R. Civ. P. 56(a) (2010))); *see also Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (noting that "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim").

* * *

El-Nahal argues that the district court erred by granting summary judgment on his Fourth Amendment claim because pursuant to *Jones*, "[p]hysical placement of a tracking device on a private

vehicle in order to obtain information is . . . a search," so that his Fourth Amendment rights were violated when "[t]he TLC mandated the physical placement of tracking devices in privately owned taxicabs." Appellant's Br. at 29. El-Nahal has not argued on appeal that he was subjected to a search by virtue of an intrusion on any reasonable expectation of privacy he had regarding the installation and use of the TTS.[13] Instead, he asserts here that he "explicitly 'rejected the premise' of defendants' argument below that he was required to demonstrate an invasion of privacy" and that his Fourth Amendment claim "does not depend on whether his expectation of privacy was violated." Appellant's Br. at 31–32. Accordingly, we address the only argument El-Nahal has presented on appeal: namely, his contention that the district court erred in concluding that summary judgment was warranted as to his property-based Fourth Amendment claim. Assuming, *arguendo*, that the TLC-mandated installation and use of TTS devices in taxicabs in New York City may constitute a search as to those with sufficient property-based interests in a taxicab, we conclude that the district court nevertheless properly granted summary judgment

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[13] The reasonable-expectation-of-privacy approach for deciding whether a search has occurred within the meaning of the Fourth Amendment derives from Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), which affirms that the Fourth Amendment protects against invasions upon an individual's "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring); *see Smith v. Maryland*, 442 U.S. 735, 740 (1979) ("Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." (citing cases)).

because there is no evidence in the record as to an essential element of El-Nahal's claim on which he bears the burden of proof: namely, that he had such a property interest in a taxicab at the time a TTS was installed.[14]

Jones itself demonstrates that a plaintiff such as El-Nahal must establish such a property-based interest. In *Jones*, the Supreme Court made clear that the reasonable-expectation-of-privacy test did not supplant, but merely supplemented the earlier, property-based approach to defining the circumstances in which a "search," for Fourth Amendment purposes, has occurred. 132 S. Ct. at 949–50. There, the Government placed a GPS tracking device on the undercarriage of a Jeep that was, as the Government acknowledged, exclusively driven by Jones.[15] *Id.* at 948–49 & n.2. The Government then tracked the Jeep's movements for 28 days, using information gleaned from the tracking in Jones's prosecution for several drug offenses. *Id.* at 948–49. The *Jones* Court instructed that pursuant to

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[14] We thus affirm on an alternative ground and do not consider the district court's conclusions: (1) that Defendants' actions "did not constitute a search within the meaning of the Fourth Amendment . . . under . . . the *Jones* physical- trespass analysis;" and (2) that assuming, *arguendo*, that a search occurred, "that search was reasonable under the special-needs analysis of the Fourth Amendment." *El-Nahal*, 993 F. Supp. 2d at 468–69.

[15] Because the Government conceded that Jones was "the exclusive driver" of the Jeep, *Jones*, 132 S. Ct. at 949 n.2 (quoting *United States v. Maynard*, 615 F.3d 544, 555 n.* (D.C. Cir. 2010), *aff'd on other grounds sub nom. United States v. Jones*, 132 S. Ct. 945 (2012)), even if Jones was "not the owner" of the Jeep, the Supreme Court noted, he "had at least the property rights of a bailee," *id.*

the property-based approach, a Fourth Amendment search "undoubtedly occur[s]" when the Government acts to "obtain[] information by physically intruding on a constitutionally protected area," *id.* at 950 n.3—that is, on individuals' "persons, houses, papers, and effects," as enumerated in the Fourth Amendment's text, U.S. Const. Amend. IV.[16]

Because Government agents had physically intruded on Jones's Jeep, which was "beyond dispute . . . an 'effect' as that term is used in the [Fourth] Amendment," *Jones*, 132 S. Ct. at 949, to plant and employ a tracking device, the Supreme Court concluded that it need not consider the reasonable-expectation- of-privacy approach in determining whether Jones was subject to a search, *see id.* at 950–53. Applying the property-based approach, the Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.* at 949. Thus, Jones was subject to a search because the Government installed a GPS device on *his* vehicle in order to obtain information—on a vehicle that, while registered to his wife, he exclusively drove and in which (as the Court took pains to note) he "had at least the property rights of a bailee" at the time the Government installed the tracking device. *Id.* at 949 n.2.

The centrality of some property interest to a property-based Fourth Amendment claim is also

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[16] The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV.

evident in the manner in which the *Jones* Court distinguished *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984). In *Knotts* and *Karo*, the Government had installed beepers—"radio transmitter[s], usually battery operated, which emit[] periodic signals that can be picked up by a radio receiver," *Knotts*, 460 U.S. at 277—into containers of chemicals that were thereafter tracked, and that the Government suspected would be used in connection with the manufacture of illegal drugs, *see id.* at 278– 79; *see also Karo*, 468 U.S. at 708–09. The Government argued in *Jones* that *Knotts* and *Karo* "foreclose[d] the conclusion that what occurred [to Jones] constituted a search" because in these earlier cases, the Court, employing the reasonable-expectation-of-privacy approach, had determined that using a beeper to track the movement of the containers on public roads did not constitute a search. 132 S. Ct. at 951. The *Jones* Court disagreed, concluding that the outcomes in *Knotts* and *Karo* were "perfectly consistent" with its property-based approach to the Fourth Amendment's scope. *Id.* at 952.

As *Jones* explained, the Government in *Knotts* had installed the beeper in the container at issue "*before it came into Knotts*[*s*] *possession*, with the consent of the then-owner" of the container. *Id.* (emphasis added). Knotts did not challenge the installation, and the Court "specifically declined to consider its effect." *Jones*, 132 S. Ct. at 952. Similarly, the *Jones* court explained that in *Karo*, "[a]s in *Knotts*, . . . [t]he Government . . . came into physical contact with the container only *before it belonged to the defendant Karo*" and with the consent of its then-owner: "Karo accepted the container as it

came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location." *Id.* (emphasis added). Jones, meanwhile, was on "much different footing" than Knotts or Karo: he "possessed the Jeep *at the time the Government trespassorily inserted* the information-gathering device." *Id.* (emphasis added); *see also* Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 2.7(f) (5th ed. 2012) (noting that "the date of the requisite trespass" rather than the "period of surveillance" is critical to assessing whether a search has occurred pursuant to *Jones*'s property-based approach). Because the physical intrusion was upon a constitutionally protected area and was undertaken for the purpose of obtaining information, the Government's conduct amounted to the type of property-based search that the Fourth Amendment protects against. *Jones*, 132 S. Ct. at 949.

