STATE OF NEW YORK
COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SCOTT C. WEAVER,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* NEW YORK CIVIL LIBERTIES UNION

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION, by

CHRISTOPHER DUNN
ARTHUR EISENBERG
PALYN HUNG
125 Broad Street, 19th Floor
New York, N.Y. 10004
(212) 607-3300

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New York, N.Y.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The New York Civil Liberties Union is a non-profit organization founded in 1951 as the New York State affiliate of the American Civil Liberties Union. As such, the NYCLU has long been devoted to protecting the fundamental rights and values embodied in the Bill of Rights of the United States Constitution and analogous provisions in the New York Constitution.

This case presents fundamental questions about whether federal and state Constitutions place any limits on law-enforcement officials seeking to use covert electronic surveillance – in this case a Global Positioning Satellite (GPS) device – to monitor, track, and record the movements and whereabouts of a person over an extended period of time. The prospect of such police action raises profound questions about New Yorkers' right to be free from unreasonable searches and seizures and the privacy interests central to this right.

The parties and other *amici* have focused on federal rights implicated by the electronic police tracking in this case. In this brief the NYCLU focuses on the implications of such tracking for the New York Constitution. The NYCLU contends that, in light of this Court's recognition that the state Constitution affords protections beyond those afforded by the Fourth Amendment and in light of the

unique and unprecedented threat to privacy posed by electronic tracking devices, police electronic tracking like that at issue in this case is sufficiently invasive so as to trigger the protections of Article I, section 12 of our state Constitution.

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union Foundation hereby discloses that it is a 501(c)(3) organization that functions as a companion entity to the New York Civil Liberties Union, which is the New York State affiliate of the American Civil Liberties Union.

STATEMENT OF FACTS AND OF THE CASE

For purposes of the issue the NYCLU addresses, the relevant facts in this matter are straightforward and largely set out in the portion of the affirmation from Assistant District Attorney Kathleen Boland that is reproduced at pages 38 and 39 of the appendix on appeal.

As Ms. Boland, explains, the appellant Scott Weaver was the target of an investigation into commercial robberies in the Albany area. *See* Affirmation of Kathleen Boland ¶ 5 (Appeal Appendix at 37). As part of this investigation, on December 21, 2005 a police official attached a Global Positioning Device (GPS)

to the underside of a van Weaver owned and left it there until February 24, 2006, *see id.* ¶ 6, a period of approximately 65 days.[1] According to the affirmation, "While the device was on the vehicle, the Colonie Police, along with the NYS Police, were able to track the defendants [sic] whereabouts in his vehicle." *Id.* ¶ 10. This tracking took pace without a judicial warrant. *See id.* ¶ 11.

As the Appellate Division explained in its opinion, Weaver was arrested and charged with burglary and larceny in relation to a theft from a K-Mart store based on information obtained from the GPS device. *See People v. Weaver*, 52 A.D.3d 138, 139 (App. Div. 3rd Dept. 2008). After unsuccessfully moving to suppress the evidence, he was convicted and sentenced to prison. *See id.* at 140.

On appeal, Weaver argued, among other things, that the warrantless tracking violated his rights under the federal and state Constitutions. A panel of the Third Department rejected those claims. *See id.* at 141-43. Noting that "constant surveillance of an individual's whereabouts by means of a [GPS] device without a warrant has far-reaching implications," Judge Stein dissented. *See id.* at 143-44 (Stein, J., dissenting).

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[1]Ms. Boland's affirmation states that the device "is merely placed on the bumper of the vehicle," *see id.* ¶ 8 (App. at 38), but the police officer who installed the GPS device testified at trial that it was not attached to the bumper "but it was a metal frame right behind the bumper." Testimony of Peter Minahan at 408:14-16 (App. at 131).

This Court then granted leave to appeal. As *amicus curiae*, the NYCLU submits this brief and urges the Court to hold that the New York Constitution mandates a judicial warrant for police tracking like that at issue here.

ARGUMENT

For the first time this Court is presented with the issue of the extent to which, if at all, the New York Constitution limits police use of electronic devices to track the movements and whereabout of people in private vehicles. The Court's ruling in this matter may have enormous consequences, as the Appellate Division's holding that electronic police tracking of vehicles is of no constitutional consequence opens the door to comprehensive and continuous police tracking of New Yorkers without any judicial oversight.

Recognizing the extraordinary threat to individual privacy posed by police use of electronic tracking devices, the highest courts of Oregon and Washington have held that their state constitutions require a warrant before the police can deploy them. Consistent with its past approach of recognizing that the New York Constitution affords protections beyond the narrow confines of the federal Constitution, this Court should follow the lead of these courts and hold that under our Constitution the type of police tracking at issue in this case requires a warrant.

