**NO. A16-0618**

# State of Minnesota
# In Court of Appeals

State of Minnesota,

*Appellant,*

vs.

Joshua Dwight Liebl,

*Respondent.*

## BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA


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## Introduction and Statement of *Amicus Curiae*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Minnesota (ACLU-MN) is one of its statewide affiliates. Since its founding in 1952, the ACLU-MN has engaged in constitutional litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among those rights that the ACLU-MN has litigated to protect is the right to be free from unreasonable searches under the Fourth Amendment to the U.S. Constitution and Article I §10 of the Minnesota Constitution.

The ACLU-MN believes that there are few more vaunted American values than the right to privacy and the right to go about one's business free of unwarranted government surveillance. GPS tracking poses a significant intrusion into the privacy rights of Minnesotans. The most intimate details of our lives, such as where and how we worship, the people with whom we associate, and where and when we receive medical care, are easily ascertained by the government via GPS tracking of our vehicles. As such, the ACLU-MN respectfully urges this court to hold that both the Fourth Amendment to the U.S. Constitution and Article I §10 of the Minnesota Constitution require police to

[1] Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* ACLU of Minnesota. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the American Civil Liberties Union of Minnesota, which was granted leave to participate as *amicus curiae* by this Court's Order dated May 2, 2016.

obtain a warrant based upon probable cause before tracking a person's movements via GPS tracking devices.

## Statement of the Case and Facts

The ACLU-MN concurs with the Appellees' Statement of the Case and Facts and adopts and incorporates the facts set forth in the Brief of Respondents.

## Argument

### I. The lower court correctly suppressed evidence obtained via warrantless GPS tracking because the Fourth Amendment to the U.S. Constitution and and Article 1 §10 of the Minnesota Constitution require law enforcement agents to obtain a warrant based on probable cause before tracking an individual's movements via GPS tracking.

This appeal raises the question whether law enforcement agents may attach a GPS device to a vehicle to track its movements—conduct that the Supreme Court unanimously held constitutes a Fourth Amendment search in *United States v. Jones*, 132 S.Ct. 945 (2012)—without first obtaining a warrant based on probable cause.

Warrantless searches are presumptively unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. Appellant does not argue that an exception to the warrant requirement applies in this case, but rather that the search was permissible because the officer obtained a lesser standard tracking order under Minn. Stat. §626A.37.

The district court correctly concluded that the warrantless GPS search at issue here was impermissible because the officer neither applied for nor obtained a probable cause warrant. Because GPS tracking constitutes a search under the Fourth Amendment and none of the recognized exceptions to the warrant requirement apply to GPS

tracking, this Court should affirm the district court's determination that Respondent's Fourth Amendment rights were violated.

### A. The Warrantless Search of Respondent's Vehicle Violated the Fourth Amendment.

Following the Supreme Court's decision in *Jones*, it is undisputed that the installation and use of the GPS tracker on Respondent's car was a Fourth Amendment search. *See Jones*, 132 S. Ct. at 949. *See also United States v. Faulkner*, No. 15-2252, slip op. at p. 5 (8th Cir. June 27, 2016)("Placement of a GPS tracking device on a vehicle is a 'search' within the meaning of the Fourth Amendment, requiring probable cause and a warrant."). Because that search was conducted without a warrant, it was presumptively unreasonable and this Court should hold that the government violated Respondent's Fourth Amendment rights. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. "[E]very case addressing the reasonableness of a warrantless search [should begin] with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Gant*, 556 U.S. at 338 (quoting *Katz*, 389 U.S. at 357); *see also, United States v. Claude X*, 648 F.3d 599, 602 (8th Cir. 2011).

Warrants are presumptively required because they "provide[] the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than

the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). The process of obtaining a warrant serves a crucial function in and of itself: It prevents the government from conducting searches solely at its discretion. *See Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). "[Warrants are] not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Id.*

The warrant requirement's safeguard is particularly important in the context of GPS tracking, which "is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously." *Jones*, 132S. Ct. at 956 (Sotomayor, J., concurring); *see also id.* at 963-64 (Alito, J., concurring in the judgment) (noting difficulty and expense of continuous, extended tracking for traditional law enforcement). Thus, if GPS tracking is not subject to a warrant requirement, it can "evade[] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Id.* At 956 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

Warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Because none of those exceptions apply here, the government violated Respondent's constitutional rights by not securing a probable cause warrant before attaching a GPS tracker to his vehicle. *See*

*United States v. Katzin*, 732 F.3d 187, 197-205 (3rd Cir. 2013)(unanimously holding that warrantless attachment and use of a GPS tracker violates the Fourth Amendment).

