
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*

PETITIONER'S REPLY BRIEF

FRANK D. GARRISON
MATTHEW GILLIAM
DAVIS VAN INWEGEN
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201

MARK MILLER
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL
33410
(916) 503-9001
Mark@pacificlegal.org

MARK PINKERT
Holtzman Vogel
2333 Ponce de Leon Blvd.
Suite 600
Coral Gables, FL 33134

Counsel for Petitioner

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INTRODUCTION

Respondent compels all federally permitted lobstermen, including Petitioner Frank Thompson, to install a GPS tracker on their fishing boats and submit to continuous government surveillance as a condition of keeping their fishing license. The circuit courts are split on whether Fourth Amendment trespassory surveillance protections under *United States v. Jones*, 565 U.S. 400 (2012), restrict warrantless administrative searches like those effected by Respondent's GPS tracking requirement. The Court should grant certiorari to resolve the split. And this is exactly the right vehicle to resolve it.

The Ninth and Sixth Circuit decisions themselves show that Respondent's arguments against the split on the first question presented—that *Rush* did not involve “trespass” and that *Taylor II* only decided whether a search occurred—are mistaken. BIO 16, 18, 21.

Respondent's arguments against the second split—whether *Jones* property-based protections inform reasonableness of a warrantless administrative search—are predicated on its misconception that the Ninth and Sixth Circuit decisions in *Patel I* (en banc), *Taylor I* and *Taylor II*, did not address the reasonableness of administrative searches of closely regulated industries under *Burger*. But that misses the point—the Ninth and Sixth held that *Jones* trespass-to-property protections determine whether an administrative search violates the Fourth Amendment. BIO 20-21.

The conflicts are real and an outcome-determinative condition of earning a living in those jurisdictions, free of the Fourth Amendment's property-based lim-

its. These questions will only recur as tracking technology spreads, and regulators are emboldened to conduct more invasive trespassory supervision with new technologies. Only this Court can provide uniformity and clarity in the federal courts.

Respondent's waiver argument fares no better. A question is preserved when it was "pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992). The question here meets both requirements. Thompson argued throughout that *Jones* and *Carpenter*'s protections against trespassory surveillance render Maine's regime unreasonable—both as a matter of Fourth Amendment first principles and within *Burger*'s framework. The First Circuit expressly acknowledged those arguments, App.14a-15a, 18a-19a, and expressly rejected them. App.28a n.18. Nothing more is required. The parties agree that a search occurred and the case presents the questions cleanly: purely legal issues, on undisputed facts, squarely decided below.

Nor can Respondent shrink the stakes to a single fishery. Nine other Atlantic states are subject to the same interstate mandate that produced Maine's rule. Pet. 30-31. And as amici from the agricultural, business, and civil-liberties communities explain, the First Circuit's logic extends to the dozens of industries lower courts have labeled "closely regulated"—farms, ranches, pharmacies, junkyards, and beyond. If the decision below stands, the government may impose continuous electronic surveillance as a condition of any kind of enterprise. That cannot be right. Certiorari is warranted.

I. The First Circuit’s Decision Created a Clear Circuit Split on the Questions Presented

A. This Court should grant the Petition to answer whether *Jones* and *Carpenter* apply beyond criminal cases to administrative searches

The Court should grant the Petition to resolve the open question dividing circuit courts of whether *Jones* and *Carpenter* provide for an analytical framework with minimum Fourth Amendment guarantees governing the reasonableness of any administrative search—regardless of whether it involves a closely regulated industry. *See* Pet. 22-24.

Respondent incorrectly argues that *Jones* and *Carpenter* are only relevant to deciding whether a search occurred, have nothing to do with the reasonableness of a warrantless administrative search, and do not “abrogate or fundamentally change” *Burger*’s analysis of whether an administrative search is unreasonable. BIO 11-12. When *Jones* and *Carpenter* apply to a Fourth Amendment search, those same protections inform whether a search is reasonable.

This Court’s *Jones* and *Carpenter* decisions clarified the common-law property-based rules built into the Fourth Amendment’s protections. *Jones* applied “an 18th-century guarantee against unreasonable searches, which ... must provide *at a minimum* the degree of protection it afforded when it was adopted.” *Jones*, 565 U.S. at 409, 411; Pet. 11-12, 19, 23. Fourth Amendment protections at step one (whether a search occurred) and step two (reasonableness)—whether property or privacy based—are “informed by historical understandings ‘of what was deemed an *unreasonable* search and seizure when [the Fourth Amendment]

was adopted.” *Carpenter v. United States*, 585 U.S. 296, 304-05 (2018) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)) (emphasis added).

Therefore, the Fourth Amendment’s guarantees against common-law trespass colors reasonableness in the second step just as much as it does in the first. Courts do not unlearn everything analyzed in step one about the government’s trespass on and surveillance of private property; they apply principles they just deployed to also decide reasonableness.

The First Circuit and Respondent reduce *Jones* and *Carpenter* to a rule of criminal procedure. This Court should grant certiorari to decide the important and recurring question of whether *Jones* property-based protections constrain administrative searches.

