ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. EMILIO JEAN, Appellant.	))))))))))	No. CR-16-0283-PR Court of Appeals No. 1 CA-CR 14-0444 Coconino County Superior Court No. CR-2012-00246

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTRODUCTION

In *United States v. Jones*, 565 U.S. 400 (2012), the Supreme Court unanimously held that affixing a global positioning system (GPS) tracker to a car constituted a search for Fourth Amendment purposes. The Court was evenly divided as to its rationale, however. Writing for the Court, Justice Scalia held that placing a tracker on the car constituted a trespass. Representing four justices, Justice Alito reasoned any trespass was *de minimis* but that Jones had a reasonable expectation of privacy under *Katz v. United States*, 389 U.S. 347 (1967). Justice Sotomayor agreed with both positions but ultimately decided the trespass theory had primacy, and thus she joined what ultimately became the opinion of the Court.

In *State v. Jean*, 239 Ariz. 495, 372 P.3d 1019 (App. 2016), the court of appeals misapplied the law of both doctrines. It relied upon *State v. Estrella*, 230 Ariz. 401, 286 P.3d 150 (App. 2012), which had similarly misapplied whether motorists have a reasonable expectation of privacy to be free from GPS tracking. The court of appeals has also now inconsistently applied the law of bailments across different lines of cases. Arizona Attorneys for Criminal Justice (AACJ) asks this Court to bring harmony to these cases and hold that courts should use a totality-of-the-circumstances approach both in determining whether a defendant has sufficient possessory interest in property and whether the defendant has an expectation of privacy that society is prepared to accept as reasonable.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of Appellant because the issue presented in this case implicates the rights of all persons to be free from intrusive government searches. 21st-century technology enables government surveillance of every aspect of a person's life. It is only through the vigilance of the courts that Americans can enforce the right to privacy and sanctity in their private affairs against what has increasingly become a surveillance state. The circumstances of this case call for this Court to invoke not only the Fourth Amendment but also the additional protections of article II, section 8 of the Arizona Constitution.

ARGUMENTS

I. The court of appeals erroneously determined that a vehicle occupant's possessory interest must be at least that of a bailee. In any event, Jean had the interest of a bailee.

The court of appeals distinguished the facts of Jean's case from previous cases involving "bailee" status. In *Jones*, for four weeks the government tracked Jones's movements in a car that his wife owned but that only he drove. 565 U.S. at 403. In *State v. Mitchell*, 234 Ariz. 410, 412 ¶¶ 3-6, 323 P.3d 69, 71 (App. 2014), deputies suspecting Mitchell of using a borrowed car affixed a tracker to that car and acted on an alert from the tracker 25 days later when Mitchell drove it to an area of interest.

In *Jones* the government did not challenge standing, such that the Court relegated the issue to a brief footnote in which the Court recognized Jones's standing because he had "at least the property rights of a bailee." 565 U.S. at 404 n.2. Similarly, although the State made no such concession in *Mitchell*, strong evidence of the defendant's possessory interest as a bailee permitted routine resolution of the standing question. *Jones* left open the question of what property interest in the trespassed property a defendant would have to show in order to have standing. *Jones* suggested that bailee status is more than enough property interest in order to get relief from a trespassory search; it did not decide the *minimum* property interest *necessary* to get such relief. In *Jean*, however, the court mistook *Jones* as announcing "at least that of a bailee" as a minimum possessory interest a person may

have to confer standing. 239 Ariz. at 500 ¶ 17, 372 P.3d at 1024.

Since *Jones*, "the common denominator under *Jones'* progeny is that lawful possession at the time of the trespass is sufficient to confer standing." *Mitchell*, 234 Ariz. at 415 ¶ 17, 323 P.3d at 74; *see also, e.g.*, *People v. LeFlore*, 996 N.E.2d 678, 687 (Ill. App. 2013), *overruled in part on other grounds*, 32 N.E.3d 1043 (Ill. 2015) (finding that defendant's "lawful possession" sufficed for Fourth Amendment standing). Some courts look to the totality of the circumstances regarding the defendant's relationship with the property to determine whether the defendant had a sufficient possessory interest. *E.g.*, *United States v. Batista*, 2013 WL 782710, at *5 (W.D. Va. Feb. 28, 2013) (finding that non-owner who drove his brother's car had standing after "considering th[e] evidence in its totality," including how many times the non-owner drove the car, how long the trips were, whether the vehicle was parked at the owner's house or the non-owner's, and how often the owner drove the car). Other than the court of appeals' decision in this case, no post-*Jones* cases appear to establish bailee status as a *sine qua non* of Fourth Amendment standing.