### B. The scope and nature of information obtained through GPS tracking constitutes a significant privacy invasion and identifies deeply personal information unrelated to evidence of illegal activity.

At least five U.S. Supreme Court Justices believed that technologically advanced tracking of a person's location can in fact violate reasonable expectations of privacy. *See Jones*, 132 S. Ct. at 957, 964 (Alito, J., concurring in the judgment) ("Longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *id.* at 955 (Sotomayor, J., concurring). "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, profession, religious, and sexual associations." *Id.* at 955 (Sotomayor, J., concurring). In addition,

> [a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society.

*Id.* at 956 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (C.A.7 2011) (Flaum, J., concurring).

Here, the Government tracked Respondent's vehicle from October 8 to October 21, 2014. Appellant Br. 7. During that time, DNR Conservation Officers had 24-hour access to Respondent's movements, including deeply personal information unrelated to

any suspected criminal conduct. For example, the Government could ascertain whether Respondent spent time at his own home, someone else's residence, bars or strip clubs, hospitals or clinics, places of worship, or engaging in political activity, all of which is unrelated to the suspected criminal conduct. *See generally Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring). The privacy invasions inherent in prolonged location tracking underscore the importance of requiring a probable cause warrant before the government attaches a GPS device and tracks an individual's movements, especially over a period of several weeks.

### C. The fact that some Minnesota courts have granted applications for mobile tracking device orders is not relevant.

Appellant argues that because Minnesota courts have apparently granted mobile tracking device orders based on less than probable cause since the U.S. Supreme Court's ruling in *Jones*, such orders are valid and sufficient under the Fourth Amendment. Appellant Br. 12-16, (citing the state court administrator's report to the Legislature under Minn. Stat. § 626A.17, subdiv. 3 for 2012-2013). The fact that police sought and obtained court orders pursuant to Minn. Stat. §626A.37 during that time period is not relevant to the question of whether the U.S. and Minnesota constitutions require a warrant for GPS tracking. A thorough analysis should still lead this court to reaffirm the warrant requirement in this case.

While it appears that some law enforcement agencies continue to seek and obtain mobile tracking device orders under Minn. Stat. §626A.37 it is unclear whether those applications and orders nevertheless conformed to the requirements of *Jones* by

specifically articulating that there is probable cause (as opposed to "reason to believe") and specifically requesting a warrant (as opposed to a court order).[2] Even with respect to orders that were based on "reason to believe", the data is silent on whether and to what extent evidence collected pursuant to such orders was admitted in a later criminal prosecution. As was true in this case, the act of granting a mobile tracking device order does not guarantee that the evidence collected will be admissible in court. The record does not reflect whether prosecutors have even sought to use GPS evidence collected without a warrant after *Jones*, whether other courts have suppressed such evidence, or whether defendants have objected to the use of such evidence. Without those missing variables, it is impossible to make any judgments about data on the issuance of post-*Jones* mobile tracking device orders, let alone to conclude that the data proves that mobile tracking device orders satisfy the Fourth Amendment's warrant requirement.[3]

Moreover, the failure of state actors to conform to a newly announced rule of constitutional criminal procedure should never insulate that conduct from constitutional scrutiny. The Minnesota Supreme Court has long followed the U.S. Supreme Court's guidance that "[n]ew rules of constitutional criminal procedure apply retroactively to cases pending on direct review at the time the new rule is announced." *State v. Osborne*,

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[2] Indeed, Subdivision 5 of the statute specifically contemplates situations where the court would issue a warrant based on probable cause rather than an order based on reason to believe. *See* Minn. Stat. §626A.37 subdiv. 5 (2016) ("A warrant or other order for a mobile tracking device issued under this section…").

[3] The full report cited by Appellant is available online. Jeffrey Shorba, Minnesota Judicial Branch (2014), https://www.leg.state.mn.us/docs/2014/mandated/141118.pdf. Notably, a review of the data shows that the overwhelming majority of mobile tracking device orders were applied for and granted by a single judicial district.