B. Respondent’s effort to distinguish *Rush* and *Taylor* confirms the split over continuous warrantless trespass on private property

The First Circuit split with the Ninth and Sixth on whether the administrative-search doctrine allows continuous, unrestricted warrantless searches outside commercial areas and hours.

In *Rush v. Obledo*, the Ninth Circuit held that warrantless inspections of a “closely regulated business” were limited to the areas and times that the home operated as a day care business. F.2d 713, 717-18, 721-22 (9th Cir. 1985). Respondent attempts to distinguish *Rush* on the ground that the court did not expressly invoke “trespass.” BIO 16. But that argument misses the point.

Although *Rush* did not use the word “trespass,” it relied on the longstanding principle that the Fourth

Amendment protects private property from unauthorized government physical intrusion. *Id.* at 718. *Jones* and *Carpenter* later clarified the Fourth Amendment’s property-based framework, but *Rush* implicitly applied those same principles by limiting inspections to the “areas to which the day care children are denied access” and “only when the home is being operated as a family day care business.” *Id.* at 721.

As Respondent concedes, the Ninth Circuit’s analysis turned on the “peculiar nature of family day care homes” because it does not host children at all hours and in all areas of the home. BIO 16 (quoting *Rush*, 756 F.2d at 721). That explanation underscores Thompson’s point. *Rush* recognized that property remains constitutionally protected—and not subject to the “closely regulated” business exception—outside the places and times devoted to the regulated business. The First Circuit adopted the opposite rule by permitting uninterrupted GPS surveillance regardless of whether Thompson’s vessel was engaged in commercial fishing.

Accordingly, the *Rush* court’s analysis of the places and hours that property owners “denied access” to others is based on the property owner’s right to exclude—i.e., prevent trespass. Thompson’s vessel is likewise not transformed into a property that is permanently searchable minute-by-minute merely because Thompson sometimes uses it for federally permitted lobster fishing. *See also Taylor v. City of Saginaw*, 11 F.4th 483, 488 (6th Cir. 2021) (*Taylor II*), (“That automobiles are regulated and *involved* in parking is inconsequential because the [closely-regulated industry] exception applies to industries, not objects.”). The First Circuit diverged from *Rush* and *Taylor II* in its

outright refusal to analyze the MDMR Rule's relationship to Thompson's private property outside of commercial fishing.

Respondent's treatment of *Taylor II* further proves Thompson's point. Respondent says *Taylor* is irrelevant because the Sixth Circuit addressed trespass only to decide whether a search occurred, then declined to apply *Burger* because municipal parking is not a closely regulated industry. BIO 18, 21. This is precisely the point. The Sixth Circuit held that tire chalking was a search under *Jones* trespass principles, and presumptively unreasonable unless an exception to warrantless searches applied. *Taylor II* did not automatically apply the *Burger* administrative search doctrine for closely regulated industries, but held that it does not apply to searches outside of industry operations, making the search presumptively unreasonable unless the government could find some other exception to the warrant requirement. 11 F.4th at 488; *but see Johnson v. Smith*, 104 F.4th 153, 167 (10th Cir. 2024) (applying the *Burger* administrative search doctrine outright without regard to *Jones* trespass protections).

The First Circuit did the opposite of *Taylor II*, arbitrarily casting aside the property analysis as inapplicable to a civil case, for private property that is not exclusively commercial. App.28a n.18. *Taylor II*, having decided a search occurred, also demonstrates that *Jones* trespass principles make the search unreasonable unless an exception to the warrant requirement applies.

At bottom, Respondent's attempted distinctions fail because both *Rush* and *Taylor II* recognize property-based limits constrain administrative searches.

The First Circuit refused to apply those limits. This Court should grant this petition to resolve that split.

C. Respondent’s arguments misconstrue the First Circuit’s conflict with the Ninth and Sixth Circuits over how *Jones* trespass-to-property protections constrain the reasonableness of administrative searches under *Burger*

1. Contrary to Respondent’s characterizations, the First Circuit’s decision created a second conflict with the Ninth and Sixth Circuits by holding that Fourth Amendment trespass-to-property principles under *Jones* and *Carpenter* do not apply to an administrative search outside the criminal context. Pet. 12, 22-29; BIO 13, 15, 20. The First Circuit’s analysis under *Burger* conflicted because it rejected *Jones* property-based considerations outright and was controlled strictly by the *Katz* reasonable expectations of privacy test, *Burger*’s default framework. Pet. 28-29.

2. Respondent also asserts that the Ninth and Sixth Circuit decisions in *Patel I* and *Taylor I* and *II* do not address the reasonableness of administrative searches of closely regulated industries under *Burger*. *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013) (*Patel I*); *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019) (*Taylor I*); BIO 20-21. Respondent’s argument misses the point. The Ninth and Sixth Circuit held that *Jones* trespass-to-property protections determine whether an administrative search violates the Fourth Amendment. Pet. 25-28.