This Court has not determined what property interest a person must have in order to qualify for protection from trespassory searches under *Jones*. The facts here show that Jean was in fact a bailee and therefore this Court should rule that he has standing even under the test articulated by the court below. Even if he was not a

bailee, this Court should find that his lawful possessory interest in the truck was sufficient to confer standing.

A. When Jean drove the truck while the owner was sleeping in the sleeping compartment, or at any times while the owner was temporarily not in the truck, a bailment was created, constituting a sufficient property right for Jean to have standing to assert Fourth Amendment protection from trespassory searches under *United States v. Jones*.

"To constitute a bailment there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment. It must be placed in the bailee's possession, actual or constructive." *Webb v. Aero Int'l, Inc.*, 130 Ariz. 51, 52, 633 P.2d 1044, 1045 (App. 1981). Arizona has a "broad definition of 'possess.'" *State v. Ottar*, 232 Ariz. 97, 100 ¶ 9, 302 P.3d 622, 625 (2013) (quoting *State v. Cheramie*, 218 Ariz. 447, 449 ¶ 11, 189 P.3d 374, 376 (2008)) (internal quotation marks omitted). "Constructive possession" merely requires "control or dominion" over property. *See Ottar*, 232 Ariz. at 99 ¶ 5, 302 P.3d at 624 (stating that constructive possession is "dominion or control over property" other than actual, physical possession); *see also* Black's Law Dictionary (10th ed. 2014) (defining "constructive possession" as "control or dominion over a property without actual possession or custody of it.").

Whether a defendant is a bailee with respect to a vehicle therefore turns on whether the defendant was delivered control of the vehicle and accepted it. *See Baugh v. Rogers*, 24 Cal. 2d 200, 214, 148 P.2d 633, 641 (1944) ("When the owner

of an automobile gives possession of it, with permission to operate it, to another person, a contract of bailment is created."); *cf. Allright Phoenix Parking, Inc. v. Shabala*, 6 Ariz. App. 21, 24, 429 P.2d 513, 516 (1967) (holding that paid parking lot was not bailee where parking customers retained their keys). "Control," in turn, merely means "to have power over." *Ottar*, 232 Ariz. at 100 ¶ 9, 302 P.3d at 625 (internal quotation marks omitted). Combining the definitions, a bailor need only deliver power over his property to a bailee to create a bailment.

This Court has held that a defendant who accepts the keys to a vehicle in which he knows there to be contraband constructively possesses the contraband *upon acceptance of those keys*, even before operating the vehicle. *Ottar*, 232 Ariz. at 100-01 ¶ 11, 302 P.3d at 625-26 (citing *United States v. Adams*, 625 F.3d 371, 385–86 (7th Cir. 2010)). In *Ottar*, this Court agreed with *Adams* that a defendant "constructively possess[ed] [marijuana in a van] once he accepted the keys to the van, and actually possess[ed] it once he entered the van and attempted to start it," even if the deliverer of the keys was still present. *Id.* at 100 ¶ 11, 302 P.3d at 625 (internal quotations omitted); *Adams*, 625 F.3d at 376, 384-85 (defendant possessed drugs in van once he "signal[ed] his desire and intention to accept control," which happened "the moment [the defendant] took the van's keys into his hands," "notwithstanding the presence of undercover law enforcement personnel," one of whom delivered the defendant the keys). To the extent the State relies on cases that

are readily distinguishable on their facts,[1] this Court should adhere to its own rule.

