No. 16-830

IN THE

Supreme Court of the United States

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

Petitioners,

v.

DAVID YASSKY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Taxi driver Hassan El-Nahal asserts that his Fourth Amendment rights were violated by use of a global positioning system (GPS) to report location and fare information about taxi trips to the New York City Taxi and Limousine Commission. The Second Circuit affirmed dismissal of his claim, finding that El-Nahal failed to make a threshold showing that he had standing to assert this claim. The questions presented are:

1. Did the Second Circuit properly dismiss El-Nahal's claim for lack of standing, where he (a) failed to make any showing that he had a property interest in a taxi either before or after installation of the GPS and (b) expressly disclaimed any theory asserting a constitutionally protected expectation of privacy that was not grounded in a property interest?

2. Is the law in any event clear that, to have standing to assert a property-based theory that GPS tracking of a vehicle constituted a search, a plaintiff must show that he or she had a property interest in the vehicle when the GPS was installed—a showing that El-Nahal does not dispute he cannot make here?

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INTRODUCTION

In his petition for certiorari, El-Nahal ask this Court to address broad questions about the outer limits of Fourth Amendment protection, raising the specter of government use of GPS information to create "a full portrait of a person's life, habits, and associations" and track "one's coming and goings to sensitive places such as political meetings or religious gatherings" (Pet. at 25, 30). But the Second Circuit decision that he asks this Court to review was exceedingly narrow: it dismissed El-Nahal's lawsuit because he made no showing that he had standing to assert a Fourth Amendment claim premised on a property-based theory that a search occurred and, on appeal, disavowed any privacy-based theory.

Certiorari should be denied for three reasons. *First*, the questions presented lack a proper foundation for review. El-Nahal asks this Court to evaluate when the use of a GPS in a vehicle constitutes a search because it is effected via a physical trespass, but made no record of having any property interest in a taxi—either at the time that the GPS was installed, or that it was used—so as to assert a theory of trespass. And while El-Nahal asks this Court to address the alternative question of when GPS tracking constitutes a search because it violates a non-property-based privacy interest, he expressly disavowed any such theory of his claim in the court of appeals, and thus the court explicitly declined to decide that question.

Second, in addition to the above threshold defects, El-Nahal is mistaken in arguing that there is a circuit split requiring resolution by this Court. El-Nahal contends that the courts of appeals disagree about whether an individual tracked by a GPS placed in a vehicle has standing to assert a claim if he or she held no property interest in the vehicle when the GPS was installed. But none of the cases he cites even address this question, let alone disagree on its answer. This Court's precedents—consistently applied in all circuits and grounded in the Fourth Amendment's historical roots—establish that a property-based Fourth Amendment claim requires a constitutionally-protected property interest at the time of the alleged intrusion.

Third, this case would be an exceptionally poor vehicle for addressing the broader issues that El-Nahal now seeks to raise about the use of GPS technology to conduct surveillance of individuals' private lives. This case does not present those broad questions because it arises in a highly specialized and narrow context: the pervasively regulated taxi industry. The taxicab technology system El-Nahal challenges reports data about locations, fares, and passengers relating to El-Nahal's work as a taxi driver. It takes places as part of the requirements of a highly regulated industry in which taxis are not truly private vehicles and drivers are aware that the information is being reported. Indeed, before the electronic system was mandated, drivers reported much of

the same information on paper trip forms. These factors—together with the underdeveloped nature of the record, threshold standing questions, and preservation issues—make this the wrong case for tackling broader questions about evolving expectations of privacy in an area of emerging technology.

STATEMENT

A. The Taxi and Limousine Commission's collection of taxi trip data as part of a program of pervasive regulation of the taxi industry

New York City's fleet of over 50,000 for hire vehicles plays a key role in the economy and life of the City, transporting nearly a quarter of a million passengers who pay some $1.8 billion annually for taxi rides (Second Circuit Joint Appendix ["A"] 113). Taxis are the face of the City, greeting residents and visitors at airports, train stations, and ferry terminals. An essential component of the City's transportation network—accommodating, for example, one quarter of all Manhattan fare-paying passengers and almost half of passengers to LaGuardia (A218)—they have extensive contact with, and are often relied upon by, the public. Operating under stressful conditions in close quarters with their passengers, including many visitors unfamiliar with New York City, taxi drivers occupy a position of particular trust,

meriting a program of special regulatory supervision.

