No. 25-1105

In the Supreme Court of the United States

FRANK THOMPSON

Petitioner,

v.

CARL WILSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, MAINE DEPARTMENT OF MARINE RESOURCES

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

A Maine Department of Marine Resources rule requires all Maine lobstermen who hold federal lobster fishing permits to install a GPS tracking device on their vessels and share their location data whenever those vessels are in the water. *Amicus* American Farm Bureau Federation addresses the following question:

Whether the fact that lobster fishing is closely regulated permits government to track every move of a vessel in real time, regardless of whether the vessel is engaged in lobstering or is being used for personal or non-regulated commercial purposes, or whether such 24/7 tracking constitutes a warrantless search of private property prohibited by the Fourth Amendment.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Farm Bureau Federation (AFBF) was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all 50 states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. AFBF's mission is to protect, promote, and represent the interests of American farmers and ranchers.

The Court of Appeals held here that an invasive tracking device required to be placed on private property as a condition of the property owner's license to carry on its trade is not an unconstitutional warrantless search because the placement is required as part of a regulatory scheme. It did so even though the device tracks the property's position all of the time—whether the property is being used for the regulated activity or is being used for purely personal or for unrelated business purposes. The court deemed this constant tracking "minimally intrusive" (Pet. App. 28a) and held it constitutionally unproblematic because it occurs in the context of a "closely-regulated industry." Pet. App. 30a. And the court distinguished the host of decisions from this Court that have found similarly invasive warrantless searches to be unconstitutional because those cases were "criminal in nature and involve[d] government searches to uncover evidence of criminal activity" (Pet. App. 28a)—a distinction that

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief.

affords criminal suspects far greater Fourth Amendment protection than business people subject to a civil regulatory scheme.

That ruling, AFBF believes, dangerously undercuts Fourth Amendment protections for farmers and ranchers. It authorizes physically-invasive monitoring of private property, without a warrant, whenever government can point to a regulatory violation that might conceivably be uncovered by the search. See Pet. App. 29a (because lobster-fishing violations may occur whenever a vessel is in the water "lobstermen need to be tracked while they too are in the water"). That threat is especially acute for agriculture because, for most farm families, the regulated "business premises" is also home. The tractor sits in the same yard where the children play; the pickup that hauls feed is the same truck that drives to church. A rule that allows warrantless, continuous surveillance of "closely regulated" business property thus allows warrantless, continuous surveillance of the farm family's daily life.

Farmers and ranchers are subject to a host of federal and state laws that are policed by executive agencies with powers to impose penalties, seek injunctions, or deny licenses or permits. Applying the First Circuit's reasoning, government agencies may contend that farms, ranches, and associated facilities can be forced to host monitoring devices covering regulated activities, with no regard to whether those devices also detect farm families engaged in everyday household activities or farm commercial activities that lie beyond the scope of the regulation.

AFBF believes that the Court of Appeals' decision threatens the property rights and personal privacy of farm and ranch families in ways prohibited by the

Fourth Amendment and by this Court's decisions. Given the vast scope of government regulation at both federal and state levels, the First Circuit's approach would allow a regulated-activity exception broadly to override Fourth Amendment protections and would render business people the least protected of all groups from intensive government surveillance.

AFBF proactively participates as a party litigant or *amicus* in many cases that involve issues that impact its members' interests. To that end, AFBF offers insights to aid this Court's consideration of the important issues raised by the Petition for Certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus AFBF submits this brief to explain the importance of maintaining constitutional protections for farm and ranch families on their own property. The decision below wrongly allows warrantless on-property-surveillance of activities unrelated to regulated conduct, which is at the core of Fourth Amendment protection as properly understood.