Courts in other jurisdictions have similarly ruled that constructive possession of a vehicle and/or its contents occurs upon receipt of the keys. *See United States v. Posner*, 868 F.2d 720, 724 (5th Cir. 1989) (defendant had constructive possession of vehicle and its contents because he had "dominion and control over the vehicle" by virtue of possessing keys); *United States v. Damsky*, 740 F.2d 134, 139 (2d Cir. 1984) ("Damsky had dominion and control over the camper once he was given the key and was therefore in constructive possession of the hashish in the camper."); *United States v. Martorano*, 709 F.2d 863, 871 (3d Cir. 1983) (suggesting that possession of keys to vehicle, coupled with present ability to drive it, constitute constructive possession of that vehicle). Acceptance of keys is routinely considered constructive possession despite the presence of others with apparent possessory interests, even if the person who delivered the keys continues to be present. *See, e.g.*,

[1] The following cases are cited in the State's Supplemental Brief at 8: *United States v. Almeida*, 748 F.3d 41, 45, 48 (1st Cir. 2014) (pick-up truck driver lacked standing as the owner or owner's bailee was present, there was no pattern of repeated use or control, and driver's possession thus appeared "informal and temporary"); *United States v. Torres*, 32 F.3d 225, 229-30 (7th Cir. 1994) (SUV driver, pulling a trailer, lacked standing in trailer as owner was present and driver in suppression hearing denied any connection and maintained his innocence); *United States v. Jefferson*, 925 F.2d 1242, 1249 (10th Cir. 1991) (driver lacked standing as owner was present and no evidence related driver's prior use); *United States v. Figueroa-Cruz*, 914 F. Supp. 2d 1250, 1263-64 (N.D. Ala. 2012) (person who drove car twice in the past lacked standing when he was not present when GPS affixed, others drove car, and car was a "'Company Car' of a large scale drug distribution enterprise").

Damsky, 740 F.2d at 137, 139 (defendant who possessed keys to camper had constructive possession despite presence of others who also had keys to it); *United States v. Jones*, 676 F.2d 327, 332 (8th Cir. 1982) (defendant obtained constructive possession of vehicle when undercover agents gave him keys, even though agents who delivered keys remained present to arrest him).[2]

The court below cited *Blair v. Saguaro Lake Dev. Co.*, 17 Ariz. App. 72, 74, 495 P.2d 512 (1972), for the proposition that Jean was not a bailee because he did not have possession exclusive of the owner. *Jean*, 239 Ariz. at 500 ¶ 17, 372 P.3d at 1024. But other Arizona law indicates that possession exclusive of the owner *in all respects* is not a prerequisite to the existence of a bailment—the owner's ability to immediately reassert possessory right on demand does not defeat a bailment. *See Webb*, 130 Ariz. at 53, 633 P.2d at 1046. In *Webb*, the court of appeals indicated that when an airplane storage lot (Aero) used keys given to it by Webb to move Webb's plane, a bailment was created, even though Aero did not have possession of the plane exclusive of Webb. *Id*. Webb retained several sets of keys himself, and he or anyone

[2] Other rulings have held that a driver's joint occupancy of a car is consistent with the driver's control, and thus constructive possession, of the car. *See, e.g.*, *State v. Owens*, 554 So. 2d 294, 296 (La. Ct. App. 1989) (use of automobile in which illegal drugs are found is "sufficient to establish that the defendant had control and dominion of the automobile," even though there were three other passengers); *People v. Turnbeaugh*, 451 N.E.2d 1016, 1020 (Ill. App. 1983) ("(T)he driver of a car is not without immediate and exclusive control of the inside of the car merely because he had one passenger."); *People v. Milam*, 587 N.E.2d 30, 33 (Ill. App. 1992) (exclusive possession needed for constructive possession may be joint).

acting with his permission could come on the lot and use the plane without informing Aero, but "(e)ach time Aero moved the plane a possible bailment was created." *Id.* *Webb* establishes that bailments may still exist even when the bailee's possessory right must be relinquished upon the owner's demand.

