14-405

United States Court of Appeals
for the Second Circuit

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

Plaintiff-Appellant,

v.

DAVID YASSKY, COMMISSIONER MATTHEW DAUS,
MICHAEL BLOOMBERG, CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

DANIEL L. ACKMAN (DA-0103)
LAW OFFICE OF DANIEL L. ACKMAN
-and-
PARTICIPATING ATTORNEY FOR
THE RUTHERFORD INSTITUTE
Attorney for Plaintiff-Appellant
222 Broadway, 19th Floor
New York, New York 10038
Tel: (917) 282-8178

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028 - Email: appeals@dickbailey.com -Website: www.dickbailey.com

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PRELIMINARY STATEMENT

Over and again, the defendant-appellees' brief invokes an expectation-of-privacy test that the United States Supreme Court explicitly disavowed in *United States v. Jones*, 132 S. Ct. 945 (2012). Though *Jones* is a very recent Supreme Court decision that specifically addresses the state's right to install and use GPS devices to track its citizens, it is, by the defendants' argument, barely relevant. Thus they assert that appellant's reliance on *Jones* is "misplaced." Appellee Br. 24.

Appellees likewise ignore the many Court of Appeals cases decided since *Jones*, including this Court's decision in *United States v. Aguiar*, which concludes that "*Jones* settled the issue of whether the warrantless use of a GPS device to track a suspect's movements constitutes a search within the meaning of the Fourth Amendment." 737 F.3d 251, 258 (2d Cir. 2013). With barely a glance at these decisions, appellees continue to insist that the NYC Taxi and Limousine Commission's (TLC) use of GPS monitoring to gather evidence for prosecuting cabdrivers "does not constitute a search." Appellee Br. 1, 18, 19, 28.

The TLC's position that there was no invasion of privacy and, therefore, no search also ignores *People v. Weaver*, 12 N.Y.3d 433 (N.Y. 2009), and it ignores the undisputed facts in the record. Even though the district court converted the defendants' motion to dismiss into a motion for summary judgment, appellees insist that the TLC's repeated pre-enactment representations about its projected use

of GPS monitoring must be ignored. They call these inconvenient facts "superfluous" and "red herrings." Appellee Br. 14, 23. Thus they ignore and would have this Court ignore:

> --that the TLC promised it would not use its new technology to track drivers, but "for the complex analysis of taxicab activity …boroughs for policy purposes" (JA-115)
>
> --that it reneged on these assurances, including those made to federal courts (*see* Appeal Br. 10-15)
>
> --that it actually used GPS tracking explicitly to hunt for evidence, which it used to prosecute thousands of drivers in TLC court and in criminal court (JA-109, 135, 156, 167)
>
> --and that in virtually all of these prosecutions, including that of Mr. El-Nahal, the TLC produced no complaining witness and no other evidence apart from that derived from GPS tracking (JA-175).

It is no surprise that the TLC would have this Court ignore its representations, including those to federal courts. These are critical in this case, just as the TLC's representations to the federal courts in 2007 were critical to the 2007 district court judgments in *Alexandre v. New York City Taxi and Limousine Comm'n*, 2007 WL 2826952 (S.D.N.Y. Sept. 28, 2007), and *Buliga v. New York City Taxi and Limousine Comm'n*, 2007 WL 4547738 (S.D.N.Y. Dec. 21, 2007), on which, despite *Weaver* and *Jones*, appellants continue to rely. However, these cases were facial, pre-enactment challenges to the mandatory installation of GPS devices (and other technology). This case is about something different. It is about the TLC's use of the technology it installed in taxis to gather evidence against taxi

drivers. Even if the 2007 judgments were reasonable at the time, they rest on legal conclusions since overruled by the Supreme Court and the New York Court of Appeals.

Under current law, the use of a GPS tracking device to monitor Mr. El-Nahal was a warrantless search in violation of the Fourth Amendment. The judgment below, based on the legal conclusion that there was no search for Fourth Amendment purposes, must be reversed.