715 N.W.2d 436, 441 (Minn. 2006) (citations omitted). It necessarily follows that a new rule of constitutional criminal procedure applies prospectively to prosecutions brought after the rule is announced.

### D. Courts in other states have required a warrant for GPS tracking in light of *Jones*.

Courts in other states have applied *Jones* prospectively. For example, in *State v. Adams*, 763 S.E.2d 341 (S.C. 2014), the South Carolina Supreme Court upheld an appellate court decision that GPS tracking without a warrant is a violation of the Fourth Amendment. *Id.* at 344. And in *Keeylen v. State*, 14 N.E.3d 865, 874 (Ind. Ct. App. 2014) the Indiana Court of Appeals ruled that, pursuant to *Jones*, GPS tracking constitutes a search and that "absent extraordinary circumstances, a warrant is required before police may conduct a 'search' by placing a GPS device on a vehicle and monitoring the vehicle's movements by means of the GPS device." *Id* at 874. In that case, like the case at bar, law enforcement personnel obtained trial court authorizations prior to the installation of the GPS device. Nonetheless, the Indiana Court of Appeals noted that a trial court authorization, while providing judicial oversight, was not a warrant. *Id.* at 875-76

Similarly in *Hamlett v. State*, 753 S.E.2d 118 (Ga. Ct. App. 2013), The Georgia Court of Appeals held that GPS tracking done pursuant to a court order as opposed to a valid warrant violated the Fourth Amendment. *Id.* at 125. ("Accordingly, we conclude that, pursuant to the Supreme Court's ruling in *Jones,* the State's installation and monitoring of the GPS tracking device in this case constituted a search under the Fourth Amendment that had to be authorized by a valid warrant.").

The Arizona Court of Appeals has also held that GPS tracking constitutes a search for which a warrant is required in the absence of an exception to the warrant requirement. *State v. Mitchell*, 323 P.3d 69, 77 (Ariz. Ct. App. 2014). As in the instant case, law enforcement personnel could have applied for a search warrant from a magistrate, but chose not to do so. *Id.*

### E. Application of the Exclusionary Rule was the appropriate response to the constitutional violation in this case.

Appellants argue that the suppression motion should have been denied because the law enforcement agents who installed and monitored the GPS device were acting in "good faith" and application of the exclusionary rule in this context would not deter police misconduct. Appellant Br. 20. While the Minnesota Supreme Court recently adopted a good-faith exception to the exclusionary rule, they did so only in the narrow circumstances where "law enforcement acts in objectively reasonable reliance on binding appellate precedent." *State v. Lindquist,* 869 N.W.2d 863, 876 (Minn.2015) (emphasis added). Appellant advocates for a broader exception—one that would permit reliance on a statute that is no longer valid because of binding appellate precedent. This unjustified reading would subvert *Lindquist's* clear holding and prove unworkable in practice.

Appellant suggests that the failure of the Minnesota Legislature to repeal Minn. Stat. §626A.37 made the conservation officer's reliance on the statute reasonable; however, it is likely that the legislature concluded that modification of the statute was unnecessary in light of the U.S. Supreme Court's decision in *Jones* making it clear that GPS tracking is a search under the Fourth Amendment. As such, absent an exception to

the warrant requirement, police must have a warrant and the provisions of Chapter 626 governing warrants provide ample statutory guidance to police applying for warrants and courts considering those applications.[4] The rule that *Lindquist* set forth provides clear, system-wide knowledge of what is permissible and what is not, eliminating the constitutional violations that result from erroneous guesswork.