This case is just like *Webb*. Jean's possessory interest may arguably not have been exclusive of the owner in the sense that the owner could reassert all possessory rights on demand. But Jean exercised control over the owner's truck to the exclusion of the owner when he drove it, including at times when the owner was not actually or constructively present because he was asleep in the sleeping compartment. When Jean operated the truck during these times, a temporary bailment was created.[3]

The GPS device was constantly attached to the truck during these temporary

[3] In another sense, however, giving another person the keys under circumstances where the person has access to drive the car necessarily gives that other person exclusive control of the car at least temporarily—even with respect to the owner—and thus a possessory interest exclusive of the owner. Obviously, once another person is driving the car, the passenger-owner cannot *immediately* re-assert his right to exclusive control (e.g. by wrenching the wheel away from the driver), because, while the owner is within his right to eject the driver and reassert exclusive control, that right to exclude the driver in control is limited to "reasonable and prudent" steps to reassert exclusive control. *See S. Pac. Co. v. Boyce*, 26 Ariz. 162, 172, 223 P. 116, 119 (1924) (right to eject trespasser from railroad car "must be exercised in a reasonable and prudent manner, and with due care for the safety of the offender").

Holding that the passenger-owner has exclusive control over the vehicle could lead to absurd results. For example, a drunken car owner who turns his keys over to a designated driver could be charged with DUI for being in actual physical control. *But see State v. Zaragoza*, 221 Ariz. 49, 54 ¶ 21, 209 P.3d 629, 634 (2009) (listing factors for jury to consider when deciding actual physical control).

bailments, constituting a continuing trespass against Jean's possessory interest as a bailee. *See Mitchell*, 234 Ariz. at 416 ¶ 23, 323 P.3d at 75 ("The State's continued, and conceivably neverending, use of [a] GPS device to monitor [a] vehicle constitute[s] a continuing trespass."). The trespass involved collecting information and thus constituted a trespassory search against Jean that violated his Fourth Amendment rights. *See Jones*, 565 U.S. at 407.

The meaning of "possession" should remain consistent. If a set of facts shows that a person has sufficient control of property to establish criminal possession of contraband, those same facts should also suffice to show possession for purposes of establishing a bailment. However, inconsistent appellate decisions apply a loose standard of possession for criminal possession purposes and a stricter standard for asserting Fourth Amendment standing. For example, the court of appeals' opinion in *State v. Orendain*, on which the court below relied, is inconsistent with *Ottar*; in *Ottar*, the defendant was ruled to have constructive possession from the moment he accepted the keys from undercover officers despite "the presence of [those] law enforcement officers," but in *Orendain*, the driver-defendant was ruled to have no property or possessory interest because the owner was a passenger and by virtue of his presence "was constantly in a position to assert his possessory interest to the extent that he desired to do so." *State v. Orendain*, 185 Ariz. 348, 351, 916 P.2d 1064, 1067 (App. 1996), *vacated in part on other grounds*, 188 Ariz. 54, 932 P.2d

1325 (1997); *Ottar*, 232 Ariz. at 101 ¶ 11, 302 P.3d at 626.

There is no dispute here that Jean accepted the truck keys from the owner and was a co-driver of the truck.[4] He therefore took constructive possession of the truck and its contents from that moment, as *Ottar* makes clear. The continued presence of the truck's owner would have in no way relieved Jean of criminal liability for possession had police swooped in and arrested him the second he accepted the keys from Velez-Colon, even if Jean had yet to operate the vehicle. At worst, it reduces Jean to the status of "limited bailee," which is still a bailee. *Cf. Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc.*, 756 F.3d 825, 831 (5th Cir. 2014) ("A bailment becomes limited '[w]here the delivery of the thing is not complete, as when the owner remains with the thing…'") (quoting *Stegemann v. Miami Beach Boat Slips, Inc.*, 213 F.2d 561, 565 (5th Cir. 1954)). The court of appeals' opinion in this case

[4] In his opening brief, Jean points out that he was actually the driver at the time the truck was pulled over. OB at 20 (citing 9/20/14 RT 77). The State points out that the suppression hearing reflects only that Velez-Colon was the driver. AB at 27 (citing 7/23/13 RT 138, 141). The State correctly cites the standard of review that appellate courts "consider only the evidence presented at the suppression hearing…" AB at 25-26 (quoting *Mitchell*, 234 Ariz. at 413 ¶ 11, 323 P.3d at 72). *See also State v. Dean*, 241 Ariz. 387, ¶ 23, 388 P.3d 24, 30 (App. 2017) ("any factual material not presented at the suppression hearing would not have been developed by its proponent, subjected to cross-examination, or considered by the trial court as a basis for its ruling.").