In correcting this injustice, this Court can also bring much-needed clarity to the standards to be applied to warrantless civil searches. As Professor Orin Kerr has recently explained, there is substantial confusion in the lower courts—manifested in the sharp and entrenched circuit splits ably described in the Petition—over how to assess the need for a warrant for searches on private property. Those circuit splits arise from conflicting understandings of the interplay between two lines of this Court's decisions, exemplified by *Silverman* v. *United States*, 365 U.S. 505 (1961) and *United States* v. *Jones*, 565 U.S. 400 (2012), which look to whether the search involves a trespass or

physical invasion of private property, and *Katz* v. *United States*, 389 U.S. 347 (1967) and *New York* v. *Burger*, 482 U.S. 691 (1987), which focus on privacy interests other than those rooted in property rights.

As Professor Kerr observes, the lack of guidance from this Court about how to reconcile these lines of authority—in particular concerning the relevance of trespass on and physical invasion of private property in conducting a search—has resulted in "a remarkable conceptual uncertainty in Fourth Amendment law. Every lower court recites that there are two search tests, but no one knows what one test means or how it relates to the other." Orin S. Kerr, *The Two Tests of Search Law: What Is the* Jones *Test, and What Does That Say About* Katz*?*, 103 Wash U.L. Rev. 309, 309 (2025). As the Petition points out (Pet. 24 n.12), the separate opinions in *Carpenter* v. *United States* may have encouraged this confusion. 585 U.S. 296 (2018).

This case, resolved below on the basis of the facts as pled and hence involving no factual disputes, provides an excellent vehicle to address confusion over the role of invasions of private property in Fourth Amendment analysis. It is also an opportunity for the Court to give guidance regarding how criminal Fourth Amendment principles apply to civil surveillance on private property, as well as to address the extent to which a regulatory scheme immunizes physically invasive searches from Fourth Amendment scrutiny.

ARGUMENT

The Court should grant certiorari because the unjust result below, which allows surveillance on a lobster-boat-owner's property of wholly private activity, results from confusion over the meaning of this Court's Fourth Amendment precedents. It is time for

this Court to end that confusion by explaining that government may not require the installation of surveillance devices on private property that capture significant unregulated conduct unless it first obtains a warrant. Before turning to the First Circuit's errors of law, we first explain why AFBF's members care deeply about the question presented here.

I. The Court Should Grant Certiorari To Afford Businesses Like Farms And Ranches At Least As Much Protection From Warrantless Searches As Criminal Suspects

Farmers and ranchers are subject to a host of federal and state regulatory schemes policed by government agencies empowered to impose penalties, seek injunctions, or deny licenses or permits. These include, for example, Clean Water Act permitting requirements under which a farmer may face enormous penalties for normal farming activities,[2] farm labor laws under which agencies seek to facilitate labor organization on farm property,[3] and close federal inspection of meat processing facilities.[4] Applying the First Circuit's reasoning, government agencies may contend that farms, ranches, and associated facilities

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[2] *E.g.*, *Borden Ranch* v. *United States Army Corps of Eng'rs*, 537 U.S. 99 (2002) (upholding by an equally divided court a $1 million penalty for deep plowing across a drainage feature to plant deep-rooted crops).

[3] *E.g.*, *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 (2021) (holding a California regulation requiring a farmer to allow frequent access by labor organizers to be a *per se* taking under the Fifth Amendment).

[4] *E.g.*, *National Meat Ass'n* v. *Harris*, 565 U.S. 452 (2012) (describing federal regulation of meat-packing plants under the Federal Meat Inspection Act).

must host monitoring devices covering these or countless other regulated activities, with no regard to whether those devices also detect farm families engaged in everyday household activities or commercial activities outside the scope of the regulation. One can imagine, for example, that under the First Circuit's cramped reading of the Fourth Amendment, California regulators enforcing that State's Proposition 12 might demand constant monitoring not only of sow barns, but of an entire farm to make sure no "cheating" occurs.[5]

Or consider concentrated animal feeding operations (CAFOs), which are "closely regulated" under federal and state water-quality laws. Under the First Circuit's logic, a State could try to mandate 24/7 sensors on barns, manure lagoons, and field-edge drainages, capturing not just regulated discharge events but every movement of the farm family living 200 yards away. The farmer's home is, quite literally, on the regulated premises.