To be clear, because there was no dispute in *Jones* that the defendant lawfully possessed the Jeep at the time it was trespassed upon, nor did the Government challenge the D.C. Circuit's determination "that the vehicle's registration did not affect [Jones's] ability to make a Fourth Amendment objection," the *Jones* Court had no occasion fully to consider the nature of the property interest that is sufficient to make out a property-based Fourth Amendment claim. *Id.* at 949 n.2. Neither need we do so here. Because we can discern no evidence at all that El-Nahal had *any* interest in a particular taxicab at the time of an alleged trespass or physical intrusion, we find no genuine issue of material fact warranting a trial. Summary judgment in favor of Defendants was therefore wholly proper.

During the proceedings that led to summary judgment in favor of Defendants, Defendants repeatedly stated that the property-based approach in *Jones* was predicated upon physical intrusion on property, and emphasized how *Jones* differed from *Knotts* and *Karo*. For instance, Defendants' opening memorandum of law explained that, unlike the defendant in *Jones*, there was no physical occupation of El-Nahal's property for the purpose of obtaining information because, as in *Knotts* and *Karo,* "the initial placement of the monitor was not at issue." Defs.' Mem. of L. in Supp. at 11, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 13. Since the "physical placement of the GPS device" was not at issue, Defendants continued, *Jones* had "little relevance in Plaintiff's claim."[17] *Id.* It logically followed from that statement that if *Jones was* to have any relevance, El-Nahal had to put the placement of the GPS device at issue—a point he implicitly acknowledged in his own papers in opposition to Defendants' motion and in support of his cross motion for summary judgment by stating that "[t]he Court's decision [in *Jones*] was based on a

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[17] Defendants reiterated this crucial aspect of *Jones* in their opposition to El- Nahal's cross-motion for summary judgment on the search claim. Defs.' Mem. of L. in Opp. at 12, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 469–70 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 30. They did so yet again in their reply memorandum in support of their own motion for summary judgment, devoting an entire section of their brief specifically to the a that "[t]here [w]as [n]o [t]respass on Plaintiff's [p]erson or [p]roperty [c]onstituting a [s]earch." Defs.' Reply Mem. of L. in Supp. at 7, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 469–70 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 36.

traditional understanding of the Fourth Amendment tied to common law trespass" and "the physical attachment of the device," Pl.'s Mem. of L. in Supp. at 15-16, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 22, and that *Jones* "focused on the [G]overnment's trespass on *Jones*[*s*] *vehicle*," *id.* at 19 (emphasis added).

Defendants thus "point[ed] out to the district court . . . that there [was] an absence of evidence," *Celotex*, 477 U.S. at 325, to support "an essential element" of El-Nahal's *Jones* claim, *id.* at 323. It then fell to El-Nahal to "come forward with specific evidence demonstrating the existence of a genuine dispute of material fact" as to that element of his Fourth Amendment claim. *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)); *see also Tovar v. KLM Royal Dutch Airlines*, No. 98 Civ. 5178(LAP), 2000 WL 1273841, at *5–6 (S.D.N.Y. Sept. 6, 2000) (in converting defendants' motion to dismiss to a motion for summary judgment, noting that defendants may satisfy their burden by "point[ing] to an absence of evidence to support an essential element of the nonmoving party's claim," at which point the burden "shifts to the [plaintiff] to come forward with 'specific facts showing that there is a genuine issue for trial'" (quoting *Goenaga*, 51 F.3d at 18; Fed. R. Civ. P. 56(e))). Yet, El-Nahal adduced no evidence as to the circumstances surrounding any alleged trespass or physical intrusion on a taxicab in which he had a property-based interest.

Here, El-Nahal emphasizes that he drives a taxicab and that the TLC mandated the physical

placement of a TTS in all privately owned cabs. But this is not enough to show that the physical placement of a TTS intruded on a constitutionally protected area *of El-Nahal*. Even if El-Nahal at some point drove a taxicab installed with a TTS, this fact, standing alone, is no more relevant than the fact that Knotts and Karo at some point possessed containers installed with beepers. As *Jones* makes plain, the possibility that the Government may have trespassed or physically intruded on *someone*'s property does not necessarily entitle *someone else* who *later acquires* an interest in that property to claim that the Government trespassed or physically intruded on her property.

El-Nahal provided no evidence describing his interest in a taxi at the time of an alleged trespass or physical intrusion. Beyond stating that he has been a taxicab driver for more than 20 years, El-Nahal leaves it a mystery whether he owns a taxicab medallion (and it is the *owners* of such medallions that TLC regulations require to equip their taxicabs with a TTS, N.Y.C., N.Y., Rules tit. 35, § 1-11(f)–(g) (2010)), rents a taxi from a corporate owner on a daily or weekly basis, or alternates driving shifts with another driver who rents a cab. Moreover, he has said *nothing at all* as to what interest he had in a particular taxi (if any) at the time it was installed with a TTS. Thus, so far as the record here discloses, El- Nahal may have rented a taxi after its owner contracted with a third-party provider to install a TTS, fully cognizant of the presence of the TTS in the cab, and even taking custody of the cab on the condition that he properly maintain the TTS while operating the taxi. *Cf. Jones*, 132 S. Ct. at 961 (Alito, J., concurring) (noting that "the [*Jones*] theory would provide no protection" if "the Federal Government required or persuaded auto

manufacturers to include a GPS tracking device in every car"). *Jones* leaves no doubt that in such a case, a property-based search claim would be lacking.

That the parameters of the property-based search theory outlined in *Jones* were not fully explicated in that case makes it all the more remarkable that El-Nahal has failed to adduce evidence on one aspect of *Jones* that *is* clear: to claim that the Government trespassed or physically intruded upon one's constitutionally protected area for the purposes of gathering information, a plaintiff must establish a property interest in a constitutionally protected area at the time of the intrusion. Here, El-Nahal has provided no evidence tending to show that he had an interest in any taxi at the time of an alleged trespass or physical invasion—an element that, whether dependent on or divergent from common-law tort principles, we have described as "the touchstone for the analysis in *Jones*." *See United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013) (Pooler, J.). No reasonable jury could find for El-Nahal on his claim that the Government's conduct constituted a search under *Jones*, and there is nothing for us to do but to affirm the district court's grant of summary judgment to Defendants. Accordingly, finding no genuine issue of material fact warranting a trial, we **AFFIRM** the judgment of the district court.

POOLER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the majority's excellent analysis of the line between *United States v. Jones*, 132 S. Ct. 945 (2012), on the one hand, and *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), on the other hand. Indeed, had

Defendants pressed the same analysis before the district court, I would join the majority in holding that Defendants had successfully shifted the burden to El-Nahal to "come forward with specific evidence demonstrating the existence of a genuine dispute of material fact" on the issue of El-Nahal's property interest in the taxi at the time of the alleged trespass, *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011), and that El-Nahal failed to meet this burden.