As courts have repeatedly recognized, New York City's taxi industry is one of a small number of exceptionally closely regulated industries.[1] Under the City's 80-year-old taxi medallion system, it is illegal to operate a taxi without a medallion (a small metal plate attached to the hood of the vehicle, which can be purchased from a current medallion holder or from the TLC). Taxis with medallions are the only TLC-licensed vehicles authorized to pick up passengers by street hail in New York City. *See* N.Y.C. Admin. Code § 19-504(a)(1). In exchange for this exclusive right, medallion owners and taxi drivers agree to adhere to a uniquely comprehensive set of rules governing safety, passenger comfort, and the economic aspects of taxi service. *See* 35 Rules of the City of New York (R.C.N.Y.) Chapters 58 and 80.

The NYC Taxi and Limousine Commission, commonly referred to as the TLC, is vested with responsibility for protecting the City's exceptionally strong interest in maintaining public trust in this

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[1] *See Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 325 (2d Cir. 1999); *Buliga v. New York City Taxi & Limousine Comm'n*, 2007 U.S. Dist. LEXIS 94024, *1 (S.D.N.Y. Dec. 21, 2007), *aff'd by Buliga v. New York City Taxi & Limousine Comm'n*, 2009 U.S. App. LEXIS 8957 (2d Cir. 2009).

"vital and integral part of the transportation system" of the City. N.Y.C. Admin. Code § 19-501; N.Y.C. Charter Ch. 65 § 2300. It licenses and supervises about 100,000 taxi drivers. N.Y.C. Taxi & Limousine Commission, *About TLC*, http://on.nyc.gov/1qKOzpF (last visited April 19, 2017). Among the TLC's most critical functions are ensuring the safety of the taxi-riding public and maintaining public trust in the taxi industry. *See Buliga v. New York City Taxi & Limousine Comm'n,* 2007 U.S. Dist. LEXIS 94024 at *11-12 (S.D.N.Y. 2007), *aff'd in unpublished op.*, 324 Fed. App'x 82 (2d Cir. 2009).

The TLC's robust regulatory framework for the taxi industry covers everything from the licensing requirements for vehicles and drivers to the appearance of the taxis and passenger rights. *See* 35 R.C.N.Y. Chapters 51-83. As part of this program of extensive supervision, drivers are prohibited from ascertaining a passenger's destination before the passenger enters a cab and from refusing to transport a passenger to any destination within New York City without good cause. *See* 35 R.C.N.Y. § 80-20; N.Y.C. Admin. Code § 19-507(a)(2)-(3). For decades, they have also been required to maintain and submit detailed records about each taxi trip, including pick-up and drop-off locations, fares, and meter readings. 35 R.C.N.Y. § 58-22. The pervasiveness of this regulatory program and unique role that taxis play in the City's transportation system has led courts to describe taxis as having only "nominal private"

status in New York. *See Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 324 (2d Cir. 1999).

The TLC's regulatory program also furnishes drivers with detailed notice about penalties for administrative violations and the procedures for adjudicating alleged violations. Drivers are on notice, for example, that three passenger overcharges within 18 months can result in fines or license revocation. N.Y.C. Admin. Code § 19-507(b)(1); *see* 35 R.C.N.Y. § 68-02. Drivers charged with violating TLC rules are afforded a panoply of procedural protections, including an administrative hearing and the opportunity to seek state-court judicial review. *See* N.Y.C. Admin. Code § 19-506; 35 R.C.N.Y. § 68-04; *see also* N.Y. Civil Procedure Law and Rules, Chapter 78.

B. The TLC's replacement of cumbersome, paper trip reporting with an electronic record-keeping system

About ten years ago, the TLC adopted regulations requiring medallion owners to install a taxicab technology system, known as T-PEP, offering GPS, credit card, and text messaging functions (A14, 108). 35 R.C.N.Y. § 75-25(c)(2). Chief among the benefits of the T-PEP system are promoting ridership by enabling passengers to pay by credit or debit card and assisting in the recovery of lost property (A128). The TLC receives a huge number of lost property inquiries—over 88,000 in

one year—amounting to half of all inquiries to the TLC (A118). GPS is particularly useful in uniting passengers with lost property because passengers typically remember their pick-up and drop-off locations, but not a driver's name or medallion number (A120).