ARGUMENT

I. UNDER *JONES*, THE TARGET OF A SEARCH IS NOT REQUIRED TO ALLEGE AN INVASION OF PRIVACY IN ORDER TO STATE A FOURTH AMENDMENT CLAIM

The TLC's central argument in defense of the judgment below is oft repeated, but always incorrect. On nearly every page of their brief, appellees claim that a citizen must "challenge an invasion of a privacy right" or "establish an expectation of privacy in the data collected" in order to state a claim under the Fourth Amendment and 42 U.S.C. § 1983. That Mr. El-Nahal supposedly lacked such an expectation is critical to the appellees' argument that there was no search. Appellee Br. 19-20. It is likewise critical to their argument that the warrantless search was reasonable. Appellee Br. 30-31. Defendants are still litigating the 2007 cases, where this expectation-of-privacy argument was plausible. And why not?

With a different record and different law, they won; but the facts are different now and, after *Jones, Alexandre* and *Buliga* are not good law. Indeed they have not been the law in New York since *Weaver*.

In *Jones*, the Supreme Court disclaimed the need to show an expectation of privacy. It relied instead on a more traditional "property-based approach" to the Fourth Amendment. 132 S.Ct. at 950. It endorsed Justice Brennan's explanation in his concurrence in *United States v. Knotts,* 460 U.S. 276(1983), that *Katz v. United States*, 389 U.S. 347 (1967), "did not erode the principle that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *Jones*, 132 S.Ct. at 951 (internal quotation omitted). This intrusion need not be deemed a "trespass," but it does involve what *Jones* calls "[t]he Government physically occup[ying] private property for the purpose of obtaining information." 132 S.Ct. at 949. This fact is "important," the Court said, and concluded, "We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id*.

Thus, the Court stated, "[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." 132 S.Ct. at 953 (emphasis in original). Given this emphatic statement of the law, appellees'

repeated propping up of the expectation-of-privacy strawman evinces an obvious disregard for *Jones'* analysis as well as its holding that the installation and use of a GPS tracking device on a car constitutes a Fourth Amendment search. That this is the holding in *Jones* has been well understood, by this Court in *Aguiar*, 737 F.3d at 258-59, by the New York Court of Appeals in *People v. Lewis*, 23 N.Y.3d 179 (N.Y. 2014), and by at least five other circuits. *United States v. Oladosu*, 744 F.3d 36, 37 (1st Cir. 2014); *United States v. Fisher*, 745 F.3d 200, 202 (6th Cir. 2014); *United States v. Ransfer*, 743 F.3d 766, 773 (11th Cir. 2014). Indeed, since appellants filed their initial brief, the Seventh Circuit and Tenth Circuit have reached this conclusion. *United States v. Gutierrez*, __ F.3d __, 2014 WL 3728170 (7th Cir. July 29, 2014) ("In *Jones,* the Court held that the government violated the Fourth Amendment by attaching a GPS tracker onto a suspect's car without a valid warrant and without the suspect's consent"); *United States v. Davis*, 750 F.3d 1186, 1189 (10th Cir. 2014). *Davis* summarizes the current law: "*United States v. Jones* settled that the attachment of a GPS device to a car, and subsequent use of that device to monitor the car's movements, is a 'search,' and that installing such a device without a warrant potentially violates the Fourth Amendment." *Davis*, 750 F. 3d at 1189 (internal citation omitted).

If this point needed to be underscored further, the Supreme Court did so again this year in *Riley v. California*, 134 S.Ct. 2473 (2014), a case decided after

the appeal brief was filed. Holding that the police may not conduct a warrantless search of data contained in smartphones with GPS capability, *Riley* specifically referenced "[h]istoric location information" as worthy of constitutional protection. 134 S. Ct. 2473, 2490 (2014). Of course, even before *Jones* or *Riley*, the New York Court of Appeals had already reached this conclusion in *Weaver*. Given the state of the law, appellees' contention that there was no search is indefensible and the district court's judgment based on this same argument must be reversed.