I disagree, however, that Defendants "point[ed] out to the district court . . . an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The majority relies on Defendants' statements that "the initial placement of the monitor was not at issue," Defs.' Mem. of L. in Supp. at 11, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 13; Defs.' Mem. of L. in Opp. at 12, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 469–70 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 30, that because the "physical placement of the GPS device in the vehicles is not at issue" *Jones* "has little or no relevance in Plaintiff's claim," Defs. Mem. of L. in Supp. at 11, and the analysis following the heading "There Was No Trespass on Plaintiff's Person or Property Constituting a Search," the only even arguably relevant portion of which merely again stated that "the physical placement of the GPS device in the vehicles is not at issue." Defs.' Reply Mem. of L. in Supp. at 7, *El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 469–70 (S.D.N.Y. 2014) (No. 13-cv-3690 (KBF)), ECF No. 36. Thus, in 64 pages of briefing by Defendants, the only statement referring to an absence of evidence on the point of El-Nahal's interest in the taxi at the time of the trespass is that "the physical placement of

the GPS device in the vehicles is not at issue." I, quite frankly, do not know what this statement means. While the majority draws nuanced lines between *Jones* and *Knotts* and *Karo*, showing the importance of an ownership interest at the time of the trespass, *at most* Defendants implicitly hint at such a distinction. I do not think this was sufficient to shift the burden to El-Nahal to provide evidence of his property interest in the taxi.

It is evident, moreover, that the district court did not read these statements in the same manner as does the majority, as the district court held that *Jones* did not control on the grounds that the trespass in *Jones* was surreptitious, that taxis are not truly private property, and that the system was installed pursuant to regulations. *See El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 467-68 (S.D.N.Y. 2014). Although I agree that the majority need not reach these issues, *see* Maj. Op. at 12 n.3, in my view, they were decided incorrectly.

As an initial matter, I cannot agree that the surreptitious nature of the intrusion was a critical factor to the holding in *Jones*. Beyond the fact that the *Jones* majority never characterized the intrusion in this manner, its reasoning expressly disclaimed any reliance on the target's expectations regarding the possibility of surveillance. The physical invasion of a constitutionally protected area is no less actionable under the Fourth Amendment merely because it is conspicuous. *See, e.g.*, *United States v. Isiofia*, 370 F.3d 226, 232-33 (2d Cir. 2004) (holding that a warrantless home search was unconstitutional where the defendant witnessed the search and gave

consent, later found to be involuntary).[18] To hold otherwise would allow the government to conduct unreasonable searches merely by announcing them. But the government could not, for instance, eliminate the Fourth Amendment's protection of "homes, papers, and effects" if it "were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry." *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979). Accordingly, El-Nahal's awareness of the GPS does not preclude the finding that the surveillance entailed a search.

Nor, in my view, is the fact that the GPS was installed pursuant to an administrative rule dispositive. On numerous occasions, the Supreme Court has addressed statutes and regulations implicating Fourth Amendment rights. For instance, in *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), the Supreme Court applied *Jones*'s reasoning in evaluating a state statute mandating the satellite-based monitoring of certain categories of recidivist sex offenders. By unanimous opinion, the Court concluded that "a State . . . conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements," *id.* at 1370, a decision not changed by the

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[18] Indeed, this point is illustrated by *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), a case the Supreme Court has described as "undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure." *Jones*, 132 S. Ct. at 949 (internal quotation marks omitted). In *Entick*, the plaintiff prevailed in an action for trespass after the King's messengers, acting under the claimed authority of a general warrant, "with force and arms" entered and searched his dwelling "against his will."

fact that this search was conducted pursuant to statute. *See id.* at 1371 (rejecting argument that this was not unconstitutional because the "State's monitoring program is civil in nature"); *see also Maryland v. King*, 133 S. Ct. 1958, 1968-69 (2013) (considering the constitutionality under the Fourth Amendment of DNA swabs taken pursuant to Maryland statute). Most recently, in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), the Supreme Court struck down a city ordinance requiring hotels to permit the warrantless inspection of their guest records on the basis that it authorized a regime of unreasonable searches without opportunity for precompliance review. *Id.* at 2447-48, 2451-53. Plainly, the government's physical intrusion on a constitutionally protected area is subject to Fourth Amendment scrutiny even if the intrusion is authorized by municipal regulations.

With respect to whether the taxi was constitutionally protected property, the district court answered in the negative, reasoning that "[t]he pervasive regulation of taxis and their openness to public use distinguishes them from the *truly* private property at issue in *Jones*." *El-Nahal*, 993 F. Supp. 2d at 467 (emphasis added). Although I agree that taxicabs differ from noncommercial vehicles in important respects, in my view, these distinctions do not strip them of all Fourth Amendment protections. *If* the taxi was El-Nahal's private personal property, *Jones* dictates that such property qualifies as "an 'effect' as that term is used in the [Fourth] Amendment." 132 S. Ct. at 949 ("It is important to be clear about what happened in this case: The Government physically occupied private property for

the purpose of obtaining information."). As such, it was entitled to special "Fourth Amendment significance" as "one of those protected areas enumerated" in the constitutional text. *Id.* at 953. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 950 (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). "The Framers would have understood the term 'effects' to be limited to personal, rather than real, property." *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984). The term was not limited, however, to personal property of a *noncommercial* nature. It included "the goods of a merchant [or] tradesman." *Altman v. City of High Point*, 330 F.3d 194, 201 (4th Cir. 2003) (quoting Dictionarium Britannicum (Nathan Baily ed., 1730)).

To recount now familiar history, "one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance." *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 355 (1977). "The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws." *Payton v. New York*, 445 U.S. 573, 583 n.21 (1980). The "particular offensiveness" engendered by these general warrant "was acutely felt by the *merchants and businessmen* whose *premises and products* were inspected for compliance with the several parliamentary revenue measures." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (emphasis added).

Consistent with this purpose, "[o]ur prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property." *Spinelli v. City of New York*, 579 F.3d 160, 167 (2d Cir. 2009). The Fourth Amendment is therefore implicated by searches conducted by regulatory authorities involving the unlicensed "physical entry" on a business's private property. *See G. M. Leasing Corp.*, 429 U.S. at 354 (indicating that Fourth Amendment would be implicated by "warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer").