That being said, the State admits in its supplemental brief that Jean was a co-driver of the truck: "even when he was driving, he lacked exclusive possession…" *State's Supplemental Brief* at 1. Because Jean's status as a co-driver was never legitimately in dispute, this Court should base its ruling on the uncontested fact.

suggests that alternate and inconsistent definitions of possession exist depending on whether the defendant is asserting bailee status for Fourth Amendment standing purposes or the State is asserting his possession for purposes of his criminal liability. This Court should reject such an arbitrary distinction.

B. Even if Jean was not a bailee, he had a sufficient property right to confer standing to assert Fourth Amendment protection from trespassory searches under *Jones*.

Nothing in *Jones* requires a defendant to be "at least a bailee" to have Fourth Amendment protection from trespassory searches. Moreover, the Supreme Court has explicitly stated—in a case concerning an alleged illegal search of a vehicle—that "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control" when "defining the scope" of the "legally sufficient interest" necessary for Fourth Amendment standing. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). *Rakas* holds that determination of who may challenge a search on Fourth Amendment grounds "belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing." 439 U.S. at 140. Therefore, the arcane distinction in property law between bailees and non-bailees ought not to be the proper distinction between who is and is not protected by the Fourth Amendment. Rather, the proper question is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth

Amendment was designed to protect." *Id*.

Here, Jean clearly had some possessory interest by virtue of accepting the keys and driving, distinguishing him from the "mere passenger" in *Rakas*. *Id.* at 131. And looking at the totality of the circumstances, other factors strengthen that possessory interest. Jean's possessory interest spanned days and was not fleeting as a "casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search." *Id.* at 142. Nor was it the "casual possession" of a driver who drives a car once, briefly, with the owner present in the passenger seat, as in *Almeida*, 748 F.3d at 47-48. Jean slept in the truck, making his interest more like an overnight guest. *See Minnesota v. Olson*, 495 U.S. 91, 98 (1990). In fact, in some respects, the exclusivity of Jean's possessory interest seems greater than the overnight guest in *Olson*, considering that Jean had a key to the premises and exerted dominion and control over it by driving while the owner was asleep, while Olson did not have a key and was never alone. *Id*. at 98.

That Jean's possessory interest did not occur in the owner's complete physical absence as in *Jones* and *Mitchell* does not resolve the question against Jean. Upon consideration of the totality of the circumstances, the evidence in this case shows that Jean had bailee status, or at least limited bailee status. But even if he had not had bailee status, his possession of the truck was sufficient to confer standing to challenge the placement of the GPS tracker.

II. Drivers and passengers have a reasonable expectation of privacy that precludes law enforcement from tracking their cross-country movement over several days.

While government infringement of property rights in order to obtain information clearly constitutes a search post-*Jones*, it does not follow that the only way that the installation and operation of the GPS could have violated Jean's Fourth Amendment right is by violating his property rights in the truck. It remains the case that "property rights are not the sole measure of Fourth Amendment violations." *Jones*, 565 U.S. at 407; *see also id.* at 414 (Sotomayor, J., concurring) ("The trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs."). *Katz*'s test for reasonable expectation of privacy still applies independent of any property right. *See Jones*, 565 U.S. at 407–08 (citing *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)). *Jones* noted that *Katz* may still be applied to find that an observation "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy." *Jones*, 565 U.S. at 412.

In *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001), the Court distinguished thermal imaging of a home from "naked-eye surveillance" and applied *Katz* to find a reasonable expectation of privacy where no trespass occurred. Although the Court focused on the sanctity of the home, it noted that visual surveillance is permissible.

Id. at 31-32. *Kyllo* stands firmly for the proposition that the method of surveillance is a factor for determining reasonableness of an expectation of privacy. *Id*. at 33.