Under *Jones*, a person need not prove an invasion of privacy in order to state a Fourth Amendment claim, and indeed was never really required at all. If it were, there *is* an invasion of privacy in this case in the form of the TLC's constant tracking of cabdrivers. A NYC cabdriver is an independent contractor who typically works a set shift, but does not punch a clock. He can go on and off duty as he pleases; he can quit work when and where he likes. When he does, the GPS tracks him to that location. Indeed, the TLC's Taxi Driver rules specify that when the taxi driver goes off-duty, "'Personal Use--Off Duty' must be keyed into T-PEP [taxi technology]" system. TLC Rule 54-15(m)(1). Thus if a cabdriver pauses during his work-day for lunch or dinner, to visit a friend or to attend a house of worship, the GPS device tracks him to where he stopped. If he stops at a medical clinic and then goes off-duty, by TLC rule, the T-PEP system records his location there, too. Such "[h]istoric location information" may reflect a wealth of detail

about "familial, political, professional, religious, and sexual associations." *Riley*, 134 S. Ct. 2490 (quoting J. Sotomayor's concurrence in *Jones*, 132 S.Ct. at 955). Unlike in *Jones*, where the tracking was limited to four weeks, or in *Weaver* where the device was in place for 65 days, or in *Lewis*, where it was installed for three weeks, a taxi driver drives with GPS tracker installed in his car every day for months and years on end.

This is not to say that a target of a search needs to be tracked to a confidential or even a private location in order to state or prove a federal constitutional claim. Mr. Weaver, for instance, was tracked to a K-Mart. It is the GPS tracking, regardless of where it leads, that constitutes a search.

II. *JONES* DID NOT SAY THAT A 'TRESPASS' WAS REQUIRED TO STATE A FOURTH AMENDMENT CLAIM

Appellees suggest and at one point state explicitly that Mr. El-Nahal must prove a trespass in order to demonstrate a Fourth Amendment violation. Appellee Br. 16, 20, 23-25. They profess that the *Jones* Court "found the attachment of the device to be a common-law trespass and therefore a search within the meaning of the Fourth Amendment." Appellants cite a recent, unpublished District of Columbia decision that, in ruling on a pre-enactment challenge to various taxi

regulations, which makes the same error. *Azam v. D.C. Taxicab Comm'n*, 2014 WL 2443866 (D.D.C. June 2, 2014).[1]

But appellants (and the D.C. District) simply misquote and mischaracterize *Jones*. The *Jones* Court actually said something closer to the opposite. It stated that the government's physical intrusion on an area, even if it may be a trespass, is "of no Fourth Amendment significance." 132 S.Ct. at 953. It added: "Thus, our theory is not that the Fourth Amendment is concerned with any technical trespass that led to the gathering of evidence. The Fourth Amendment protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates." 132 S.Ct. at 953, n.8.

Trading on their mischaracterization of the Supreme Court's decision, appellees announce that, "[s]o the question raised by *Jones* is whether the installation of T-PEP equipment in taxi vehicles constitutes a 'trespass,' and thus a search under the reasoning of that decision." *Id*. 25. Again, however, the Supreme Court said no such thing. While the Supreme Court's decision does employ a traditional property rights-based view of the Fourth Amendment, *Jones* also stated, "[t]he concurrence notes that post-*Katz* we have explained that an actual trespass is

[1] *Azam* cites *Jones* for the proposition that "A search within the meaning of the Fourth Amendment occurs when the government trespasses on private property," failing to note that *Jones* never said that. It goes on to follow *Alexandre* and *Buliga*'s expectation-of-privacy analysis, barely discussing the Supreme Court's decision in *Jones* at all. Resting on basic errors in comprehension, the decision and its single-paragraph reasoning is utterly unpersuasive.

neither necessary nor sufficient to establish a constitutional violation. That is undoubtedly true, and undoubtedly irrelevant. " 132 S.Ct. at 951, n.5 (internal citations and quotations omitted). The Court added: "Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information." *Id*. Thus, directly contrary to the appellees' position, *Jones* does not require the demonstration of a trespass.[2] If it did, the very same trespass that occurred in *Jones*—the placement of a GPS tracking device on a vehicle for the purpose of obtaining information—occurred in this case.[3]