The conclusion that TLC's rule worked an unlicensed physical intrusion on a constitutionally protected effect is not altered by the taxicab's "openness to public use." *El-Nahal*, 993 F. Supp. 2d at 467. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). An implied license therefore permits regulatory officials to do what "any private citizen might do," without implicating the Fourth Amendment. *See Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)). A government agent, in the same manner as a private person, may hail a taxi when it is on duty and physically occupy it for the duration of a trip. *See Maryland v. Macon*, 472 U.S. 463, 470 (1985). But, without the driver's leave, a typical passenger may not dust the car's interior for fingerprints, mount a camera on the dashboard, or

rifle through the vehicle's glove compartment to peruse the tips that other passengers have paid. "[T]here is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979). The Supreme Court explored a related issue in *Jardines*, where law enforcement officers invited a narcotics-detecting canine to sniff around a suspect's front porch. The Court held that a Fourth Amendment search occurred because the detectives had gathered information by "physically entering and occupying" the constitutionally protected curtilage of the house, in order "to engage in conduct not explicitly or implicitly permitted by the homeowner." *Jardines*, 133 S. Ct. at 1414. The dog's investigation amounted to an "unlicensed physical intrusion," despite the fact that custom extended an implicit license "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 1415. "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." *Id.* at 1416. The detectives' conduct was therefore a search under the Fourth Amendment because they engaged in behavior that objectively exceeded the scope of their implicit license to enter while occupying a constitutionally protected area. *Id.* at 1416-17. Here as well, the implied license all taxis extend to the public does not encompass an invitation to install surveillance technology in their vehicles.

* * *

Accordingly, I join the majority's analysis of *Jones*, *Knotts*, and *Karo*. Because I do not believe that Defendants properly put at issue El-Nahal's interest in the taxi at the time of the trespass, and because I disagree with the district court's analysis of the physical trespass-based Fourth Amendment claim, I would vacate and remand for further factual development. I therefore concur in part and respectfully dissent in part.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HASSAN EL-NAHAL, individually and on behalf of all others similarly situated, *Plaintiff*

v.

DAVID YASSKY, COMMISSIONER MATTHEW DAUS, MICHAEL BLOOMBERG, THE CITY OF NEW YORK, *Defendants*.

No. 13-CV-3690 KBF
Signed: Jan. 29, 2014

MEMORANDUM DECISION AND ORDER

KATHERINE B. FORREST, District Judge:

On May 31, 2013, plaintiff Hassan El–Nahal filed a complaint against defendants David Yassky, Commissioner Matthew Daus, Michael Bloomberg, and the City of New York alleging that the New York City Taxi and Limousine Commission (TLC) has violated 42 U.S.C. § 1983 and the Fourth Amendment of the United States Constitution, as well as Article I, § 12 of the New York State Constitution, by using a global positioning system (GPS) device to track plaintiff's whereabouts without probable cause or a search warrant. (Complaint ¶¶ 113–120, ECF No 1.) On August 21 and September 24, 2013, the parties

filed cross-motions for summary judgment. (ECF Nos. 11, 17.) For the following reasons, defendants' motion is GRANTED and plaintiff's motion is DENIED.

I. BACKGROUND

A. Factual Background

The following facts are undisputed, unless indicated otherwise. The Court recites only those facts relevant to its decision.

The New York City Taxi and Limousine Commission (TLC) is the agency charged with regulating and supervising the transportation of persons by licensed vehicles for hire in New York City. (Defs.' Statement Pursuant to Rule 56.1 ("Defs.' 56.1") ¶ 1, ECF No. 33.) The TLC's responsibilities include regulating taxicab safety, design and comfort; reasonable rates of fare for taxi service; and the licensing of taxi drivers. (Defs.' 56.1 ¶¶ 25.) The TLC has the right to inspect books and records and to require the submission of any reports that it deems necessary. (Defs.' 56.1 ¶ 6.)

Since 1992, the TLC rules have required a TLC-licensed New York City taxi driver to create and maintain a trip record. (Defs.' 56.1 ¶ 7.) Until recently, drivers were required to keep a trip record in which they entered certain information, including: (1) at the start of each trip, the date, time, specific location, and number of passengers; (2) on completion of the trip, the destination, time, amount of fare, and any tolls paid; (3) the taxi's readings at the end of the shift; and (4) any toll bridges or tunnels used by the driver, whether or not with a passenger. (Defs.' 56.1 ¶ 8.)

The TLC currently mandates that all New York City taxis must be equipped with a Taxicab Technology System ("T–PEP" or "TTS" system), which includes a GPS, a credit-card device, and monitors for the driver and passengers, and which automatically collects certain trip information, including the taxi license number, the taxi driver's license number, the location of trip initiation, the time of trip initiation, the number of passengers, the location of trip termination, the time of trip termination, the metered fare for the trip, and the distance of the trip. (Ackman Decl. Ex. 2, at § 3–06(b), ECF No. 18; Pl.'s Rule 56.1 Statement in Supp. of His Mot. for Summ. J. ("Pl.'s 56.1") ¶¶ 3, 5, ECF No. 20; Defs.' 56.1 ¶ 9.)[19] Taxi drivers are required to create handwritten trip records if the T–PEP system fails to operate properly. (Defs.' 56.1 ¶ 10.)

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[19] Plaintiff claims that "the TLC requires that all taxis and taxi drivers *continuously* transmit their locations *at all times* to the TLC or its agents by use of GPS." (Mem. of L. in Supp. of Pl.'s Cross Mot. for Partial Summ. J. and in Opp. to Defs.' Mot. to Dismiss ("Pl.'s Mot.") 3, ECF No. 22; Pl.'s 56.1 ¶ 6.) That is a leap from the facts. Rather, TLC Rule 3–06 states: "Each taxicab shall be capable of transmitting data to the Commission ... at *pre-determined intervals* established by the Chairperson." (Ackman Decl. Ex. 2, at § 3–06(b) (emphasis added); *see also* Defs.' Resp. to Pl.'s Statement of Material Facts ("Defs.' Resp.") ¶¶ 56, ECF No. 28.) Additionally, the system only transmits data when the driver is on duty. (*See* Ackman Decl. Ex. 2, at § 3–06(b).) *See Carniol v. New York City Taxi & Limousine Comm'n,* 42 Misc.3d 199 (N.Y.Sup.Ct.2013) (explaining that "the TTS equipment placed in each New York City taxicab electronically tracks location, trip and fare information only while the drive[r] is on duty").

Taxis are also equipped with a meter that displays the fare, surcharges, and the rate codes. (Defs.' 56.1 ¶ 11.) There are six rate codes, including trips within the city, trips to and from airports, trips beyond the city limits and to other counties, negotiated fares, and group rides. (*Id.*) At the start of each trip, the driver sets the rate by pushing a button on the meter. (Defs.' 56.1 ¶ 11.)

Among other requirements, taxi drivers are prohibited from charging a fare above the approved rates. (Defs.' 56.1 ¶ 13.) Penalties apply to various violations of the rules, including overcharging. (Defs.' 56.1 ¶ 14.) When a taxi driver is charged with a violation of any TLC rule, the TLC may, in its discretion, impose a penalty of license revocation, license suspension of up to six months, and/or a fine. (Defs.' 56.1 ¶¶ 15–16.)