I. THE HIGHEST COURTS OF TWO OTHER STATES HAVE HELD THAT THEIR STATE CONSTITUTIONS REQUIRE POLICE TO OBTAIN A WARRANT BEFORE ENGAGING IN ELECTRONIC TRACKING.

Though the United States Supreme Court has yet to address the Fourth Amendment implications of GPS tracking by the police, the highest courts of two states have held that such tracking triggers the warrant requirement of their state constitutions.

The first was the Supreme Court of Oregon, which held in 1988 that use of a radio receiver to track a criminal suspect was a search within the meaning of that state's constitution so as to require a judicial warrant. Like the defendant here, the defendant in *State v. Campbell* was suspected of a series of burglaries, leading police officers to attach a radio receiver to his car. *See* 306 Or. 157, 160, 759 P.2d 1040 (1988). The police nonetheless were unable to follow the vehicle, but use of an airplane ultimately located the vehicle through the receiver 40 miles away near a home that the defendant ultimately was convicted of burglarizing. *See* 306 Or. at 159-61.

On appeal, the Supreme Court of Oregon recognized that the "reasonable expectation of privacy" standard governed Fourth Amendment analysis but expressly rejected that analysis as controlling the counterpart provision of the

Oregon Constitution because it had become "a formula for expressing a conclusion rather than a starting point for analysis." *See id.* at 164. Rather, the court held that the value protected by the state constitution was "the privacy to which one has a *right.*" *Id.* (emphasis in original).

Having jettisoned the doctrinal framework that allows increased surveillance capacity to shrink Fourth Amendment protections, the court then squarely rejected another pillar of electronic-tracking decisions: "[I]t is wrong to characterize the radio transmitter as simply a device for 'enhancing' visual observation in the manner of moderate power binoculars or camera lenses. The transmitter has nothing to do with vision; it broadcasts a signal that enables the police to locate, with little delay, the transmitter from anywhere its signal can be received." *Id.* at 166. Most significantly, the court recognized that technological advances since the adoption of the state constitutional protection in 1859 required a new approach to search and seizure law, one based on a core principle of "the people's freedom from scrutiny." And this principle mandated judicial oversight of tracking devices:

> Any device that enables the police quickly to locate a person or object anywhere within a 40-mile radius, day or night, over a period of several days, is a significant limitation on freedom from scrutiny . . . . The limitation is made more substantial by the fact that the radio transmitter is much more difficult to detect than would-be observers,

> who must rely upon the sense of sight. Without an ongoing, meticulous examination of one's possessions, one can never be sure that one's location is not being monitored by means of a radio transmitter.

306 Or. at 172.

Voicing even more serious concerns – perhaps prompted by the intervening advances in tracking technology – the Supreme Court of Washington reached a similar conclusion in 2003 in *State v. Jackson*, 150 Wash.2d 251, 76 P.3d 217 (2003). That case involved use of a GPS device for two and one-half weeks to track a man suspected of murdering his daughter, with the device leading police to a remote spot where the man had buried the girl's body.

At the outset, the court eschewed the federal "reasonable expectation of privacy" formulation, recognizing that standard's vulnerability to advancing technology: "Thus, whether advanced technology leads to diminished subjective expectations of privacy does not resolve whether use of that technology without a warrant violates [the Washington Constitution]." 150 Wash. at 260.

And like the Supreme Court of Oregon, it rejected the notion that electronic tracking was simply an enhanced version of visual observation. As the court explained, "[W]hen a GPS device is attached to a vehicle, law enforcement officers do not in fact follow the vehicle. Thus, unlike binoculars or a flashlight,

the GPS device does not merely augment the officers' senses, but rather provides a technological substitute for traditional visual tracking." *Id.* at 261-62. Going further, it explained how GPS tracking opened the door to extraordinarily intrusive government surveillance, allowing the government to monitor visits to a wide array of places, including doctors' offices, political party meetings, strip clubs, family planning clinics, the "wrong" side of town, and labor rallies. *See id.* at 262.

Given these capabilities, the court agreed with the Supreme Court of Oregon and held that police use of a GPS device required a warrant. Otherwise, "then there is no limitation on the State's use of these devices on any person's vehicle, whether criminal activity is suspected or not." *Id.* at 264.

The Respondent attempts to blunt the impact of these cases by arguing that they invoke doctrinal standards or textual provisions that differ from those at issue in this case. *See* Respondent's Brief at 30-32. Yet, this does not address the true import of these cases. What is so important about them, beyond their laudable recognition of the genuine threat posed by electronic police tracking, is their understanding that electronic police tracking qualitatively differs from conventional visual observation of vehicles in public streets. Both courts recognized that this type of police surveillance represents an entirely unprecedented intrusion into personal privacy that renders irrelevant the

traditional reasonable-expectation-of-privacy analysis that has governed Fourth Amendment claims about vehicle-related police activity. And that is precisely what the NYCLU calls upon this Court to recognize in this appeal.