Pesticide application is another hook. FIFRA and parallel state pesticide laws make pesticide use one of the most heavily regulated activities on any farm, and many state regimes require detailed recordkeeping tied to the applicator and to the vehicle used to transport restricted-use products. A logical next step for an aggressive state regulator is to demand GPS tracking of every vehicle that moves regulated pesticides—and on most family farms, the vehicle that hauls a jug of restricted-use herbicide from the co-op

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[5] See *National Pork Producers Council* v. *Ross*, 598 U.S. 356 (2022); Pet. App. 29a (justifying constant monitoring on the ground that less extensive monitoring of lobster boats would "incentivize those seeking to avoid detection" of violations).

to the shop is the same pickup that hauls feed, the same pickup that takes a child's 4-H calf to the county fair, and the same pickup that drives the family to church on Sunday. Under the First Circuit's rule, that truck would be subject to 24/7 monitoring because it is sometimes used in a closely regulated activity. The tracked "business premises" in agriculture is the home. That is why the First Circuit's rule is uniquely dangerous for farmers and ranchers.

The First Circuit's decision not to follow the *Jones/Silverman* trespass or physical invasion test because this is a civil, closely-regulated-industry case rather than a criminal case, App.28a, means that commercial lobstermen have less Fourth Amendment protections than do criminally-accused defendants. That decision means that, in the circuits that take this narrow view of Fourth Amendment protections, farmers and their families can be surveilled at home—for most farm families live on the farm—whenever government agents can point to a regulatory scheme covering some aspect of the business operation. Meanwhile, criminal suspects are protected from searches of their property unless a warrant has been obtained. That cannot be right, and as we demonstrate in Part II, it is not: properly understood, this Court's precedents mandate that a warrant be obtained for government searches that involve the physical invasion of the target's private property.

II. Search Devices Physically Placed On Private Property Are Subject To Rigorous Fourth Amendment Scrutiny That Maine's Rule Cannot Survive

Many modern Fourth Amendment cases involve difficult issues raised by advanced technology that allows remote tracking or sensing of persons, places, or

things without need to enter the target's property. This Court's recent grant of certiorari to review the constitutionality of geofencing warrants in *Chatrie* v. *United States*, No. 25-112 (U.S. cert. granted Jan. 16, 2026), provides one example; remote thermal imaging searches are another. See *Kyllo* v. *United States*, 533 U.S. 27 (2001). This Court has long been careful to ensure that when such "[s]ubtler and more far-reaching means of invading privacy have become available to the Government" as the result of the "progress of science," Fourth Amendment protections are not eroded. *Olmstead* v. *United States*, 277 U.S. 438, 473-474 (1928).

This case, by contrast, is easy—and the First Circuit got it seriously wrong. Maine requires the physical placement of a GPS device on private business premises to track activities regardless of whether they are regulated or not, or are business related or personal. The Fourth Amendment simply does not permit such surveillance devices placed on private property without a warrant. See *Jones*, 565 U.S. at 401, 404 (confirming the Fourth Amendment's "common-law trespassory test" and holding that an agent's physical trespass on Jones' car to place a GPS device required a warrant); *Carpenter*, 585 U.S. at 309 ("GPS tracking," which provides a "detailed and comprehensive record of the person's movements," is a search that requires a warrant). The First Circuit's erroneous decision dangerously mistakes that key rule of law for one that may be overridden merely by pointing to a regulatory scheme that covers *some* of the surveilled activities and to the supposedly *de minimus* nature of the invasion.

A. Physically invasive searches of private property require a warrant

The privacy rights protected by the Fourth Amendment are at their strongest when a government search involves physically invading or trespassing upon a person's property. See *Byrd* v. *United States*, 584 U.S. 395, 396 (2018) (explaining that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy" in that property, and that "'property concepts'" are instructive in "'determining the presence or absence of the privacy interests protected by [the Fourth] Amendment'").