In 2007, before the taxi technology rules took effect, plaintiffs filed two lawsuits challenging the new rules and seeking to enjoin them from taking effect. (Pl.'s 56.1 ¶¶ 9, 13.) In both cases, the district courts rejected the drivers' claims on the basis that no search had occurred for purposes of the Fourth Amendment, because drivers had no legitimate expectation of privacy in any of the information that would be collected under the TLC T–PEP rules. (Pl.'s 56.1 ¶¶ 11, 13 (citing *Buliga v. New York City Taxi & Limousine Comm'n,* No. 07 Civ. 6507(DLC), 2007 WL 4547738 (S.D.N.Y. Dec. 21, 2007), *aff'd,* 324 Fed.Appx. 82 (2d Cir.2009) (summary order); *Alexandre v. New York City Taxi & Limousine Comm'n,* No. 07 Civ. 8175(RMB), 2007 WL 2826952 (S.D.N.Y. Sept. 28, 2007)).)

Also in 2007, before the technology mandate took effect, the TLC issued a "Statement of Basis and Purpose," which stated the reasons for its technology and GPS mandate. (Pl.'s 56.1 ¶ 16.) The TLC made no mention in this statement (or elsewhere) of using GPS data to investigate or prosecute taxi drivers. (Pl.'s 56.1 ¶ 17.) On its website, the TLC stated that it would use the T–PEP technology to provide customer service improvements, and that it was "replacing the current hand-written trip sheets with automatic electronic trip sheets which are limited to collecting pick-up, drop-off, and fare information, all of which are already required." (Pl.'s 56.1 ¶ 17.)

On March 12, 2010, the TLC issued an e-mail press release in which it claimed that 35,558 taxi drivers had illegally overcharged at least one passenger over a 26–month period by manually switching the taxi meter from Rate Code 1 (the default setting used for trips within the city) to Rate Code 4 (the rate that applies to out-of-city trips). (Pl.'s 56.1 ¶ 19.) The TLC stated that it used "GPS technology installed in taxicabs" to make this discovery. (*Id.*) On March 14, 2010, the TLC issued a revised press release that stated that 21,819 drivers had overcharged passengers. (Pl.'s 56.1 ¶ 24.)

On or around January 3, 2012, the TLC sent a letter to plaintiff instructing him to appear at a hearing concerning overcharges. (Pl.'s 56.1 ¶ 36.) Plaintiff was found guilty after a hearing, and the ALJ imposed fines totaling $550 and revoked his license. (Pl.'s 56.1 ¶ 46.) The OATH Taxi and Limousine Tribunal appeals board reversed that ruling and reinstated plaintiffs license. (Pl.'s 56.1 ¶¶ 47–48.) On remand, the TLC reinstituted some charges against

plaintiff. (Pl.'s 56.1 ¶ 52.) Plaintiff was again found in violation and his license was again revoked. (Pl.'s 56.1 ¶ 53.) On appeal, the appeals tribunal again reversed. (Pl.'s 56.1 ¶ 54.) Finally, plaintiff was found guilty for a third time, he again appealed, his conviction was again reversed, and his license was again restored. (Pl.'s 56.1 ¶¶ 55–57.)

Plaintiff claims, "To this day, with possibly one or two exceptions, the TLC has not produced any claim by any actual passenger that he or she was overcharged." (Pl.'s Mot. 9; Pl.'s 56.1 ¶ 31.)

B. Procedural History

Plaintiff filed his complaint on May 31, 2013. (ECF No. 1.) On August 21, 2013, defendants moved to dismiss the complaint for failure to state a claim. (ECF No. 9.) On September 13, 2013, the Court deemed that motion a motion for summary judgment. (ECF No. 16.) That motion became fully briefed on December 6, 2013. (ECF No. 36.) On September 24, 2013, plaintiff filed a cross-motion for summary judgment. (ECF No. 22.) That motion became fully briefed on November 15, 2013. (ECF No. 34.)

II. STANDARD OF REVIEW

Summary judgment may not be granted unless a movant shows, based on admissible evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). On summary judgment, the Court must "construe all evidence in the light most favorable to the nonmoving party,

drawing all inferences and resolving all ambiguities in its favor." *Dickerson v. Napolitano,* 604 F.3d 732, 740 (2d Cir.2010).

Once the moving party has asserted facts showing that the nonmoving party's claims cannot be sustained, the opposing party must set out specific facts showing a genuine issue of material fact for trial. *Price v. Cushman & Wakefield, Inc.,* 808 F.Supp.2d 670, 685 (S.D.N.Y.2011); *see also Wright v. Goord,* 554 F.3d 255, 266 (2d Cir.2009). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," because "[m]ere conclusory allegations or denials ... cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines,* 593 F.3d 159, 166 (2d Cir.2010) (citations omitted); *see also Price,* 808 F.Supp.2d at 685 ("In seeking to show that there is a genuine issue of material fact for trial, the non-moving party cannot rely on mere allegations, denials, conjectures or conclusory statements, but must present affirmative and specific evidence showing that there is a genuine issue for trial.").

Only disputes relating to material facts—*i.e.,* "facts that might affect the outcome of the suit under the governing law"—will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). The Court should not accept evidence presented by the nonmoving party that is so "blatantly contradicted by

the record ... that no reasonable jury could believe it." *Scott v. Harris,* 550 U.S. 372, 380 (2007); *see also Zellner v. Summerlin,* 494 F.3d 344, 371 (2d Cir.2007) ("Incontrovertible evidence relied on by the moving party ... should be credited by the court on [a summary judgment] motion if it so utterly discredits the opposing party's version that no reasonable juror could fail to believe the version advanced by the moving party.").

III. DISCUSSION

Plaintiff alleges a violation of the Fourth Amendment of the United States Constitution and Article I, § 12 of the New York Constitution by virtue of defendants' use of GPS devices in regard to taxi service. (*See* Compl. ¶¶ 113–120.) However, plaintiff directs much of his complaint and many of his arguments not to the *collection* of data through the T–PEP system but to the *use* of the data in administrative proceedings. (*See, e.g.,* Compl. ¶ ¶ 25–34.) Those arguments ultimately prove irrelevant to the federal constitutional claim-the only federal claim—presented by plaintiff's complaint. (*See* Compl. ¶¶ 113–126.) Regardless of how defendants used the T–PEP data, they did not conduct a search in collecting that data; and if, *arguendo,* defendants did conduct a search, that search was reasonable. Plaintiffs federal constitutional claims therefore fail as a matter of law.

A. Plaintiff's Fourth Amendment Claim

The use of T–PEP data in an administrative proceeding does not constitute a search within the meaning of the Fourth Amendment. Even assuming that the use of such data was a search, any such search was reasonable and thus did not constitute a

violation of the Fourth Amendment. As a result, plaintiffs Fourth Amendment claim fails as a matter of law.