The T-PEP system also affords industry stakeholders a number of other benefits. For example, it enables the TLC to notify drivers via text message of high demand locations and street obstacles, like accidents, construction, and traffic delays (A118). It replaces the cumbersome, paper reporting system previously used by drivers with automatic recording and reporting of this information (A14). And it facilitates comprehensive statistical analysis of taxi activity that was not feasible under the prior, paper reporting system (A129), enabling the TLC to publish reports evaluating taxi use and supply and demand.[2]

The TLC does not receive any information from GPS devices regarding use of taxis when they are off-duty (A111, 222). *See Alexandre v. New York City Taxi & Limousine Comm'n*, 2007 U.S. Dist. LEXIS 73642, *31 (S.D.N.Y. Sept. 28, 2007). New

[2] *See* N.Y.C. Taxi & Limousine Commission, *2014 Taxicab Fact Book*, http://on.nyc.gov/11BKyi8 (last visited April 19, 2017); N.Y.C. Taxi & Limousine Commission, *2016 TLC Fact Book*, http://on.nyc.gov/1SUBN6m (last visited April 19, 2017).

York's state and federal courts are in agreement that the City's collection and use of the T-PEP data serve compelling public needs, do not intrude into constitutionally protected privacy expectations, and thus fully satisfy constitutional requirements. *See Alexandre*, 2007 U.S. Dist. LEXIS 73642 at *31-35 and *Buliga*, 2007 U.S. Dist. LEXIS 94024 at *5-13; *Matter of Carniol v. New York City Taxi & Limousine Comm'n*, 126 A.D.3d 409, 410 (N.Y. App. Div. 2015).

C. The TLC's discovery of fare overcharges in response to a consumer complaint and commencement of enforcement proceedings against El-Nahal

After a local doctor complained to the TLC about being overcharged for a ride home from NYU Medical Center, the TLC reviewed electronic trip sheets for the complained-of driver and discovered that he had overcharged 574 passengers in one month (A22-23, 152).[3] The TLC then discovered that a number of other drivers had similarly overcharged passengers by using the out-of-city

[3] *See* Rebecca Harshabarger, *City busts 659 cabbies for overcharging passengers*, New York Post (June 26, 2014), http://nyp.st/2oboHtC. The TLC had also received other passenger complaints about fare overcharges. *See generally,* Anahad O'Connor, *Cabbies Cheat? Riders Express No Surprise*, New York Times (March 13, 2010), http://nyti.ms/2pb8J73.

fare code (double the in-city fare code) for in-city trips (A146, 150). Many of the fraudulent charges involved pick-ups and drop-offs at tourist locations such as Central Park, LaGuardia Airport, Grand Central Station, and Wall Street (A150)—locations where passengers would be less apt to know that they were being charged the out-of-town rate.

The TLC implemented a multi-pronged response to these overcharges. As a near-term fix, it created a highly visible passenger alert when the out-of-city rate code is activated (A148, 152-53). It reported the worst offenders for investigation by the City Department of Investigation, leading the District Attorney to bring felony charges against 59 taxi drivers for defrauding customers and misdemeanor petit larceny charges against 14 more drivers (A150). Ultimately, the TLC resolved the issue by equipping taxis with "geo-fencing" technology that automatically activates the out-of-town rate code (*see* A136). Although drivers with multiple overcharges account for only a small percentage of licensed taxi drivers, the TLC's analysis indicated that these drivers overcharged passengers by almost $1.1 million over a 26-month period of time (A146).[4]

[4] During this 26-month period, the data showed, 21,819 taxi drivers overcharged passengers a total of 286,000 times (out of 361 million total taxi trips) (A146).

The TLC also initiated administrative enforcement proceedings against drivers with evidence of repeated overcharges, including El-Nahal–one of only .03% of drivers whose trip data reflected ten or more overcharges (A147). Rather than pay a $1,000 fine, El-Nahal availed himself of the robust procedural protections provided by the TLC rules and, after three hearings, succeeded in obtaining dismissal of the summonses (A178-79, 186-216).[5] He contended during the administrative proceedings that the overcharges were inadvertent and that he had advised the passenger of the error in each instance and negotiated a mutually satisfactory resolution, although he provided no evidence to support this claim (A186, 193, 213).

D. El-Nahal's lawsuit against the City

El-Nahal then sued the City and various individual defendants in federal court, alleging that the TLC's use of the T-PEP system violated the prohibition against unreasonable searches and seizures under the state and federal constitutions (A16-37).[6] The district court (Forrest, J.) granted

[5] The successive hearings were a result of an incomplete record, rather than a finding that El-Nahal had not violated TLC rules (*see* A187-88, 195).