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[2] Though their argument has no relevance to *Jones* or to *Weaver*, appellees strive mightily to contend, "T-PEP installation does not constitute a trespass because the device is installed pursuant to regulation, and thus with the full knowledge of both the owners and drivers of taxicabs, and cannot be considered a 'trespass' in the way that the placement of a device on a private vehicle constitutes a trespass." Of course, appellees offer no authority for this proposition. The mere fact that an action is pursuant to regulation does not mean that it might not also be a trespass. Indeed, sometimes the purpose of a regulation is to allow a physical intrusion while barring an lawsuit for a trespass. *See, e.g*., *Loretto v. Teleprompter Manhattan CATV Corp*., 53 N.Y.2d 124, 153-54 (N.Y. 1981) (cable company's placement of cable box on the roofs of rental property is a trespass, but not actionable due to regulation permitting the placement), *rev'd on other grounds*, 458 U.S. 419 (1982). While it is neither here nor there, the mandated installation of the T-PEP equipment in private taxicabs may be trespassory, but not actionable.

[3] At the time FBI agents placed the tracking device on the Jeep registered to Jones's wife, it was "parked in a public parking lot." It used the device to track Jones' movements "over [a] 4–week period." *Jones*, 132 S.Ct. at 948.

III. APPELLEES STILL FAIL TO PROVIDE ANY AUTHORITY FOR THEIR INSISTENCE THAT SURREPTITIOUSNESS IS AN ELEMENT OF A FOURTH AMENDMENT CLAIM

Just as they attempt to invent a trespass requirement, appellees repeatedly suggest that surreptitiousness is an aspect of a Fourth Amendment claim. Appellee Br. 2, 16, 24, 26, 38-39. They do so even though, as we have noted, nothing in *Jones* treats the surreptitiousness of the placement of a GPS device as a critical factor, or even a relevant fact. *See* Appellant's Br. 32-34. They press this point despite the plain fact that the Supreme Court has found searches to be unconstitutional in many instances—including *Mapp v. Ohio*[4], *Terry v. Ohio*[5], *Arizona v. Gant*[6], *City of Indianapolis v. Edmond*[7], and *Chandler v. Miller*[8]—where the search was conducted openly in full view of the target. *See* Appellant's Br. 44-46. Not only do appellees ignore the abundant counter-examples, they fail to cite a single case where the Supreme Court, the NY Court of Appeals or any other court held that a search was unlawful *because* it was clandestine or that a search was lawful because it was not. Thus, the alleged fact that the searches in this case were not surreptitious is of no moment.

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[4] 367 U.S. 643 (1961).

[5] 392 U.S. 1 (1968).

[6] 556 U.S. 332 (2009).

[7] 531 U.S. 32 (2000).

[8] 520 U.S. 305 (1997).

It is, as it happens, also not a fact. As noted in our opening brief, the TLC never informed cabdrivers or the public at large that it planned to use its GPS tracking devices—installed, it promised, for other purposes—to gather evidence and prosecute drivers. *See* Appellants' Br. at 5-8. The undisputed evidence shows that neither El-Nahal nor any other taxi driver knew that the TLC was using the GPS tracking devices that way. So, in this sense, the search here *was* surreptitious.

IV. THE CITY DOES NOT DEFEND THE ASSERTION THAT A YELLOW TAXICAB IS SOMEHOW NOT PRIVATE PROPERTY

Appellees do not pretend to defend directly the district court's suggestion that El-Nahal's taxicab is somehow not private property. This suggestion, employed as a way of "distinguishing" *Jones*, is, of course, contrary to the well-known facts, explicitly recognized by two recent decisions of this Court, that all yellow taxis are privately owned and operated and that taxi medallions are also privately owned and are bought and sold. *Nnebe v. Daus*, 644 F.3d 147, 162 (2d Cir. 2012) (taxi drivers are "private earners," not city employees); *Noel v. NYC Taxi and Limousine Commission*, 687 F.3d 63, 70 (2d Cir. 2012) ("obvious" that "the New York City taxicab industry is a private industry"). It is equally obvious that many private industries and much private property are regulated, even pervasively regulated, but remain private.