In the instant case, the conservation officer's decision to rely the statute and seek a court order rather than a warrant, in spite of clear U.S. Supreme Court precedent holding that GPS tracking under nearly identical circumstances is a search under the Fourth Amendment (and in spite of clear legislative guidance under Minn. Stat. §626A.40 that "[n]othing in this chapter authorizes conduct constituting a violation of any law of the United States,") was unreasonable and should not be sanctioned by this Court. The U.S. Supreme Court has stated that executive officers should "err on the side of constitutional behavior." *United States v. Johnson*, 457 U.S. 537, 561 (1982). It has even recommended a specific course of action: in "a doubtful or marginal case," law enforcement agents should obtain a warrant because a warrant "provides the detached scrutiny of a neutral

[4] That the legislature did not repeal the GPS tracking language found in Minn. Stat. §626A.37 is in line with the legislature's failure to repeal other laws that have been held unconstitutional by the courts. *See* Minn. Stat. §256B.0625 subdiv. 16 (prohibiting public funding for abortion services except where necessary to prevent the death of the mother or in the case of rape or incest); Minn. Stat. §609.293 (criminalizing noncommercial, adult, consensual sodomy); Minn. Stat. §211B.08 (prohibiting religious and charitable organizations from soliciting contributions from political candidates or committees).

magistrate, which is a more reliable safeguard against improper searches" than the judgment of law enforcement officers. *United States v. Leon*, 468 U.S. 897, 913–14 (1984) (internal quotation marks and citations omitted).

Suppressing the evidence in this case will result in "'appreciable deterrence'" of unconstitutional searches, thus serving the central goal of the good faith exception cases. *Leon*, 468 U.S. at 909. Suppression would prevent investigators and the prosecutors who advise them—quintessential "adjuncts to the law enforcement team," id. at 917—from engaging in guesswork about the questionable validity of statutes in light of binding appellate court precedent.

These principles are particularly important where, as here, law enforcement agents deploy a novel, surreptitious surveillance technology. This exercise of executive power is perhaps uniquely capable of evading public, legislative, and judicial scrutiny. Innocent people have no mechanism to learn that they have been subjected to such surveillance, and even criminal defendants usually learn that they have been targeted only if the government makes the discretionary decision to use evidence derived in this manner in its case-in-chief. Suppression of the unconstitutionally acquired GPS evidence will deter future violations by law enforcement and is the proper outcome in this case.

But even if this Court were to adopt Appellant's arguments for the erroneous expansion of the good-faith exception, it should still decide the Fourth Amendment question in order to provide much-needed guidance to law enforcement and citizens in Minnesota.

When a case presents a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates, there is sufficient reason for the Court to decide the violation issue before turning to the good-faith question." *Illinois v. Gates*, 462 U.S. 213, 264, 265 n.18 (1983) (White, J., concurring) (*citing O'Connor v. Donaldson*, 422 U.S. 563 (1975)). This is just such a case. GPS devices have become a favored tool of law enforcement, and their highly intrusive nature cries out for clear judicial regulation. Law enforcement and prosecutors in Minnesota would benefit from guidance from this Court that clearly states that, notwithstanding prior practice and statutory language to the contrary, police must obtain a warrant before attaching a GPS device to a vehicle and monitoring it over a period of time.

## II. Article I §10 of the Minnesota Constitution provides independent state constitutional grounds to impose a warrant requirement for GPS tracking.

The plurality in *Jones* made it clear that individuals have a reasonable expectation of privacy in the context of GPS tracking. *Jones*, 132 S. Ct. at 954-55 (Sotomayor, J., concurring) ("even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."' (internal citations omitted). The primary purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of City and Cnty. of San Francisco*, 387 U.S. 523, 528 (1967). Even if, as Appeallant argues, the Fourth Amendment does not require a warrant for the type of intrusive GPS tracking that occurred in this case, this Court should hold that Article 1 §10 of the Minnesota Constitution does.

### A. Minnesota Courts are free to interpret the State Constitution more expansively than the Federal Constitution and they have a long history of doing so in order to extend protections for individual rights.

Generally, Minnesota courts will interpret the Minnesota Constitution to provide greater protection than its federal counterpart when the Court has "a principled basis" to do so. *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004). The Minnesota Supreme Court provided a framework in *Kahn v. Griffin*, to explain the circumstances that warranted the Court's departure from U.S. Supreme Court precedent:

> Our precedent indicates that we are most inclined to look to the Minnesota Constitution when we determine that our state constitution's language is different from the language used in the U.S. Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the U.S. Constitution. We take a more restrained approach when both constitutions use identical or substantially similar language. But we will look to the Minnesota Constitution when we conclude that the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure. We also will apply the state constitution if we determine that the Supreme Court has retrenched on Bill of Rights issues, or if we determine that federal precedent does not adequately protect our citizens' basic rights and liberties.