1. Legal Standard for a Search

a. "Reasonable Expectation of Privacy"

A search within the meaning of the Fourth Amendment of the U.S. Constitution "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Maryland v. Macon,* 472 U.S. 463, 469 (1985) (internal quotation marks omitted). This inquiry "embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy—whether ... the individual has shown that he seeks to preserve [something] as private. The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable...." *United States v. Knotts,* 460 U.S. 276, 280–81 (1983) (alteration in original) (citations and internal quotation marks omitted).

Here, as the Second Circuit has already ruled, plaintiff had no reasonable expectation of privacy in the T–PEP data at issue. *See Buliga,* 324 Fed.Appx. 82. Local law requires the collection of the data. (Defs.' 56.1 ¶ 9.) Prior to the installation of the T–PEP system, drivers were required to create "trip sheets" containing the same information. (Defs.' 56.1 ¶¶ 7–8.) Furthermore, "[t]axicabs in New York City have long been subject to regulation by the TLC," *Buliga,* 2007 WL 4547738, at *2, and the TLC maintains the right to inspect books and records, including the trip sheets. (Defs.' 56.1 ¶ 6). Accordingly, plaintiffs

cannot show a reasonable expectation of privacy in any of the information collected under the system. *See Buliga,* 2007 WL 4547738, at *2; *Alexandre,* 2007 WL 2826952.

The gravamen of plaintiffs complaint—and most of the facts he marshals regarding his expectations of defendants' conduct—is not a challenge to the process of collecting the data from vehicles, but rather a challenge to the *use* of the data in administrative proceedings. Plaintiff claims that, because "the TLC issued repeated assurances that it would not use GPS tracking as a prosecutorial tool," there is thus "every reason for taxi drivers to expect that the agency would not track individuals and then use the collected evidence as the basis for regulatory charges and license revocations." (Mem. of L. in Supp. of Pl.'s Cross Motion ("Pl.'s Mot.") 18, ECF No. 22.) Plaintiff's conflation of collection and usage is unavailing here.

Essentially, plaintiff alleges, based on a set of facts involving defendants' statements about the T–PEP system (*see* Pl.'s 56.1 ¶¶ 16, 19), that he reasonably expected that defendants would "not use GPS tracking as a prosecutorial tool." (Pl.'s Mot. 18.) That may be the case, but that is legally irrelevant to the Fourth Amendment analysis here. The subsequent use of data does not create a privacy interest in the information that does not otherwise exist. *See Macon,* 472 U.S. at 469 ("The mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities ... is not one that society is prepared to recognize as reasonable."). Plaintiff admits as much in his own brief, stating, "[W]hether a search was

conducted depends not at all [on] where the fruits of that search are used." (Pl.'s Mot. 25.)

The only expectation that is relevant to the constitutional analysis of whether a search existed is an expectation of privacy in the data themselves. (*See* Pl.'s Mot. 18.) For the reasons set forth above, there is no reasonable expectation of privacy in such information. Though it is unnecessary to the legality of the search, the Court notes that there can be no plausible subjective expectation of privacy in the information at issue. Regulations not only mandate use of the T–PEP system but also require taxi drivers to create handwritten trip records if the system fails to operate, and have long required drivers to keep records of their activity. (Defs.' 56.1 ¶¶ 8–10.) *See, e.g., Smith v. Maryland,* 442 U.S. 735 (1979) (explaining that the petitioner's "conduct was not and could not have been calculated to preserve the privacy of the number he dialed").

Nor does the analysis change even if, as plaintiff claims, the prosecutions of taxi drivers for overcharging had been impossible under the prior paper-record system. (*See* Pl.'s Mot. 20 ("Rate 4 prosecutions would have been impossible using the old tools.").) If no reasonable expectation of privacy existed in the collection of data regarding trip locations to begin with, then the ease of using such data to prosecute overcharging does not alter that expectation of privacy. *See Knotts,* 460 U.S. at 284 ("Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper

allowed the police to be more effective in detecting crime, it simply has no constitutional foundation.").[20]

As a matter of constitutional law, plaintiff had no reasonable expectation of privacy in the data collected through the T–PEP system-regardless of the ends to which defendants ultimately used such data.

b. Physical Trespass on Plaintiff's Property

The Government also conducts a search within the meaning of the Fourth Amendment when it physically intrudes or trespasses upon an individual's "person[ ], house[ ], papers, [or] effects" for the purpose of obtaining information. *United States v. Jones,* —— U.S. ——, 132 S.Ct. 945, 949 (2012). This constitutes a search regardless of whether the

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[20] *Knotts* remains good law even after *Jones. See Jones,* 132 S.Ct. at 951–52. Plaintiff cites to *Weaver,* which found a reasonable expectation of privacy from GPS tracking in part because "[c]onstant, relentless tracking of anything is now not merely possible but entirely practicable." 12 N.Y.3d at 441. That decision is not binding here with regard to this Court's Fourth Amendment analysis with respect to the data at issue. It is also distinguishable for several reasons. As an initial matter, *Weaver* related to a private van, not vehicles regulated by the government and open to the public. *Id.* at 436. Furthermore, the collection of data from the T–PEP system is not "constant" or "relentless," *id.,* but rather limited to transmitting the locations of the start and end of each trip and the trip distance at pre-determined intervals. (Pl.'s 56.1 ¶¶ 2–3, 5.) The T–PEP system also transmits no data about taxicabs that are off-duty. (*See id.*) Justice Alito's concurrence in *Jones,* which also does not control, is similarly distinguishable. *See Jones,* 132 S.Ct. at 964 (Alito, J., concurring).

individual maintains a reasonable expectation of privacy in the item searched. *See id.* at 952–53.

Plaintiff claims that defendants' collection of data through the T–PEP system was a search under *Jones* because defendants "mandated the installation of tracking devices in privately owned and operated taxicabs and monitored those devices for months and, in some cases, years." (Reply Mem. of L. in Supp. of Pl.'s Cross Mot. ("Pl.'s Reply") 5, ECF No. 34.) This case is not factually on all fours (or even close) with *Jones.*

In *Jones,* police officers had surreptitiously attached a GPS device to a Jeep Grand Cherokee registered to the wife of a suspected narcotics trafficker. *See Jones,* 132 S.Ct. at 948. The Court found the surreptitious attachment of the device to be a common-law trespass and therefore a search within the meaning of the Fourth Amendment. *See id.* at 952. The Court's decision was highly fact-specific and hinged heavily on the fact that the property in question was private. *See id.* at 949 ("It is important to be clear about what happened *in this case:* The Government physically occupied *private property* for the purpose of obtaining information.") (emphasis added).