The court of appeals made short shrift of Jean's claim to reasonable expectation of privacy to be free from GPS tracking over several days:

> Finally, regarding Jean's claim that use of the GPS violated his reasonable expectation of privacy, Jean had no reasonable expectation of privacy in his movements as a passenger or driver of the truck. It is well settled that a person travelling in a vehicle on public roads has no reasonable expectation of privacy in the person's movements from one place to another. *United States v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). This court has held from this principle that there is no reasonable expectation of privacy that is infringed by GPS monitoring of a device placed on a vehicle, and that "[t]his is true particularly where the government's monitoring is short-term." *State v. Estrella*, 230 Ariz. 401, 404, 286 P.3d 150, 153 (App. 2012). Given that authorities monitored the truck in which Jean was riding for only two days, we conclude he established no Fourth Amendment violation.

239 Ariz. 495, ¶ 20, 372 P.3d at 1024. This paragraph includes numerous legal errors. The first error is the implicit assertion that Jean could establish no reasonable expectation of privacy unless he first established a property interest in the truck. As stated above, these are two independent bases for Fourth Amendment protection; neither is a prerequisite for the other.

Second, the court insinuated that the duration of government monitoring was "short-term." Presumably this was to create a contrast with Justice Alito's use of the term "long-term," *see Jones*, 565 U.S. at 419 (Alito, J., concurring). Although it looked to *Estrella* for support, the facts of *Estrella* are markedly different; Estrella

was tracked only from Sierra Vista to Tucson. *Estrella*, 230 Ariz. at 402 ¶ 3, 286 P.3d at 151. Jean and his co-driver, on the other hand, were tracked from Phoenix to California and then back to Arizona on I-40, over the course of two days, and state police were contacted to stop the truck as it passed through northern Arizona. *Jean*, 239 Ariz. at 497 ¶ 2, 372 P.3d at 1021.

Third, *Estrella* refused to consider that five justices in *Jones* squarely recognized a reasonable expectation of privacy was violated by tracking movements for such an extended period of time. Instead, the *Estrella* majority adhered to the beeper cases, citing *State v. Ring (Ring III)*, 204 Ariz. 534, 561 ¶ 61, 65 P.3d 915, 938 (2003), for the parenthetical proposition that "lower court must leave [the] Supreme Court to overrule its own decisions." 230 Ariz. at 405 ¶ 13, 286 P.3d at 154. However, what this court actually said in *Ring III* was, "We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules ***or casts cognizable doubt on that decision***." *Ring III*, 204 Ariz. at 561 ¶ 61, 65 P.3d at 938 (emphasis added). In *Agostini v. Felton*, upon which *Ring III* relied, the Supreme Court held: "We reaffirm that if a precedent of this Court has ***direct application*** in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which ***directly controls***, leaving to this Court the prerogative of overruling its own decisions." 521 U.S. 203, 237 (1997) (internal quotations omitted, emphasis added). *Knotts* and *United States*

v. Karo, 468 U.S. 705 (1984), are beeper cases. This case, like *Jones* and *Mitchell*, involve much different technology. Thus, *Estrella* erred in relying on *Knotts*.

As Judge Eckerstrom explained, "five justices of the Court have implicitly declined to adopt that part of *Knotts*'s reasoning." *Estrella*, 230 Ariz. at 408-09 ¶¶ 29-31, 286 P.3d at 157-58 (Eckerstrom, J., dissenting) (citing *Jones*, 565 U.S. at 418 (Alito, J., concurring in the judgment), 413 (Sotomayor, J., concurring)). Judge Eckerstrom ultimately rejected that part of the Alito concurrence that would hold "that the appropriate application of these principles must turn on the duration or distance of the movements monitored." *Id*. ¶ 33. AACJ agrees with the arguments set forth by Jean in calling for this Court to adopt Judge Eckerstrom's analysis.