II. THE DEFENDANT'S STATE CONSTITUTIONAL CLAIM IS NOT CONTROLLED BY FOURTH AMENDMENT "REASONABLE EXPECTATION OF PRIVACY" DOCTRINE.

As the parties both note in their briefs, this Court often has held that Article I, section 12 of the New York Constitution provides greater protection than does the Fourth Amendment of the United States Constitution. *See* Respondent's Brief at 15-16 (Jan. 21, 2009) (citing cases); Brief for Defendant-Appellant at 50-59 (Nov. 3, 2008) (citing and discussing cases). Given this, the specific question presented on this appeal is whether this Court should, as did the Supreme Courts of Oregon and Washington, recognize that police electronic tracking of private vehicles is another situation in which our state Constitution goes beyond the Fourth Amendment.

In approaching this issue, it is important to note at the outset that an earlier decision by this Court forecloses any suggestion that police searches involving vehicles are categorically governed by the "reasonable expectation of privacy" standard as formulated and applied by courts construing the Fourth Amendment.

In *People v. Class*, this Court, without separately analyzing the federal and state claims, ruled that a police official conducted a search within the meaning of both the New York and federal Constitutions when he entered a car to locate its vehicle identification number ("VIN"). *See* 63 N.Y.2d 181 (1984). Finding no lawful justification for the search, the Court suppressed evidence obtained pursuant to the entry, vacated the defendant's conviction, and ordered the indictment dismissed. *See id.* at 497.

The United States Supreme Court reversed this Court's Fourth Amendment ruling, holding that persons had no reasonable expectation of privacy, as that standard has developed under the federal Constitution, in their vehicles being entered to obtain VIN numbers and thus that the police entry into the defendant's car did not trigger constitutional scrutiny. *See New York v. Class*, 475 U.S. 106, 111-14 (1986). It vacated this Court's judgment and remanded the case. *See id.* at 119.

On remand this Court nonetheless reaffirmed its original disposition of the case, relying exclusively on Article I, section 12. *See People v. Class,* 67 N.Y.2d 431 (1986). As the Court explained, "Where, as here, we have already held that the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds unless respondent

demonstrates that there are extraordinary or compelling circumstances. That showing has not been made." *Id.* at 433.

Given the absence of any detailed analysis in either of this Court's opinions in *Class* about the specific differing approaches that might be taken under the state and federal Constitutions when analyzing car-related searches, *Class* does not provide clear guidance about the doctrinal approach to be taken in this case. Nonetheless, the critical point that emerges from *Class* is that claims under Article I, section 12 are not to be mechanically disposed of by reference to the widely criticized reasonable-expectation-privacy analysis governing Fourth Amendment claims.[2]

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[2]Several commentators have noted serious shortcomings in the federal doctrine in the specific context of electronic tracking. *See* Susan Freiwald, *A First Principles Approach to Communications' Privacy*, 2007 Stan. Tech. L. Rev. 3 (2007) (arguing that "reasonable expectation of privacy" test is insufficient in context of modern communications and that hidden electronic surveillance should be subject to heightened procedural requirements); Peter P. Swire, Katz *is Dead, Long Live* Katz, 102 Mich. L. Rev. 904, 923-31 (2004) (pointing out inadequacy of "reasonable expectation of privacy" test for emerging technology and urging more substantive test that gives greater protections to privacy and procedural mechanisms to safeguard against law enforcement abuse); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 Ind. L.J. 549, 575-88 (1990) (urging abandonment of "reasonable expectation of privacy" test and return to principles underlying original judicial formulation of "right to privacy" by recognizing new class of governmental searches, such as use of tracking devices, termed "intrusions" and protecting individual freedom and security); James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an*

(continued...)

That, however, is what the Appellate Division did here. Without so much as a mention of *Class*, the lower court rigidly applied conventional reasonable-expectation-of-privacy analysis and simply relied on the proposition that individuals have no reasonable expectation of privacy in publicly visible aspects of a vehicle on a public roadway. *See People v. Weaver*, 52 A.D.2d 138, 142-43 (App. Div. 3rd Dept. 2008).