Though appellees do not defend the district court's contrary factual assertion, they persist in the insinuation that El-Nahal's cab is not "truly private" and cite the district court's decision in support. Appellee Br. 12, 24, 25, 26. While "truly private" is not a category or a term with any meaning in law, for appellees it appears to mean property that *is* private, but that is *also* regulated. The suggested distinction between this case and *Jones* or *Weaver* fails because there is no authority for the idea that regulated property or regulated industry is stripped of Fourth Amendment protections. Indeed, the Supreme Court and the NY Court of Appeals have repeatedly held to the contrary. *E.g.*, *New York v. Burger*, 482 U.S. 691, 699 (1987); *Anobile v. Pelligrino*, 303 F.3d 107, 117-18 (2d Cir. 2002); *People v. Scott*, 79 N.Y.2d 474, 497-99 (N.Y. 1992).

It also fails because all drivers and all cars are regulated. Every driver must pass a test, obtain a license, renew that license from time to time, and abide by myriad traffic laws every time they get behind the wheel. "Private" vehicles must still be licensed and must pass state inspections. If *Jones* and *Weaver* and the Fourth Amendment apply to cars, but not to taxicabs, then there is no real reason that the state could not seize GPS data from a GPS device (or the device itself) installed in any car. Under the appellees' argument, the state could demand historical location data from a Garmin or Tom Tom device installed in a vehicle or from a smartphone. The state could also demand the installation of GPS devices in

cars, and then claim the right to the information they hold or create. Indeed, as noted, the Supreme Court in *Riley* cited the prospect of the state commanding such information as one of its reasons for holding that the police may not search the data stored on cell phones without a warrant even if the phone is seized pursuant to an arrest. 134 S. Ct. at 2490. Appellees cite *Riley* elsewhere, but fail to engage, much less counter, the Supreme Court's reasoning on this point.

V. BECAUSE THE TLC USED GPS TRACKING TO GATHER EVIDENCE FOR PROSECUTION, THE SEARCH IS PRESUMPTIVELY UNREASONABLE AND THE 'SPECIAL NEEDS' EXCEPTION DOES NOT APPLY

The district court's judgment rests primarily on its conclusion that GPS tracking is not a "search" for Fourth Amendment purposes. The district court also concluded, in the alternative, that the search (if there was a search) is "reasonable" under the "special needs" exception to the warrant requirement. Appellees, like the district court, fail to acknowledge that when a search is used to gather evidence, a reasonable search requires a warrant. Moreover, they fail to apply the special needs test which, as the name implies, require that the reason for it be "special," that is not for purposes of law enforcement, and that it be based on substantial need, which the TLC cannot demonstrate. Appellees do cite the three-factor balancing test often employed in a 'special needs' analysis, but they ignore other prerequisites to establishing a right to claim this exception to the warrant requirement, specifically a non-law-enforcement primary purpose and a rule of law

that provides sufficient "certainty and regularity" as substitute for a warrant. The TLC's failure to comply with these prerequisites condemns their claim to this exception.

A. A Search Undertaken by Law Enforcement to Gather Evidence Fails the 'Special Needs' Test and Requires a Warrant

The Supreme Court has made it clear many times, most recently less than two months ago in *Riley*, that "[the Court's] cases have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant.'" 134 S.Ct. at 2482 (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)). *Riley* emphasizes that "[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id*. The N.Y. Court of Appeals has likewise written: "Over and again [the Supreme] Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, and 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." *Weaver*, 12 N.Y.3d at 444 (citations and internal quotations omitted). "All warrantless searches presumptively are unreasonable per se," and, therefore, "[w]here a warrant has not been obtained, it is

the People who have the burden of overcoming" this presumption of unreasonableness. *People v. Hodge*, 44 N.Y.2d 553, 557 (1978).