[6] Although El-Nahal filed the complaint on behalf of himself and similarly situated individuals, he never sought class certification in the district court (A33; *see* Pet. App. 7a n12).

the defendants' motion for summary judgment, holding that the installation and use of the T-PEP system does not constitute a search within the meaning of the Fourth Amendment and that, even if it did constitute such a search, transmission of this information was constitutionally permissible because it was reasonable (Pet. App. 34a-41a).

In rejecting El-Nahal's claim, the district court recognized that the Fourth Amendment protects against two distinct sets of concerns: trespasses into personal property and intrusions into the reasonable expectation of privacy of a person or business. (Pet. App. at 34a-44a). Taking into account the pervasive regulation of taxis and their openness to public use, the district court found that use of the T-PEP trip data does not constitute a common-law trespass into property because drivers are aware of, and consent to, use of the system as a condition of participation in a heavily regulated industry in which taxis are not truly private vehicles (Pet. App. at 39a-40a). The data's use does not constitute an intrusion into a protected privacy interest, the district court found, because drivers such as El-Nahal have no reasonable expectation of privacy data conveying basic information about their work as a driver (Pet. App. at 28a-29a, 35a-38a).

The district court further found that, even if the mandatory installation of the T-PEP system did constitute a search, the search was reasonable and served special needs, beyond the normal need for

law enforcement (Pet. App. at 41a-44a). The court explained that El-Nahal had a low privacy interest in the data collected, which was limited to data directly related to his work as a taxi driver (Pet. App. at 42a). On the other hand, the governmental interest in collecting the data is quite substantial (*id.* at 42a-43a). And because the TLC only collects information while drivers are on duty, the court found, there is little likelihood that personal information could be obtained through the T-PEP system (*id.* at 43a).

El-Nahal appealed, but limited his challenge on appeal to the district court's ruling under the physical-trespass, property-based analysis (Pet. App. at 9a-10a). The United States Court of Appeals for the Second Circuit affirmed the grant of summary judgment to the defendants, but on significantly narrower grounds. Applying settled precedent, the Second Circuit concluded that El-Nahal failed to make a sufficient showing that he had standing to assert a property-based claim, because he proffered no evidence demonstrating that he had a property interest in a taxi when the T-PEP system was installed (Pet. App. at 10a-11a). Because El-Nahal expressly disavowed making a privacy-based Fourth Amendment claim on appeal, the Second Circuit made explicit that it was not addressing whether he could assert a claim solely for intrusion into a reasonable expectation of privacy in the trip information (Pet. App. at 10a).

The Second Circuit's analysis of El-Nahal's property-based claim was firmly rooted in three decisions of this Court. In *United States v. Karo*, 468 U.S. 705 (1984), this Court found that the presence of a beeper inside of a container shipped to the defendant and then used to monitor his movements did not infringe on a constitutionally protected property interest because the beeper did not interfere with the defendant's possessory interest in the container "in a meaningful way." *See* 468 U.S. at 712-13. Indeed, any "technical" impairment of the defendant's property was so marginal that it went unnoticed by him. *See id.* *Karo* followed on the heels of another decision by this Court, *United States v. Knotts*, 460 U.S. 276 (1983), which found that use of a beeper inside of a container did not violate the Fourth Amendment, where the defendant did not assert that he had a property interest in the container at the time that the beeper was installed.

The importance of holding a property interest at the time of installation, the Second Circuit found, was confirmed by this Court's subsequent decision in *United States v. Jones*, 565 U.S. 400 (2012) (Pet. App. at 11a-14a). In *Jones*, a majority of this Court found that warrantless installation of a GPS device into a private vehicle violated the Fourth Amendment because the defendant had a property interest in the vehicle when the GPS was installed. 565 U.S. at 404. That ruling, this Court was careful to emphasize, was "perfectly consistent" with *Karo* and *Knotts* because, in those cases, the defendant

did not come into possession of the property until after installation of the tracking device. *See id.* at 409-410.[7]

