No. 16-830

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

REPLY BRIEF FOR PETITIONER

DANIEL L. ACKMAN
LAW OFFICE OF
DANIEL L. ACKMAN
-and-
Participating Attorney for
The Rutherford Institute
222 Broadway, 19th Floor
New York, NY 10038

TILLMAN J. BRECKENRIDGE*
BAILEY & GLASSER LLP
1054 31st St., NW, Suite 230
Washington, DC 20007
202-463-2101
tbreckenridge@baileyglasser.com

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

*Counsel of Record

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The Respondents' Brief in Opposition disavows the privacy rights the New York Taxi and Limousine Commission insisted it would respect when it passed regulations requiring taxi cabs to install GPS devices allowing the TLC to track all vehicles at all times. Yet, it spends page after page extolling the beneficial properties of the devices without acknowledging that this case does not present a facial challenge. Nor does Petitioner Hassan El-Nahal assert that the Commission may no longer use the devices. That is a red herring. This case presents the narrower issue of whether it constitutes an unreasonable search under the Fourth Amendment for the Commission to engage in suspicionless GPS tracking of taxi drivers to generate evidence that it would use in criminal, quasi-criminal and administrative prosecutions. More specifically, this case implicates (1) whether suspicionless GPS tracking to uncover unlawful activity constitutes a trespass under *United States* v. *Jones*, and (2) whether, as raised in the *Jones* concurrences, the mining of the data itself constitutes a search that must be independently evaluated to determine whether it was reasonable.

The Commission asserts two baseless "threshold" issues. First, the Commission asserts that El-Nahal presented no evidence of a possessory interest in the taxi he drove. That is false. El-Nahal established that he legally drove a taxi—a fact that the Commission does not dispute. And presumably the Commission is aware of its own requirement that a taxi driver must either own or lease a taxi medallion in order to legally drive a taxi. Thus, there cannot be any dispute over whether El-Nahal had some possessory interest in his taxi at the times the Commission tracked him, and

both the District Court and the Second Circuit correctly presumed El-Nahal's possessory interest. Second, the Commission asserts that El-Nahal forfeited any personal privacy claim in the Second Circuit. That assertion fails because the District Court correctly determined that Second Circuit precedent foreclosed that argument. El-Nahal argued the issue the Second Circuit had not previously resolved, and now re-presents personal privacy in this Court, which need not adhere to Second Circuit decisions—unlike the Second Circuit panel.

When distractions are cast aside, this case presents a disagreement among the circuits on the application of *Jones*, and it is a strong vehicle for remedying the concerns expressed in the *Jones* concurrences. There is no dispute that the tracking device was legally used for most of the purposes the TLC advanced when it enacted its regulation. The question here, however, is the government may go beyond those stated purposes to search for unlawful behavior in light of (1) El-Nahal's possessory interest in the taxi at the time the data was acquired, and (2) El-Nahal's reasonable expectation that the data would not be mined for unlawful activity.

The Commission does not deny that it passed regulations requiring GPS devices in taxis with the express recognition of drivers' privacy rights and a promise that the data would not be used to search for unlawful activity. Yet the Commission acknowledges that just a few years later, it executed a dragnet search of the data, which led to prosecutions of significant offenders, and multiple license suspensions of El-Nahal and others. Under Second Circuit law, El-Nahal does not even have standing to contest this deprivation of his ability to ply his trade under

the Fourth Amendment. That is wrong, and this Court should step in to correct it.

ARGUMENT

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.

Hassan El-Nahal, who drove a taxi full-time, completing more than 9,000 trips per year, accidentally overcharged passengers on 10 occasions between November 2009 and February 2010. Pet. 8. And for that, he was subject to several administrative prosecutions—each time having his license, and his ability to earn a living, temporarily revoked—before he was finally vindicated with prejudice by the Appeals Unit. Pet. 8-9.

The Second Circuit ruled that El-Nahal lacked prudential standing to pursue a claim that the Fourth Amendment barred the Commission's tracking for the purpose of uncovering unlawful activity. Pet. App. 11a. Had El-Nahal been able to bring his case in the Fifth or Eleventh Circuit, the court would have determined that he had standing. 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. *United States* v. *Gibson*, 708 F.3d 1256, 1277 (11th Cir. 2013). As noted in the petition, other circuits have avoided holding that drivers lack Fourth Amendment standing against GPS tracking when they did not own

the vehicle at the time of the installation. Pet. 14-15. The Second Circuit, on the other hand, based its standing inquiry solely on whether there was a possessory interest at the time of installation. Pet. App. 11a.