*Kahn v. Griffin*, 701 N.W. 2d. 815, 828 (Minn. 2005) (internal citations omitted).

Minnesota Courts have long acted to protect the individual rights of Minnesotans in a multitude of areas including the right to religious freedom, right to privacy, right to counsel, equal protection, and, of course, freedom from unreasonable searches. *See, e.g.*, *Jarvis v. Levine*, 418 N.W.2d 139, 148-9 (Minn. 1988) (privacy to make medical decisions); *State v. Nordstrom*, 331 N.W.2d, 901, 904–05 (Minn. 1983) (right to counsel); *State v. Hershberger*, 462 N.W.2d 393, 397–98 (Minn. 1990) (providing stronger right to free

exercise of religion); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (establishing more vigorous test for equal protection violations); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 186 (Minn. 1994) (invalidating law enforcement sobriety checkpoints as an unreasonable search); *Women of the State of Minn. by Doe v. Gomez*, 542 N.W. 2d 17, 30–31 (Minn. 1995) (recognizing greater privacy right to reproductive decisions).

Minnesota courts have ruled to ensure that Article I §10 of the Minnesota Constitution adequately protects Minnesotans' basic right to be free from unreasonable searches and seizures. For example, in *Jarvis*, the Minnesota Supreme Court acted to protect the right to bodily integrity by recognizing an independent right to privacy in the context of the forcible administration of drugs to a patient at a mental hospital. *Jarvis*, 418 N.W.2d at 148-9. Often the courts have taken pains to enumerate a separate state constitutional ground for their decision in order to ensure that the constitutional principle will stand even if it is later eroded by the U.S Supreme Court's Fourth Amendment jurisprudence. *See e.g., O'Connor v. Johnson*, 287 N.W.2d 400 (Minn.1979) (warrant authorizing search of attorney's office invalid under both federal and state constitutions); *Welfare of E.D.J.,* 502 N.W.2d 779 (Minn.1993) (rejecting *California v. Hodari*, 499 U.S. 621 (1991) and adhering to long-standing rule that a seizure occurs when a reasonable person feels she is not free to leave); *State v. Cripps*, 533 N.W.2d 388 (Minn. 1995) (holding that underage patron in a bar was seized, within the meaning of Article I, §10 of the Minnesota Constitution, when an armed and uniformed police officer approached her and sought identification for proof of legal age to consume alcohol

because objectively reasonable person would have believed that he or she was neither free to disregard police questions nor free to terminate encounter); *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002) (holding that conservation officer's search of a fish house without a warrant, consent or probable cause violates constitutional protections against search and seizure under the Fourth Amendment of the United States Constitution and Article I, §10 of the Minnesota Constitution); *In re Welfare of B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003) ("[E]ven if short-term social guests do not have a reasonable expectation of privacy under the Fourth Amendment, their expectation is legitimate under Article I, Section 10 of the Minnesota Constitution."); *In re Welfare of C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (statute requiring warrantless seizure of biological specimen from arrestees for the purpose of DNA analysis violates both Fourth Amendment to the U.S. Constitution and Article 1 §10 of the Minnesota Constitution); *State v. Diede*, 795 N.W.2d 836 (Minn. 2011) (citing both U.S. Minnesota constitutional protections against unreasonable searches and seizures and holding that seizure and search of defendant was unconstitutional).

The Minnesota Supreme Court has been particularly protective of the Minnesota constitutional rights of drivers and passengers to be free from unreasonable searches and seizures. In *Ascher*, the Court disagreed with a U.S. Supreme Court decision allowing the use of suspicionless temporary roadblocks to find alcohol-impaired drivers. *Ascher* N.W.2d at 186-87 The Minnesota Supreme Court held that suspicionless temporary roadblocks violate Article I, §10. *Id.* The Court noted that it has

> long held [that Article I, §10] generally requires the police to have an objective individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop. Based primarily on the state's failure to meet its burden of articulating a persuasive reason for dispensing with the individualized suspicion requirement in this context, we conclude that the constitutional balance must be struck in favor of protecting the traveling public from even the "minimally intrusive" seizures which occur at a sobriety checkpoint.