To be sure, the "special needs" doctrine is one of those exceptions. After reviewing the Supreme Court's cases on special needs, this Court wrote, "the 'special needs' category of constitutionally permissible warrantless, suspicionless searches is 'closely guarded.'" *Lynch v. City of New York*, 737 F.3d 150, 157 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2664 (U.S. 2014) (quoting *Chandler*, 520 U.S. at 309). For the exception to apply, the City must demonstrate compliance with prerequisites to its application, prerequisites that neither appellees nor the district court even consider, much less prove.

First, to "ascertain whether a search program serves special needs beyond normal criminal law enforcement, a court must conduct a 'close review of the scheme at issue' in light of 'all the available evidence' to determine its 'primary purpose.'" *Lynch*, 737 F.3d at 157. The district court did not conduct this review, much less demonstrate that the TLC's GPS tracking passed its test. Appellees omit this review as well, perhaps because they certainly fail it. By their own admission, the TLC officials, just after completing the process of prosecuting Wasim Cheema, went back through the data in search of evidence to use in prosecuting other drivers. JA-156; Appeal Br. 11. This was the primary purpose, and it is the quintessential example of one that fails the very first aspect of the special needs

test. Indeed, after reviewing the Supreme Court's cases, this court wrote, in *Ferguson v. City of Charleston,* the "warrantless [drug testing of pregnant women] did not fall within the special needs doctrine because its immediate objective was to gather evidence of unlawful drug use in order to use threats of arrest and prosecution as the means to force women who tested positive into treatment." *Lynch*, 737 F.3d at 158 (citing *Ferguson*, 532 U.S. 67, 82-83 (2001).

In this case, the TLC's primary objective in the wake of the Cheema matter was to gather evidence, and there was no secondary objective. Tellingly, neither appellees nor the district court deny that evidence-gathering became the City's focus, which is, in any event, evident from the statements of city officials and how, in fact, the data was actually used. That the post-Cheema review of GPS data was *not* motivated by "concerns *other than* crime detection or ordinary evidence gathering" is dispositive. That the purpose was to gather evidence means that the special needs exception does not apply. *See Cassidy v. Chertoff,* 471 F.3d 67, 75 (2d Cir. 2006).

B. The TLC's Search Program Allows No Certainty and Regularity As To Provide a Constitutionally Adequate Substitute for a Warrant

Appellees' claim also fails under the three-factor balancing test, a test that appellees advance, but which only comes into play *after* a proper non-law-enforcement purpose for the search—the special need— has been established.

*United States v. Amerson,*483 F.3d. 73, 83 (2d Cir. 2007) ("the fact that the government has a 'special need' does not mean the search and seizure is 'automatically, or even presumptively' constitutional"). This three-factor balancing test, taken from *Cassidy* and other cases, requires weighing (1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs. But in addition, the "inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Anobile*, 303 F.3d at 118. In other words, as the Supreme Court put it in *New York v. Burger*, "the regulatory statute *must perform the two basic functions of a warrant*: it must advise [the target of the search] that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." 482 U.S. 691, 703 (1987) (emphasis added, internal quotation and punctuation omitted). This is a critical requirement that appellees (like the district court) do not even consider. Still, the TLC's failure to provide certainty and regularity is another fatal flaw in its claim to the special needs exception.

In contrast to cases like *Burger* itself, the TLC was not acting pursuant to a statute of regulation that advised taxi drivers that the TLC intended to use its GPS devices to track individual driver and gather evidence. Indeed, the TLC advised

drivers that it would not do that. This same advice might have limited the discretion of TLC officials, but because the TLC acted contrary to its own "advice," these statements provided no *de facto* limit on the TLC's exercise of power. Thus, the regulation on the books provided no "constitutionally adequate substitute for a warrant." As the Fifth Circuit explained in *United States v. Villarreal*, "[t]he [City] has pointed to no regulatory scheme at all here, much less one that requires warrantless searches to function effectively. We cannot *sua sponte* transform a search for contraband into a safety inspection." 963 F.2d 770, 775 (5th Cir. 1992).