Respondents assert that there is no division among the Circuits, but they do not even address the Fifth Circuit's ruling in *United States* v. *Hernandez*, 647 F.3d 216, 218, where the court recognized the privacy interest of a non-owner in a tracked vehicle. They also disagree on the proper interpretation of *Gibson*, arguing that the Court found that Gibson had a possessory interest in the car he borrowed at the time the GPS device was installed. Opp. 20. That is beside the point. The Eleventh Circuit stated a standard that would have recognized Gibson's—and El-Nahal's—standing so long as he was borrowing the car when the relevant data were recorded. *Gibson*, 708 F.3d at 1277. As both the Fifth and Eleventh Circuits recognize that a person asserting a Fourth Amendment claim against GPS tracking of an automobile did not need to have a possessory interest in the vehicle at the time the GPS device was placed, both would have come to a different result than the Second Circuit in this case.

Respondents' asserted factual ground for denying review fares no better. Neither the District Court nor the Second Circuit questioned El-Nahal's possessory interest in the taxi at the time data regarding his travels were recorded. And it is odd for the Commission to assert this as a "threshold" issue in its opposition. Opp. 15-16. At the outset, there is no question that, in light of the fact that all acknowledge El-Nahal did not own the taxi, he must have leased it. Taxi drivers are independent contractors. Ahmed v.

City of N.Y., 129 A.D.3d 435, 437, 10 N.Y.S.3d 233, 235 (N.Y. App. Div. First Dep't 2015) ("Most taxi drivers work as independent contractors, leasing medallion cabs from the owners…."); see also TLC 2014 Taxicab Factbook at 7-8 (describing how most taxis are leased by the day or the week and are generally driven by non-owners)[1]. And the Commission's own regulations acknowledge that drivers who do not own their taxis must lease them. *See* RCNY §§ 58-21(c)(1) & (c)(4) (capping lease rates for medallion rental); Opp. 4 ("Under the City's 80-year-old taxi medallion system, it is illegal to operate a taxi without a medallion."). In any event, as established in *United States* v. *Jones*, 132 S. Ct. 945, 949 n.2, El-Nahal had at "at least had the property rights of a bailee" as the driver and sole person responsible for the taxi when he took fares.

In light of El-Nahal's clear possessory interest in the taxi, the question of trespass is squarely presented. The Fifth and Eleventh Circuit's views of this issue are far more sensible than the Second Circuit's. A continuing trespass does not become any less of a trespass because ownership of the property changes hands. For instance, a buyer of real estate does not lose standing to assert the trespass of a squatter simply based on the fact that he started squatting before the owner bought the property.

Ultimately, though, this discussion should not even be necessary. *Jones* left circuit courts to configure a new concept of physical trespass for purely digital information—a question they are clearly attempting to avoid, *see* Pet. 14-15—when the

---

[1] available at http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf

fundamental, unavoidable issue that needs to be addressed is whether mining GPS data for unlawful activity without a warrant is a search. This case squarely presents that question.

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

This case presents critical issues of Fourth Amendment standing, and El-Nahal's status as a taxi driver does not change that. Respondents assert that "New York City taxi drivers do not have a reasonable expectation of privacy in the trip data that the [Commission] collects." Opp. 24. That is quite contrary to what the Commission asserted both to drivers and to courts when it first required GPS devices be mounted in to taxis. Pet. 6-7. The Commission assured the drivers, the public, and the United States District Court for the Southern District of New York that the information from these systems would be used for only limited purposes and would not intrude on the drivers' expected privacy. *E.g.* JA131-32. It also stated that its searching would not result in prosecutions. *Id.* Thus, even if there had not been a reasonable expectation of privacy in the abstract—there was—the Commission certainly created one.

Indeed, as noted in the Petition, this switcheroo was exactly the concern addressed and allayed in *Maryland* v. *King*, 133 S. Ct. 1958, 1979 (2013). The Court noted that keeping and searching DNA information of arrestees did not violate anyone's reasonable expectations of privacy because of the statutory limitations on use of the information. *Id.* The Court recognized that further data mining would create additional privacy concerns, but stated that the Court should address that case when presented. Though in a different context, that case is now

presented: The Commission promised to protect drivers' privacy by limiting its data mining, then went well beyond the limits to prosecute drivers criminally and administratively. It even swept up innocents like El-Nahal in the dragnet, and preventing them from earning a living in their chosen trade.

This case therefore is an appropriate vehicle to address whether a driver of an automobile must have a possessory interest in the car at the time the device is placed to assert a Fourth Amendment right against the continued digital reporting of his information. And the Commission does not dispute that "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." Pet. 19. Nor does it dispute the other applications of the Second Circuit's holding. *Id.* (noting the possibility of a government demanding access to a third-party's logs of GPS information derived from devices already installed in cars).