Acknowledging that *Class* is a car-search case in which this Court held that Fourth Amendment analysis does not apply, the Respondent nonetheless argues that *Class* is irrelevant because the police here "did not physically enter defendant's car nor . . . expose an area that was invisible from the outside." Respondent's Brief at 22. But this focus on the factual particulars simply misses the significance of *Class*. What makes that decision important for this case is that in *Class* this Court rejected the notion that Fourth Amendment reasonable-

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[2](...continued)
Expanded View of Fourth Amendment Privacy Province, 36 Hastings L. J. 645, 698-704, 712-14 (1985) (suggesting "instrumental" view of privacy that rejects expectation of privacy as undercutting protection of liberty and focuses instead on need for privacy and noting that tracking devices are "informational intrusions" different from those achieved by human senses).

expectation-of-privacy analysis dictates the outcome of claims under Article I, section 12.[3]

III. THE COURT SHOULD HOLD THAT ELECTRONIC POLICE TRACKING OF PRIVATE VEHICLES REQUIRES A WARRANT.

Not only does *Class* establish that Article I, section 12 car-search claims are not necessarily controlled by federal reasonable-expectation-of-privacy analysis, it suggests a particular alternative approach to assessing such claims. Specifically, in its original opinion, the Court explained,

> A VIN inspection normally involves a lesser invasion of privacy than a full blown search because of the fixed, known, and readily accessible location of the VIN on the automobile. Additionally, there is a compelling police interest, in situations such as automobile thefts and accidents, in the positive identification of vehicles. Consequently, it may well be that some lesser justification than probable cause would be appropriate.

63 N.Y.2d at 495.

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[3]Respondent devotes considerable attention to examining whether, under either the interpretative or non-interpretative approach, the Court should recognize that Article I, section 12 affords greater protections in car-search cases than does the Fourth Amendment. *See* Respondents' Brief at 16-29. Given this Court's ruling in *Class*, however, that analysis is unnecessary. Moreover, the Respondent's entire approach is flawed, as it treats this case as concerning nothing more than police officers' observation of vehicles on public streets. This case, however, deals with the very different issue of continuous electronic tracking and recordings of the whereabouts and movements of a person for more than two months.

Thus, the Court indicated that in car-search cases, it is appropriate to consider the extent to which police activity invades privacy (something different than a reasonable expectation of privacy). And even when it came to something as innocuous as a VIN number, the Court held that the protections of Article I, section 12 were triggered.

Continuous police tracking of the whereabouts and movements of a person in his or her car represents, the NYCLU respectfully submits, a far greater intrusion into privacy than does a search for a VIN number. It is no answer to assert that electronic tracking is simply an enhanced version of direct observation of a vehicle on a public street. Rather, as both the Supreme Courts of Oregon and Washington recognized, electronic tracking is qualitatively different and opens the door to comprehensive police monitoring of our lives. As the Supreme Court of Washington observed,

> [T]he intrusion into private affairs made possible with a GPS device is quite extensive as the information obtained can disclose a great deal about an individual's life. For example, the device can provide a detailed record of travel to doctors' offices, banks, gambling casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the "wrong" side of town, the family planning clinic, the labor rally. In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails

and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life.

150 Wash.2d at 262.

Moreover, even in terms of the reasonable-expectation-of-privacy doctrine, that one may not have such an expectation in the sight of one's car on a public street has no bearing on whether people can and should reasonably expect that their public movements and whereabouts will not be subject to continuous, long-term police tracking and recording and the maintenance of such records in police dossiers. To the contrary, the NYCLU submits that New Yorkers have a strong and reasonable expectation to be free from such police monitoring.[4]

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[4]In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court properly moved away from limiting constitutional protections against unreasonable searches and seizures to circumstances where there is a "physical penetration" of private property. In abandoning the strict linkage between "trespass" and constitutionally-protected privacy, the Court famously stated that "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. The doctrinal development set forth in *Katz* was intended to expand the reach of constitutional protection beyond the narrow confines of the "trespass" doctrine. It was not intended to eliminate that line of protection that previously turned upon physical intrusions into tangible private property as set forth in *Olmstead v. United States*, 277 U.S. 438 (1928). The placement of the GPS device on Defendant's vehicle can be seen as an "old-fashioned" intrusion upon private property that should be protected by the federal and, perforce, the state Constitution even under the pre-*Katz* line of authority.

CONCLUSION

Given the unique threat that electronic police surveillance poses to the notion of privacy that is at the core of Article I, section 12, the NYCLU respectfully urges the Court to hold that electronic police tracking like that at issue in this case triggers the protections of the New York Constitution and requires a judicial warrant.

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION, by

CHRISTOPHER DUNN
ARTHUR EISENBERG
PALYN HUNG
125 Broad Street, 19th Floor
New York, N.Y. 10004
(212) 607-3300

Dated: February 5, 2009
New York, N.Y.

TO:
Stuart M. Cohen, Clerk
Court of Appeals,
State of New York
20 Eagle Street
Albany, NY 12207-1095

Trey Smith
Matthew C. Hug
Smith Hernandez LLC
Rensselaer Technology Park
105 Jordan Road

Troy, NY 12180-8376
Attorneys for Defendant-Appellant

Christopher D. Horn, of counsel
P. David Soares, District Attorney, Albany County
Albany County Judicial Center
6 Lodge Street
Albany, NY 12207
Attorneys for Plaintiff-Respondent