This "traditional property-based understanding of the Fourth Amendment" (*Florida* v. *Jardines*, 569 U. S. 1, 11 (2013)) is supported by the plain text of the Amendment, as Justice Scalia explained writing for the Court in *Jones*. See 565 U.S. at 405 ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous").

It is consistent too with the historical background of the Amendment, in particular the Framers' familiarity with Lord Camden's opinion in *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C. P. 1765), extolling the "sacred" nature of property rights and requiring their protection from physical invasion. See *Jones*, 565 U.S. at 406.

And it is consistent as well with the centrality of property rights across our Constitution. As this Court has observed, "protection of property rights is

'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 171 (2021), quoting *Murr* v. *Wisconsin,* 582 U.S. 383, 394 (2017). "The Framers realized that robust protection of the rights of property owners undergirds liberty by diffusing power and protecting individual autonomy from governmental control." James W. Ely, Jr., *Property Rights and Judicial Activism*, 1 Geo. J.L. & Pub. Pol'y 125, 126 (2002).

Central to a person's property rights is "the right to exclude," which "is 'universally held to be a fundamental element of the property right" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176, 179-180 (1979).

For Maine to demand that petitioner's lobster boat host a GPS device that tracks the location of the boat in real time regardless of where it is located or what it is doing infringes petitioner's property rights by prohibiting petitioner from excluding the device—by removing it or turning it off—when not engaged in regulated activities.

This should not be a controversial proposition. To be sure, some of this Court's decisions, such as *Katz*, analyze the Fourth Amendment warrant requirement by looking to the search target's privacy interests. But the appropriate test is situational. Where a search involves government trespassing upon private property, whether land or chattels, this Court time-and-time-again has held that the search requires a warrant. As the Court explained in *Jones*, "the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." 565

U.S. at 409. And where a search would involve a trespass or physical invasion, a warrant must be obtained. See, *e.g.*, *United States* v. *Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) ("physical intrusion of a constitutionally protected area in order to obtain information" is a search requiring a warrant).[6]

What counts under these decisions is not, as the court of appeals wrongly assumed, that the search occurred in a criminal investigation context, but that the search involved the physical invasion of the search target's property. It was error for the First Circuit to apply the *Katz* test without paying heed to the trespass that occurs when government mandates that citizens host a tracking device on their private property.

B. The size of the physical invasion involved in a search is irrelevant

The court of appeals declined to require a warrant in part because it thought the mandated placement of a GPS tracker on petitioner's vessel was "minimally intrusive." Pet. App. 28a. But where a search involves a physical invasion of private property, the degree of intrusion is irrelevant; any trespass requires a warrant.

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[6] Professor Kerr has argued that *Jones* may be read as requiring a warrant for searches that involve common law trespass, or alternatively for searches that involve physical intrusions on private property, and that sometimes these approaches may point to different results given peculiarities of states' trespass laws. Kerr, *Two Tests*, 103 Wash. U.L. Rev. at 311-312. The Court need not confront that issue here, however, for requiring placement of a continuously-monitoring GPS device on a vessel is undoubtedly both a trespass-to-chattels and a physical intrusion into a constitutionally protected area.

The inviolability of property rights from even insubstantial physical invasions is well-established. Consider, for example, *Loretto*. There, the defendant's installation of a ½-inch diameter cable and two 1½-cubic-foot boxes on the roof of plaintiff's building—which in no way interfered with her use of the property—was held to be a physical taking requiring compensation under the Fifth Amendment. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982). When a physical invasion occurs, there is a taking regardless of "the extent of the occupation, * * * whether the action achieves an important public benefit," or whether it "has only minimal economic impact on the owner." *Id.* at 434-435.