Here, drivers are aware of the use of the T–PEP system. As the New York Supreme Court recently explained in upholding the constitutionality of the TLC regulations at issue even after *Jones,* the "GPS monitoring occurred with the knowledge of the taxi driver," and the T–PEP "system was installed with the taxi owner's consent for the purpose of gathering information when a taxi driver is on duty about the location of trips and rates charged." *Carniol v. New*

York City Taxi & Limousine Comm'n, 42 Misc.3d 199 (N.Y.Sup.Ct.2013). That alone is sufficient to distinguish the surreptitious use of the GPS device at issue in *Jones.*

In addition, New York City taxicabs are subject to regulations for public use, unlike the Jeep at issue in *Jones.* Plaintiff emphasizes that defendants' mandate applied to "privately owned taxicabs" and that "[t]axis are privately owned and operated." (Pl.'s Mot. 15.) However, as the Second Circuit has stated in the context of financial disclosure requirements, taxi medallion owners have a merely "*nominal* private status." *Statharos v. New York City Taxi & Limousine Comm'n,* 198 F.3d 317, 324 (2d Cir.1999) (emphasis added). The pervasive regulation of taxis and their openness to public use distinguishes them from the truly private property at issue in *Jones. See Carniol,* 975 N.Y.S.2d at 849 (distinguishing *Jones* because the "TTS and GPS do not record information about the driver's personal life").

Thus, mandating the installation of the T–PEP system and installing the system in compliance with regulations do not constitute a common-law trespass: taxi drivers are aware of the system, the system is installed pursuant to regulations, and the taxicabs in which the system is installed are not truly private vehicles. For that reason, *Jones* is inapposite,[21] as are

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[21] *Jones* decidedly does not hold that "[i]t is the method of gathering the information by GPS—even if it is the very same information—that causes the constitutional violation." (*See* Pl.'s Reply 9.) The surreptitious physical trespass on a private vehicle was the determining factor there. *Jones,* 132 S.Ct. at 949.

the New York state court decisions to which plaintiff cites. Both *People v. Weaver,* 12 N.Y.3d 433, 443–45 (2009) and *Cunningham v. New York State Dep't of Labor,* 21 N.Y.3d 515, 519 (2013), dealt with GPS devices that were surreptitiously installed on private vehicles.

For these reasons, defendants' actions here did not constitute a search within the meaning of the Fourth Amendment, whether under the "reasonable expectation of privacy" formulation or the *Jones* physical-trespass analysis.

2. Reasonableness of the Search

Even assuming *arguendo* that a search occurred because plaintiff had a reasonable expectation of privacy in the collected data or because defendants physically trespassed on plaintiff's property, plaintiff's Fourth Amendment claim still must fail, because any such search was reasonable under the circumstances. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 652 (1995). While reasonableness generally requires obtaining a warrant, a search unsupported by probable cause and a warrant can be reasonable and thus constitutional where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Id.* at 653.

As Judge Cote explained in *Buliga,* defendants' collection of data—assuming it is a search—"qualifies for special needs analysis, since [it] is undeniably incompatible with the normal requirement of a

warrant and probable cause," "the collection regime leaves no discretion to law enforcement," and "the TLC regulation fulfills important purposes that could not be achieved by normal law enforcement methods." *Buliga,* 2007 WL 4547738, at *3 n. 5.

Special-needs analysis requires the examination of three factors: "(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs," *Cassidy v. Chertoff,* 471 F.3d 67, 75 (2d Cir.2006). Evaluated under that framework, defendants' collection of plaintiffs data was reasonable.

First, plaintiff had a low privacy interest in the data collected through the T–PEP system, and the governmental intrusion was of a low degree. The data relate directly to plaintiff's work as a taxi driver, and regulations already required plaintiff to keep track of the information collected through the system. (Defs.' 56.1 ¶¶ 7–10.) Additionally, taxi drivers have a low privacy interest because "the taxi industry is pervasively regulated by the Commission." *Statharos v. New York City Taxi & Limousine Comm'n,* 198 F.3d 317, 324 (2d Cir.1999); *see Skinner v. Railway Labor Execs. Ass'n,* 489 U.S. 602, 619 (1989) (finding a low privacy interest for employees who participate an "industry that is regulated pervasively"); *Buliga,* 2007 WL 4547738, at *3 ("The information is directly related to job performance in a regulated industry.").

Furthermore, the governmental interest in collecting the data is substantial, and the installation of the T–PEP system and collection of data through the system are an effective way to address that

interest. "[T]he City of New York, acting through the TLC, 'has a substantial interest in promoting taxi customer service, taxicab ridership, and passenger and driver safety.'" *Buliga,* 2007 WL 4547738, at *4 (quoting *Alexandre,* 2007 WL 2826952, at *10). The City's collection of T–PEP data is directly related to those goals; for example, the City can use the data to ensure that taxi drivers are driving their vehicles the minimum amount required by regulations or to ensure that drivers are not systematically overcharging passengers. Meanwhile, because defendants only collect information related to the locations and times of the start and end of each trip and the trip distance, and only collect information while drivers are on duty (Ackman Decl. Ex. 2, at § 3–06(b); Pl.'s 56.1 ¶¶ 3, 5; Defs.' Resp. to Pl.'s Statement of Material Facts ("Defs.' Resp.") ¶¶ 56, ECF No. 28), there is little likelihood that defendants will obtain personal information through this system—thus rendering it an effective means of addressing the governmental need in question. *See Ontario v. Quon,* 560 U.S. 746 (2010); *Buliga,* 2007 WL 4547738, at *4.

Plaintiff argues that the special-needs exception to the warrant requirement cannot apply here because defendants used T–PEP data "not for general statistical purposes or to craft policy or to find lost property," but "for purposes of filing charges." (Pl.'s Mot. 29.) Again, plaintiffs objection is to the *use* of data. Plaintiff admits that the TLC could, under the special needs exception, constitutionally "mandate installation of GPS devices in taxis for ... data collection and recovery of lost property." (Pl.'s Reply

7.) That is enough to support defendants' actions as constitutional under the special-needs exception.[22]

For these reasons, even assuming that defendants' actions here constituted a search, that search was reasonable under the special-needs analysis of the Fourth Amendment.[23]

B. Supplemental Jurisdiction Over Plaintiff's State–Law Claims

As set forth above, defendants' collection of data regarding plaintiff through the T–PEP system was not a search within the meaning of the Fourth Amendment; assuming that it was a search, such a

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[22] Plaintiff cites *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), for the proposition that the special-needs exception only applies to searches performed for reasons completely unrelated to law enforcement, and that defendants collected data in this case "for purposes of filing charges." (Pl.'s Mot. 28–29.) However, in *Edmond.* the government checkpoint at issue "unquestionably ha[d] the *primary purpose* of interdicting illegal narcotics," thus rendering the special-needs exception unavailable. 531 U.S. at 40 (emphasis added). Here, the T–PEP system here is part of a pervasive regulatory scheme with many purposes—such as collecting data, finding lost property, and stopping overcharging—all in service of the TLC's "substantial interest in promoting taxi customer service, taxicab ridership, and passenger and driver safety." *Buliga,* 2007 WL 4547738, at *4; *see also United States v. Martinez–Fuerte,* 428 U.S. 543, 557 (1976) (upholding random traffic checkpoint stops that were part of a complex scheme of border policing).