El-Nahal's property-based claim plainly fails under the *Jones* standard, the Second Circuit determined, because the "record is devoid of evidence" about whether El-Nahal had an interest in a taxi when the T-PEP system was installed—an omission that was "all the more remarkable" given that his claim hinged on proving such an interest (Pet. App. at 3a, 18a). The court found it "a mystery" whether he owned a taxi medallion, rented a taxi, or alternated shifts with another driver who rents one (*id.* at 17a). In light of this basic deficiency, the Second Circuit held, no reasonable jury could find that there was a property-based violation (*id.*). Judge Pooler concurred in part and dissented in part, agreeing with the majority's analysis that a plaintiff who lacked a property interest at the time of installation lacked standing to assert a trespass-

[7] In a concurrence drafted by Justice Alito, four members of this Court found that even installation of the device did not constitute a property-based Fourth Amendment violation, urging that the constitutionality of GPS use should be evaluated without reference to common-law, physical-trespass doctrines. *Jones*, 565 U.S. at 418-19. Under this analytical framework, El-Nahal's lawsuit was properly dismissed because he advanced only a property-based claim, and did not contend on appeal that he had a reasonable expectation of privacy in the trip information itself.

based Fourth Amendment claim, but finding that the case should be remanded for further factual development about the nature of El-Nahal's property interest (Pet. App. at 18a-26a).

REASONS FOR DENYING THE PETITION

Although El-Nahal contends that the Second Circuit held that he "has no Fourth Amendment right against [GPS] surveillance" of his taxi use (Pet. at 2), the court did no such thing. Instead, it dismissed his claim because (a) the record was devoid of any evidence concerning his claimed property interest and (b) he disclaimed reliance on any theory premised on the notion that he had a constitutionally protected privacy interest in the data collected by the T-PEP system. These same failures would preclude this Court from reaching either of the questions presented for review in the petition.

There is no foundation for this Court to review the boundary of property interests protected by the Fourth Amendment because El-Nahal neither alleged, nor proffered any evidence, that he had a property interest in a taxi at any point in time. This appeal likewise presents no occasion for review of questions regarding whether and when GPS tracking violates a non-property-based reasonable expectation of privacy, because that question was neither pressed before nor decided by the court of appeals, as El-Nahal expressly disavowed that theory of his case on appeal.

Indeed, El-Nahal's failure to present and grapple with the threshold obstacles to review is itself a reason to deny his petition. *See* S.Ct.R. 14.4 (failure to address matters essential to understanding of points presented is sufficient reason to deny petition).

Nor would there be any reason to grant review, even were these threshold defects absent. Even if El-Nahal had laid an adequate foundation for this Court's review of the question presented addressing his standing to raise a property-based theory, he would nonetheless be mistaken in asserting that there is a circuit split regarding that question. To the contrary, the courts of appeals are in agreement that a property-based Fourth Amendment claim requires an interest in constitutionally-protected property at the time of the alleged trespass. When it comes to claims based on use of electronic tracking devices, this Court made clear in *Karo* and *Jones* that a plaintiff who had no property interest at the time of installation of the device lacks standing to assert that such a trespass has occurred. None of the decisions cited by El-Nahal depart from this Court's guidance or present a conflict in authority on this point.

Finally, this case presents a uniquely poor vehicle to review broad Fourth Amendment concerns regarding use of GPS technology, as the Petition seeks to raise. This case arises in the highly specialized context of New York City taxis—which is among the most comprehensively

regulated of businesses. The T-PEP system collects basic information pertinent to a taxi driver's work as part of a comprehensive regulatory scheme governing taxi service in New York City. Safeguards are in place to insure that the electronic trip data is only gathered while the driver is on duty. Thus, the T-PEP system simply does not implicate the wider concerns about chilling associational and expressive freedoms raised by El-Nahal.

A. This case presents no occasion for review of the questions presented in the petition.

1. El-Nahal supplied no evidence that he had a property interest in a taxi at any time.

El-Nahal failed to create the minimum factual record on which this Court could review his first proposed question for review, concerning whether standing to assert a property-based Fourth Amendment claim should be limited to individuals with a possessory interest at the time of the initial trespass (Pet. App. at 17a). As the Second Circuit observed, El-Nahal identified himself as a long-time taxi driver but did not explain the nature of his possessory interest in a taxi (Pet. App. at 11a, 14a, 16a, 17a, 18a). He did not indicate whether he owns a taxi medallion, rents a taxi from a corporate owner, or drives a taxi rented by another driver (*id.* at 17a). He neither described his property interest in a taxi at the time the T-PEP system was

installed, nor his interest at any later point in time (see Pet. App. at 17a). And although he asserts at various points in his Petition to this Court that he leased a taxi, he includes no record citations in support of these assertions (Pet. at 8, 20). That is because El-Nahal neither alleged, nor provided evidence demonstrating, that he had entered into any such lease.