Unsurprisingly, that same principle controls in the Fourth Amendment context, as this Court's seminal decision in *Silverman* establishes. There, the warrantless insertion of a spike microphone about 1/8th of an inch into a home's wall to overhear the inhabitants' conversations violated the Fourth Amendment because this "physical entrench[ment]," as with the GPS device here, "usurp[ed] part of the petitioners' house or office." 365 U.S. at 511. That some physical invasion occurred was determinative.

This Court has since confirmed that the principle reaches even intermittent physical invasions. In *Cedar Point*, the Court held that a regulation granting union organizers access to farm property for only three hours per day, 120 days per year, worked a *per se* physical taking—rejecting the argument that the invasion's temporary or intermittent character made it anything less. 594 U.S. at 170-174. Maine cannot escape *Silverman*'s rule by observing that its GPS device is small, or that it transmits only periodically.

Size and frequency do not matter; physical invasion does.

Under *Silverman* there is no Fourth Amendment escape clause for "minimally intrusive" physical invasions of private property. *Any* "physical intrusion of a constitutionally protected area in order to obtain information" requires a warrant. *Knotts*, 460 U.S. at 286 (Brennan, J., concurring) (citing *Silverman*).

C. That Maine regulates lobster fishing does not excuse the need for a warrant for its trespass on petitioner's private property

The First Circuit's other rationale for holding Maine's regulation to be constitutional was that lobster fishing is a closely regulated industry. That reasoning fares no better, however, in immunizing the rule from the warrant requirement.

Petitioner does not use his vessel only for lobster fishing. Petitioner uses the boat for family excursions, to assist in search and rescue missions, and to transport needy island residents to mainland medical treatment. Pet. App. 49a, 180a, 191a, 210a, 217a. Yet these non-lobstering activities are all tracked by the GPS device affixed to his boat, which he cannot remove or turn off without risking losing his license. Those sorts of "basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Horne* v. *Department of Agriculture*, 576 U. S. 351, 366 (2015).

Whether or not *Burger* was correct in stating that as a general matter closely regulated industries "'have such a history of government oversight that no reasonable expectation of privacy * * * could exist for a

proprietor over the stock of such an enterprise'" (482 U.S. at 700), an owner *does* have a reasonable expectation that government will not *physically intrude on private property* to search activity that is *unrelated* to the regulated business. This Court has warned against allowing "what has always been a narrow [closely regulated industry] exception to swallow the [Fourth Amendment] rule." *City of Los Angeles* v. *Patel*, 576 U.S. 409, 424-425 (2015). Allowing private property to be surveilled by physically invasive techniques that catch significant unregulated activity is inconsistent with that "narrow exception" principle. Monitoring significantly more activity than is needed to enforce a regulation cannot conceivably be justified as a reasonable search.

Again, physical takings cases are instructive in illustrating that the existence of a regulatory scheme does not trump constitutional rights. California closely regulates union organizers' interactions with businesses and their employees, among other things by requiring that farmers allow union personnel to enter their private property to organize agricultural workers. Nevertheless, that regulatory context does not immunize California from takings claims. To the contrary, this Court held in *Cedar Point Nursery* that a state agency rule requiring farmers to allow agricultural union organizers to access their farms on a regular basis or face sanctions for unfair labor practices effectively granted the unions an easement, and that this physical invasion of property was a *per se* taking requiring compensation. 594 U.S. at 172 ("These sorts of physical appropriations constitute the 'clearest sort of taking,' *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (2001), and we assess them using a simple, *per se* rule").

There is no reason to think that the Fourth Amendment is the poor relation to the Takings Clause, offering less protection for private property and the privacy it affords to citizens. To the contrary, *Silverman* and *Jones*, among other cases, recognize that invasions of private property to conduct searches are the easy case for finding a warrant to be required. Only upon clear proof that a physical invasion is necessary and narrowly tailored to serve important regulatory goals can government evade the warrant requirement. Constant GPS monitoring of a lobsterman's location when he is not lobster fishing does not come close to satisfying that standard.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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