*Id.* at 187. *See also State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002) (reasonableness requirement of Article 1, §10 prohibits expanding the scope of a routine traffic stop to conduct drug dog sniff of motor vehicle absent reasonable articulable suspicion of drug related criminal conduct); *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) ("investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion" in violation of Art. 1 §10); *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004) (rejecting *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) and holding that Article 1 §10 prohibition against unreasonable seizures requires that the "principles and framework of Terry for evaluating the reasonableness of seizures during traffic stops [applies] even when a minor law has been violated").

### B. A warrant requirement is the "better rule of law" because the State of Minnesota has recognized the significant privacy intrusions that occur when police use location tracking technology.

The Minnesota Supreme Court considers a number of factors when determining whether to interpret the Minnesota Constitution more broadly than the U.S. Constitution. *See Kahn*, 701 N.W.2d at 82 (citing seven non-exclusive factors courts may review). The overarching theme of those factors is to ensure that Minnesota courts adopt

and implement the "better rule of law." *Askerooth*, 681 N.W.2d at 362 n.5; *see also* Terrence J. Fleming and Jack Nordby, *The Minnesota Constitution: "Wrapt in the Old Miasmal Mist,"* 7 Hamline L. Rev. 51, 76 (1984). "In determining the proper resolution of a case under the Minnesota Bill of Rights, the court may legitimately consider the resolution it finds the most intellectually persuasive and socially satisfactory." Fleming and Nordby, 7 Hamline L. Rev. at 76–77.

When the Court has determined either that a federal precedent does not adequately protect the rights of Minnesotans or constitutes a "sharp departure" from a long-standing approach to the law, it generally turns to the Minnesota Constitution because that federal precedent is not the "better rule of law." By focusing on the "better rule of law", the Court is able to fortify their decision to independently apply the Minnesota Constitution. *See, e.g.*, *Ascher*, 519 N.W.2d at 187. The intrusive nature of GPS tracking and the deeply personal information that it reveals about individuals should lead this Court to conclude that a strict warrant requirement is "the better rule of law."

As discussed above, the information that can be obtained through GPS tracking is incredibly intrusive. Tracking an individual's movements for months at a time provides police with troves of information that are completely unrelated to their criminal investigation. An individual's private life is on display including how much time the person spends at home, when and where they attend church, mosque or temple (or that they do not attend church, mosque or temple), the doctors, chiropractors and therapists

they receive medical and mental health care from, the First Amendment and other political activities they engage in and much more.

In *In re Welfare of B.R.K.*, the Minnesota Supreme Court extended a reasonable expectation of privacy under Article 1 §10 of the Minnesota Constitution to short-term social guests, even if they did not have such an expectation under the Fourth Amendment. *In re Welfare of B.R.K.*, 658 N.W.2d 565 (Minn. 2003). They did so in order to "fully protect the privacy interest an individual has in his or her home…". *Id.* A similar analysis should lead this court to adopt an independent state constitutional warrant requirement for GPS tracking considering the stronger privacy protections the Minnesota Supreme Court has recognized in the context of a vehicle and its occupants. Requiring a warrant based upon probable cause for GPS tracking is necessary in order to "fully protect the privacy interest" that the Minnesota Supreme Court has already recognized as being stronger than the U.S. Constitution.

In 2014, the Minnesota Legislature adopted Minn. Stat. §626A.42 which states, in part, "a government entity may not obtain the location information of an electronic device without a tracking warrant. A warrant granting access to location information must be issued only if the government entity shows that there is probable cause the person who possesses an electronic device is committing, has committed, or is about to commit a crime." Minn. Stat. §626A.42 (*emphasis added*). The statute reflects legislative policy in favor of requiring police to obtain a warrant before collecting intrusive location data from individuals. In light of the Legislature's recognition of the important privacy

interests at stake when law enforcement agents obtain detailed information about an individual's movements over time, it should be clear to this Court that a warrant requirement for GPS tracking is the better rule of law.

## Conclusion

For all of the foregoing reasons, *amicus curiae* American Civil Liberties Union of Minnesota urges this Court to uphold the District Court's decision and hold that, absent an exception to the warrant requirement, police must obtain a warrant based upon probable cause before installing a GPS tracking device to track an individual's movements.

Dated: June 29, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared with Microsoft Word 2010, which reports that the brief contains 5110 words.

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