[23] Because no search occurred here, and any search was in any event reasonable, the Court need not reach plaintiff's additional arguments that taxi drivers never consented to the TLC's GPS searches or that the TLC cannot establish the "administrative search" exception to the warrant requirement. (Pl.'s Mot. 22–28.)

search was reasonable as a matter of law. Therefore, defendants are entitled to summary judgment on defendants' first cause of action. (*See* Compl. ¶¶ 113–117.) Plaintiff's remaining causes of action are state-law claims, alleging violations of the New York Constitution, Article 78 of the New York Civil Practice Law and Rules, and the New York City Charter, as well as fraudulent inducement by the TLC. (*See* Compl. ¶¶ 118–126.)

The Court may decline to exercise supplemental jurisdiction over state-law claims if it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "Once a district court's discretion is triggered under § 1367(c)(3), it balances the traditional 'values of judicial economy, convenience, fairness, and comity,' in deciding whether to exercise jurisdiction." *Kolari v. New York–Presbyterian Hosp.,* 455 F.3d 118, 122 (2d Cir.2006) (citing *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988)).

Here, the assertion of supplemental jurisdiction over plaintiff's state-law claims would be inappropriate in the absence of related federal claims. No state-law cause of action alleged in plaintiff's complaint implicates a federal question or any issue of federal policy or interest. *See Seabrook v. Jacobson,* 153 F.3d 70, 72 (2d Cir.1998) (noting that it is particularly appropriate for a district court to dismiss state-law claims where "the federal claim on which the state claim hangs has been dismissed"); *Marcus v. AT & T Corp.,* 138 F.3d 46, 57 (2d Cir.1998) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well."). Furthermore, the case remains in early stages. *See Valencia v. Lee,* 316 F.3d 299, 306 (2d Cir.2003)

(explaining that declining supplemental jurisdiction over state-law claims is appropriate where federal claims have been dismissed at a relatively early stage).

For these reasons, the Court dismisses plaintiff's state-law claims "so that state courts can, if so called upon, decide for themselves whatever questions of state law this case may present." *Giordano v. City of New York,* 274 F.3d 740, 754 (2d Cir.2001).

IV. CONCLUSION

For these reasons, defendants' motion for summary judgment is GRANTED, and plaintiff's motion for summary judgment is DENIED. The Clerk of Court is directed to close the motions at ECF Nos. 11 and 17 and to terminate this action.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-405-cv

Appeal from the United Stated District Court
for the Southern District of New York

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of September, two thousand sixteen.

Before: Rosemary S. Pooler,
Debra Ann Livingston,
Christopher F. Droney,
Circuit Judges.

HASSAN EL-NAHAL, individually and on behalf of all others similarly situated, *Appellant*,

v.

DAVID YASSKY, COMMISSIONER MATTHEW DAUS, MICHAEL BLOOMBERG, THE CITY OF NEW YORK, *Appellees*.

ORDER

Appellant Hassan El-Nahal, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX D

42 U.S.C.A. § 1983

Effective: October 19, 1996

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX E

THE RULES OF THE CITY OF NEW YORK

Effective: March 30, 2004 to April 1, 2011

RCNY Title 35 § 1-11

Section 1-11. Vehicle Condition.

(e) (i) For any taxicab that is required to be equipped with the taxicab technology system, such equipment shall at all times be in good working order and each of the four core services shall at all times be functioning.

(ii) In the event of any malfunction or failure to operate of such taxicab technology system, the owner shall file an incident report with the authorized taxicab technology service provider promptly and in no event malfunction or failure to operate or such time as the owner reasonably should have known of such malfunction or failure to operate. If the driver or taxicab agent previously filed a timely incident report regarding such malfunction or failure to operate, the owner shall not be required to file a separate incident report but shall obtain an incident report number from the driver, agent or authorized taxicab technology service provider. The owner shall meet, or shall instruct the taxicab agent to meet the appointment for repair scheduled by the authorized taxicab technology service provider following the filing of an incident report with such authorized taxicab technology

service provider. A taxicab in which any of the four core services of the taxicab technology system, or any part thereof, are not functioning shall not operate more than forty-eight (48) hours following the timely filing of an incident report by the owner, driver or agent.

(f) The owner of any taxicab required to be equipped with the taxicab technology system shall equip such taxicab, except as provided in subdivision (g) of this section, with a taxicab technology system as set forth in sections 3-03(e)(7) and (8), 3-06 and 3-07 of this title.

(g) The owner of any taxicab required to be equipped with a taxicab technology system shall contract to procure such equipment on or before August 1, 2007. Except as provided in this subdivision, the owner shall install a taxicab technology system no later than the compliance date set forth in section 1-01 of this chapter. Taxicabs that are to be retired within six (6) months of the compliance date for each such taxicab shall be exempt from the requirement that the taxicab technology system be installed in the taxicab. If any taxicab technology service provider contracts to provide more than three thousand (3,000) taxicabs with its taxicab technology system before August 1, 2007, the date by which each such taxicab is required to be equipped with such taxicab technology system may, upon prior written approval from the Chairperson, or his or her designee, be extended to each such taxicab's first scheduled inspection at the

Commission's Safety and Emissions Facility on and after February 1, 2008.

(h) The owner of any taxicab requiring six (6) or more repairs of the taxicab technology system in any thirty (30) day period shall promptly take such vehicle for inspection to, or schedule an inspection with, the not apply to the owner if compliance is made by the driver or agent of such vehicle.

RCNY Title 35 § 3-06

Section 3-06. Specifications for the Collection and Transmission of Required Trip Data.

(a) All vehicles, except as provided in section 1-11(g) of this title, shall comply with the data collection and transmission requirements of this section. This specification shall be implemented no later than the compliance date set forth in section 1-01 of this title.

(b) Each taxicab shall be capable of transmitting data to the Commission or its designated repository at pre-determined intervals established by the Chairperson. All transmissions shall be in a format and manner approved by the Chairperson. The data to be transmitted shall include the taxicab license number; the taxicab driver's license number; the location of trip initiation; the time of trip initiation; the number of passengers; the location of trip termination; the time of trip termination; the metered fare for the trip; and the distance of the trip. All data transmitted to

TLC will be sent in a secure format as approved by the Chairperson.

(c) To the extent necessary to facilitate data transfer, the Commission may mandate that each taxicab be equipped with external antennas.

(d) No equipment designed to comply with the provisions of this section shall be installed unless it has been approved by the Commission, based upon a determination that the unit and equipment conforms with the specifications as set forth herein, is safe, and fulfills the intended purposes for such equipment.