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

The transgression in this case is more digital than physical, as it is undisputed that the Commission mined GPS tracking data in a dragnet sweep and caused criminal and administrative prosecutions of numerous taxi drivers based on what it found—in El-Nahal's case, six accidental overcharges when he gives 9,000 rides a year. Thus, 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.

The Petition noted that the concurrences in *Jones* raised the issue of whether the mining of GPS data is a search in its own right, and argued that the Court eventually would have to grapple with the privacy implications of the fact that GPS data of individuals is constantly and necessarily received and stored by third-parties. The majority opinion in *Jones* left open the question of whether warrantless searching of lawfully-obtained GPS data to obtain prosecutable evidence constitutes a violation of the individual's Fourth Amendment rights. This case is an effective vehicle to address that question. Indeed, that the NYC taxi industry is strenuously regulated clears out many of the factors that would normally obscure the question. There is no issue of whether the government properly subpoenaed third-party records, or whether the third-party has a right (or a contractual duty) to resist turning over such records. The only question is whether there was a reasonable expectation of privacy such that the government could not conduct sweeping, suspicionless searches using that data.

Given the ubiquity of GPS-equipped devices, and the massive amounts of data they can provide, *see* Pet. 23, this is a question that needs to be answered in a factual context like this one—where the government, based on a generalized belief that some members of a particular class were engaged in unlawful activity, mined the private data of *all* members of the class and developed profiles of their movements and activities.

In defending their practice, Respondents do not say much about the search of the data itself, except to claim that El-Nahal cannot assert a personal privacy based claim because he did not make that argument in the Second Circuit. Opp. 19. Of course, when

circuit precedent forecloses an argument, a party does not waive or forfeit that argument by futilely asking a panel to go outside the scope of its authority and overrule a prior panel. *U.S. Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 n.7 (2013) (argument not waived when party "shifted ground on appeal because the District Court ruled that Third Circuit precedent foreclosed his contract-based argument"); *see also MedImmune* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007) (argument not waive when addressed in cursory fashion in court of appeals because circuit precedent foreclosed the argument). Just as in *McCutchen*, the district court here ruled that the circuit already had addressed the issue and ruled against the asserted position. App. 35a ("Here, as the Second Circuit has already ruled, plaintiff had no reasonable expectation of privacy in the T-PEP data at issue."). It was thus prudent for El-Nahal to shift ground within the same fundamental issue on appeal—El-Nahal's privacy right against collecting and mining the GPS data for unlawful activity—and reserve this facet of the argument for this Court.[2]

Respondents also cite Justice Alito's concurrence in *Jones* to assert that the issue here is unripe because society's expectations in this realm are not yet well-developed. But that misses the key point in the

---

[2] On the other hand, the Second Circuit did not conclude, despite Respondent's suggestion, that taxi drivers in any way consented to the search. To the contrary, they merely "acquiescence[d] to a claim of lawful authority" which is not consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *see also Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2002) ("The official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntarily")

concurrence, which expressly states that there has long been a societal expectation against the government "secretly monitor[ing] and catalog[ing] every single movement of an individual's car for a very long period. *Jones*, 132 S. Ct. at 964 (Alito, J. concurring).

As the Petition noted, "[w]hether the technology is in your pocket, on your wrist, or in your car, GPS technology is everywhere." And it can be used to create a profile of an individual's activities, tastes, and vulnerabilities. Pet. 25. That stands in direct tension with the societal expectation against the government secretly monitoring individuals' movements for a long time when the government has collected massive amounts of individuals' location data based on a regulation put in place purportedly with safeguards against just that action. And given the fact that data mining is becoming less and less expensive, there is no natural limit on the scope of the government's reach like there was when individual agents had to keep a receiver within a reasonable distance of a suspect with a beeper device secretly attached to a drum of chemicals. For these reasons, the Court should grant the Petition and reverse the decision of the Second Circuit.

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,

DANIEL L. ACKMAN
LAW OFFICE OF
DANIEL L. ACKMAN
-and-
Participating Attorney for
The Rutherford Institute
222 Broadway, 19th Floor
New York, NY 10038

TILLMAN J. BRECKENRIDGE*
BAILEY & GLASSER LLP
1054 31st St., NW, Suite 230
Washington, DC 20007
Telephone: 202-463-2101
Facsimile: 202-463-2103
tbreckenridge@baileyglasser.com

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

*Counsel of Record

Counsel for Petitioner