This threshold failure to adduce facts demonstrating standing, even under the Petition's own standing theory, would preclude this Court's review of the question presented regarding standing, as well as any review of the merits of his property-based claim. Fourth Amendment rights are personal and cannot be asserted absent evidence that an individual has sufficient Fourth Amendment interests at stake. *See Brown v. United States*, 411 U.S. 223, 230 (1973) (Fourth Amendment rights cannot be vicariously asserted). Thus, if this Court granted certiorari, it would be unlikely to reach the proposed question for review, regarding El-Nahal's property-based claim, because El-Nahal failed to make a showing that he had a property interest at stake. And if this Court did rule on the validity of the claim notwithstanding this basic deficiency, the guidance provided could well be confusing to lower courts in the absence of allegations or evidence describing El-Nahal's asserted property interest. The absence of a clear set of facts makes this an inappropriate case for addressing important constitutional issues about

Fourth Amendment protection against intrusion into property interests.

2. El-Nahal disavowed any claim based on an expectation of privacy in the trip data reported to the TLC.

This case presents even less occasion to review El-Nahal's second question presented, concerning when the use of GPS technology intrudes upon an individual's reasonable expectation of privacy. El-Nahal's privacy-based theory that a search occurred was rejected by the district court because he had no reasonable expectation of privacy in the discrete, work-related trip data transmitted to the TLC. In the face of this basic obstacle, El-Nahal expressly limited his argument in the Second Circuit to his property-based theory under the Fourth Amendment (Pet. App. at 10a).

Because El-Nahal disavowed any argument that use of the T-PEP system intruded upon a reasonable expectation of privacy, the Second Circuit made clear that it was not addressing that claim (Pet. App. at 10A). El-Nahal thus forfeited his opportunity to have his privacy-based claim reviewed by this Court. *See Jones*, 565 U.S. at 413; *OBB Personenverkehr AG v. Sachs*, 577 U.S. ___, ___, 136 S. Ct. 390, 398 (2015). To maintain the integrity of the process of certiorari, *see Taylor v. Freeland & Kronz*, 503 U.S 638, 645-646 (1992), and preserve scarce judicial resources, *see*

Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985), this Court should not review arguments that were abandoned by a party and were not addressed by the court of appeals.

B. Threshold defects aside, there is also no circuit split for this Court to resolve.

Even leaving these threshold standing and preservation obstacles aside, El-Nahal is deeply mistaken in asserting that the Second Circuit's ruling creates a circuit split requiring resolution by this Court. El-Nahal argues that the Second Circuit's ruling in this case conflicts with the decisions of three other courts of appeal regarding whether a post-installation possessory interest in a tracked vehicle is sufficient to assert a property-based Fourth Amendment claim (Pet. at 13-15). But none of the cases relied on by El-Nahal purport to rule on that issue.

The primary case relied on by El-Nahal, *United States v. Gibson*, did not reach whether a post-installation possessory interest furnishes standing, because the court found that Gibson had a possessory interest in the searched vehicle when the GPS device was installed. 708 F.3d 1256, 1276-77 (11th Cir. 2013). The other cases cited by El-Nahal are even less on point. *United States v. Davis* addressed only the "narrow" question of whether a passenger holds Fourth Amendment rights against being tracked by GPS. 750 F.3d 1186 (10th Cir. 2014) (holding that a passenger cannot challenge

the violation of someone else's Fourth Amendment rights). And *United States v. Barraza-Maldonado* did not even address whether the installation and use of a GPS device violated the defendant's Fourth Amendment rights. 732 F.3d 865, 869 (8th Cir. 2013) (noting that the "only" issue being addressed was the applicability of the good faith exception to Fourth Amendment exclusionary rule).

El-Nahal's speculation about how these courts might rule on Fourth Amendment standing issues in other, future cases is not a basis for granting certiorari. But he is any event incorrect in suggesting that the law regarding the scope of a protected property interest is evolving or unclear. To be sure, the law regarding an individual's reasonable expectation of privacy against electronic tracking is evolving and necessarily in flux. *See Jones*, 565 U.S. at 426-31 (Alito, J., concurring). But the same is not true of the scope of a constitutionally protected *property* interest against use of such a device: that interest, this Court has held, is rooted in historical, common-law notions of trespass. *See id*. at 404-08. On that front, the Second Circuit's ruling aligns with clear precedent from this Court locating physical trespass at the time of a tracking device's installation. *See Jones*, 565 U.S. at 409; *Karo*, 468 U.S. at 712-13.