Another error in *Jean*'s reasonable-expectation-of-privacy analysis is the distinction that in *Jones* and *Mitchell* "the defendants were the targets of the respective investigations" whereas "DPS officers here had no idea Jean was in the truck until they stopped it." *Jean*, 239 Ariz. at 500 n.5, 372 P.3d at 1024 n.5. The court erred by using this analysis in the bailment section. Whether Jean was the target of the investigation is entirely irrelevant; in fact, the Supreme Court has repeatedly instructed that the subjective motivations of police have no place in the analysis. *See, e.g.*, *Brendlin v. California*, 551 U.S. 249, 260 (2007) (citing *Rakas*, 439 U.S. at 132-35, as "rejecting the 'target theory' of Fourth Amendment standing, which would have allowed 'any criminal defendant at whom a search was directed' to challenge

the legality of the search" (internal quotation marks omitted)). Whether Jean asserted an expectation that society is prepared to accept as reasonable is unrelated to the officers' knowledge of Jean's presence, much less any interest he has in the truck.

Finally, the facts of this case go beyond the average vehicle case. Here, Jean and Velez-Colon were driving a semi truck across the country and back, each taking a turn driving while the other slept. Although the duration of the trip is unknown, the truck had Florida plates and was registered to a business in Kissimmee, Florida. *See* Suppression Hearing Transcript at 55-56. The truck was tracked by GPS from Phoenix to California to Flagstaff over the course of two days. *Id*. at 64-66. It is well-known that truck drivers regularly sleep in their trucks; that is the reason why the truck is built with a sleeping berth. In this way, a truck, not unlike a recreational vehicle, is both a vehicle and a home.

To the extent that the truck is like a home, Jean can claim a reasonable expectation of privacy as an overnight guest. In *State v. Peoples*, 240 Ariz. 245, 250 ¶ 19, 378 P.3d 421, 426 (2016), this Court determined that "[t]here is no uniform time when overnight guest status ends. To make this determination, a court must examine the totality of the circumstances, as it does when deciding whether a defendant was ever an overnight guest in the host's home." This Court determined that various actions taken by Peoples, which the court of appeals found to be indicative of a termination of overnight guest status, were instead more indicative of

a person behaving reasonably under the circumstances, particularly because the host's apartment was so small. *Id*. at 250-51 ¶¶ 21-22, 378 P.3d at 426-27. Because the overnight guest rule is a corollary of the right to privacy in one's own home, this Court found that article II, section 8 of the Arizona Constitution provides additional protections in such a circumstance. *Id*. at 248 ¶ 8, 378 P.3d at 424. Similarly, as Jean lived in and slept in Velez-Colon's truck, he is entitled to no less protection as an overnight guest.

This Court has not addressed whether vehicles that also act as homes should be afforded these additional protections. In fact, vehicles typically receive less protection; two "well-delineated exceptions" to the warrant requirement, *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971), are the automobile exception, *see Carroll v. United States*, 267 U.S. 132 (1925), and the inventory exception, *see Colorado v. Bertine*, 479 U.S. 367 (1987). In *California v. Carney*, 471 U.S. 386 (1985), the Supreme Court held that a motor home is entitled to no greater protection than any other vehicle. This holding, however, drew a stinging dissent that noted the improvidence of hearing the first case addressing the issue. *Id*. at 396-99 (Stevens, J., dissenting) ("By promoting the Supreme Court of the United States as the High Magistrate for every warrantless search and seizure, this practice has burdened the argument docket with cases presenting fact-bound errors of minimal significance.").

No Arizona court has yet applied *Carney* to a case involving a vehicle with

living quarters; in fact, according to Westlaw, *Carney* has only been cited in eight Arizona decisions (three of which are unpublished). The facts of this case do not require this Court to decide such vexing questions at all, much less the exact contours of the right to privacy in a mobile home, because it is indisputable that an unconstitutional search occurred in this case. For purposes of this case, this Court should simply note that the additional protections available to homes under our state constitution extend to those homes that travel on eighteen wheels.

CONCLUSION

For these reasons, *amicus curiae* requests that this Court hold that co-drivers of a vehicle have both standing to challenge a trespassory search and a reasonable expectation of privacy in the search of the vehicle, when the totality of the circumstances supports such findings.

RESPECTFULLY SUBMITTED this 13th day of April, 2017.

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