The same is true here: The TLC announced a program requiring the installation of GPS tracking devices, defended the program as a way to conduct the "complex analysis of taxicab activity in the five boroughs for policy purposes" and as an aid in the recovery of lost property. It said it would not use it to track or prosecute individual drivers, but it did. These are the undisputed facts. Appellees may call them "superfluous," but they further preclude resort to the special needs exception to the warrant requirement.

As to the three-factor test, not surprisingly, appellants declare that their interests are "substantial" and taxi drivers interests are "diminished." This is because appellees put no value on the interests of taxi drivers. In fact, the intrusion here – the fact that drivers are tracked for 12 hours a day for months on end—is far

more substantial than that involved in *Amerson* (taking of swab of saliva from a convicted felon's cheek) or *Cassidy* (the momentary search of a bag or vehicle on a ferry). While the TLC's professed purposes when the T-PEP system was announced (statistical analysis and so-on) are not particularly intrusive, what the City actually did in this case is far more so.

Moreover, the TLC's need in this case is plainly not the fulfillment of its overall mission of regulating taxis. It is much smaller than that. Its interest here is simply finding, prosecuting and punishing taxi drivers for a crime or violation that went totally unnoticed by the public at large and by which El-Nahal, like most drivers, even if guilty, gained a meager sum. JA-192-194.

Nor was the TLC's dragnet search in any way necessary to put and end to Rate 4 abuse going forward. Though appellees (like the district court) fail to acknowledge this fact, it is evident for the undisputed facts in the record that the TLC could have caused harm without prosecuting a single driver. It could have done what it in fact did: It could have, as Chairman Yassky testified, "secured a fix" by causing the T-PEP system to deliver an audible warning when the Rate 4 button was engaged. It could have installed geo-fencing that would disable the Rate 4 button within the five boroughs. JA-148, 151. In other words the "immediacy of the government's needs, and the efficacy of its policy in addressing

those needs" could have been served without any search for evidence raising Fourth Amendment concerns.

In short, no one should be fooled by the TLC's mantra-like invocation of its responsibilities—"safety, design and comfort" and so on. Appellee Br. 3. The action at issue here—using GPS to track and prosecute drivers—has nothing to do with safety or comfort. The issue is plainly not whether the TLC may mandate the installation of taxi technology for some valid purpose. It is whether the TLC may spy on drivers and use the fruits of that spying as evidence—the sole evidence—in their prosecutions. The purposes are purely law enforcement and punishment pure and simple. Thus it fails the special needs test in every way.

CONCLUSION

Under *Jones*, as well as under *Weaver*, the question of whether there is a search is not dependent on there being an expectation of privacy (though no driver could have expected the TLC to act as it did given what is promised). It is not based on whether there was trespass or whether the TLC's action was surreptitious (though it was). The question is whether the TLC required the installation of a GPS device in Mr. El-Nahal's taxicab and then used that device to monitor his movements. That is what the TLC did and, under *Jones*, it constitutes a search. This search requires either a warrant, which the TLC never sought or obtained, or some exception to the warrant requirement. The one exception that appellees

claim, the 'special needs' exception, is not available to them because, among other things, the TLC's purpose was not special, but ordinary law enforcement, and there was no need that made this search necessary. Thus based on the undisputed facts, plaintiff-appellant has established a violation of the Fourth Amendment and the New York Constitution. The judgment below, therefore, must be reversed with an order requiring the granting of summary judgment for Mr. El-Nahal.

Dated: New York, New York

August 13, 2014

__/s/_____

Daniel L. Ackman (DA-0103)
Law Office of Daniel L. Ackman
-and-
Participating Attorney for
THE RUTHERFORD INSTITUTE
222 Broadway, 19th Floor
New York, NY 10038
Tel: 917-282-8178
Fax: 917-591-8300
E-mail: d.ackman@comcast.net

Attorney for Plaintiff-Appellant

CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 5,111 words of text.

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Dated: August 13, 2014

Daniel L. Ackman

db