Here, as in *Karo*, El-Nahal accepted the taxi as it came to him. He knew full well that the T-PEP system was part and parcel of the vehicle and that its use was a condition of his license to participate

in a highly regulated transportation service with exclusive street hail privileges. Even assuming, therefore, that he had a property interest in a licensed taxi (a point he has never shown), the presence of the T-PEP no more constituted a common-law trespass than the mandated partition between front and rear seats, special rooftop light, or credit card reader. Its use did not meaningfully interfere with any possessory interest in the taxi. *See Jones* at 419, n. 1-2 (Alito, J., concurring) (attaching small, light object such as a GPS device does not damage a vehicle or interfere with its operation).

The Second Circuit's holding does not, moreover, mean that someone who acquires a private vehicle with a GPS device installed will generally be barred from challenging its use under the Fourth amendment, as El-Nahal suggests (*see* Pet. at 18-21). In *Jones*, this Court clarified that an individual can challenge GPS tracking of a private vehicle as an unlawful search under the Fourth Amendment either on the theory that it was effected by a physical trespass or that it constituted an invasion of a reasonable expectation-of-privacy standard. *Jones*, 565 U.S. at 409. On the particular facts of this case, however, El-Nahal simply chose to abandon any reasonable-expectation-of-privacy theory.

C. This case would be a particularly poor vehicle for addressing broader GPS-related Fourth Amendment questions.

The unique, quasi-public character of New York City taxis, the pervasiveness of the regulatory scheme governing their operation and use, and the limited work-related nature of the GPS data collected by the TLC all make this case a poor vehicle for examining the broader questions about use of GPS data that El-Nahal asks this Court to review. A New York City taxi is an unusual, one-off type of property. In comparison to an individual buying or renting a car for private use, a medallion owner or taxi driver who purchases or leases a taxi obtains a significantly more limited and regulated bundle of property rights. The most important property right, the right to exclude, is sharply circumscribed by detailed regulations governing operation of on-duty taxis, the configuration of vehicles, and physical items that are required to be installed. The unique limitations on property rights to a taxi make this a poor test case for evaluating the outer boundaries of constitutionally protected property interests.

These same factors also make this case an especially poor vehicle for exploring reasonable-expectation-of-privacy claims. The privacy concerns that El-Nahal raises—about government monitoring individuals in their homes, surveilling their personal activities around the clock in real time, and chilling expressive and associational

freedoms (*e.g.*, Pet. at 26, 28, 30)—simply are not implicated here. New York City taxi drivers do not have a reasonable expectation of privacy in the trip data that the TLC collects. They have long been subject to regulation by the TLC, which has required cabdrivers to report the times and locations of trips and fares. *See* 35 R.C.N.Y. § 2-28(a) (2003). If anything, the T-PEP raises far fewer privacy concerns than the beepers addressed by this Court in *Knotts* and *Karo*, because the T-PEP is used to collect work-related information, with the knowledge of both owner and driver. This may well be the reason that El Nahal's counsel did not press any privacy-based theory on appeal below.

"Prudence counsels caution before … establish[ing] far-reaching premises that define the existence, and extent, of privacy expectations." *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). The reasonable-expectation-of-privacy standard rests on the assumption that society has a well-developed and stable set of privacy expectations, but privacy assumptions about emerging electronic tracking technology are still in flux. *See Jones*, 565 U.S. at 426 (Alito, J., concurring). Legislatures, too, are still shaping society's expectations of privacy in these new technologies; as El-Nahal notes, numerous states have enacted laws addressing collection of GPS data by law enforcement (Pet. at

29 n. 10).[8] If this Court were to leap ahead of lower courts and legislatures and take on the burden of delineating the contours of evolving societal expectations of privacy in this emerging technology, it should do so in a case where the most important privacy concerns about GPS technology are in play and a privacy claim was briefed in the court of appeals. This is simply not the case to examine the key Fourth Amendment concerns implicated by the use of GPS technology.

[8] *See also Jones*, 565 U.S. at 430 (Alito, J., concurring) (emphasizing that a legislative body is well situated "to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 805-06 (2004) (arguing that Congress should be the primary driver of privacy protections when technology is in flux).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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