True, the circuit courts’ administrative search decisions did not involve a closely regulated industry. But that is irrelevant. Respondent fails to understand

that the *Jones* trespass-to-property protections applied by those courts govern the Fourth Amendment’s *whole* analysis of warrantless administrative searches at both the first step (whether a search took place) *and second step* (reasonableness). Pet. 25-28.¹

Jones did more than define what constitutes a search; it clarified the Fourth Amendment’s common-law property protections as a minimum constitutional guarantee of reasonableness in both criminal and administrative searches. *Jones* explained that the Fourth Amendment’s “18th-century guarantee against unreasonable searches” must provide “at a *minimum* the degree of protection it afforded when it was adopted.” 565 U.S. at 409, 411. Likewise, *Carpenter* explained that the Fourth Amendment’s protections are informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.” 585 U.S. at 304-05 (quoting *Carroll*, 267 U.S. at 149). The Ninth and Sixth Circuits believe those historical understandings inform the whole analysis. The First Circuit does not.

3. Respondent also asserts that the First Circuit did not apply the *Katz* reasonable expectations of privacy test or ground its reasonableness inquiry on Thompson’s expectations of privacy. BIO 15. That is wrong. The First Circuit held that “[b]ecause the

¹ The Ninth Circuit, in *Patel I*, applied the *Jones* trespass test and *Katz* reasonable expectations of privacy test at step one of the Fourth Amendment inquiry to determine whether an inspection of motel records constituted a search and used its step one conclusions at step two to constrain its reasonableness inquiry. *Patel I*, 738 F.3d at 1061, 1063; Pet. 26.

Burger test applies to searches of closely-regulated industries, which necessarily have a reduced expectation of privacy . . . the privacy concerns and judicial balancing Thompson requests come pre-baked into the *Burger* test, and need not be repeated outside of its application.” App.18a-19a (citing *New York v. Burger*, 482 U.S. 691, 702 (1987)).²

The First Circuit’s holding that Maine’s GPS tracking regime is “sufficiently restricted based on the ‘limited and specific type of data’ collected” elevates *Katz* reasonable expectations of privacy (i.e., privacy interests based on the nature of the data obtained) and displaces *Jones* and *Carpenter* protections. BIO 13; Pet. 29.³

4. Contrary to Respondent’s characterizations, the First Circuit’s refusal to incorporate *Jones* and *Carpenter* trespass-to-property protections into the *Burger* framework shows it was constitutionally deficient. BIO 12-13. Those cases show that continuous GPS tracking of Thompson’s boats outside of commercial operations and hours is not necessary to the gov-

² The First Circuit’s reference to “privacy concerns and judicial balancing” refers to Thompson’s trespass arguments under *Jones* and *Carpenter*. See *infra* at 11-12.

³ Respondent’s invocation of suspicion-less boarding of vessels on the high seas has no bearing on this argument. BIO 13-14. Those searches were, as Respondent admits, episodic. *Ibid.* Maine’s rule mandates the installation of electronic tracking technology that subjects a vessel to 24/7 continuous surveillance. Pet. 6-7. That is a far cry from the occasional maritime inspection. See also Brief Amicus Curiae of The Manhattan Institute, 13-19. Ships could not be searched at all hours, nor were captains required to send their location by carrier pigeon every minute of every day.

ernment’s regulatory scheme (*Burger* prong two) because it cannot collect *any* lobster harvesting data when Thompson is not lobstering. Nor is 24/7 GPS tracking a “constitutionally adequate substitute for a warrant” (prong three)—the government’s continuous trespassory surveillance of Thompson’s private boat outside of commercial lobstering shows unfettered discretion to conduct searches of his property unlimited in time, place, and scope. That contravenes the Ninth and Sixth Circuit decisions (*supra* at 5-7) applying *Jones* trespassory protections outside commercial activities. Pet. 16-22; *Taylor II*, 11 F.4th at 488 (holding that the administrative search doctrine “applies to industries, not objects”).

The Court should grant certiorari to resolve the circuit splits and decide whether the *Burger* administrative search test includes *Jones* and *Carpenter* trespass-to-property limitations on conducting warrantless administrative searches outside the scope of commercial operations and business hours.

II. This Case Is the Right Vehicle to Resolve the Questions Presented

Although Respondent asserts that this case is a poor vehicle for reviewing the questions presented, BIO 22-24, the opposite is true—this case is an ideal vehicle. The issues were properly preserved, those issues are purely legal, and the parties’ concessions eliminate the complication of whether something is a closely regulated industry and simplify the legal issues before the Court.

A. Thompson raised his *Jones* trespass arguments below

Respondent’s assertion that Thompson did not raise arguments below that *Jones* trespass principles constrain administrative searches is wrong. BIO 7-8, 22-23. First, Thompson argued that Maine’s GPS tracking requirement constitutes an unreasonable trespassory search unrelated to commercial lobstering and violated the Fourth Amendment’s fundamental protections. Pet. 10-11 (citing App.14a-15a; Plaintiff-Appellant’s Initial Brief at 14-25, *Thompson v. Wilson*, 159 F.4th 91 (1st Cir. Apr. 1, 2025) (No. 25-1007)). Relying on “general Fourth Amendment principles,” Thompson argued the tracking requirement’s “constant invasion of individual movement flatly sits within *Carpenter* and *Jones*.” Plaintiff-Appellant’s Initial Brief at 22, *Thompson*, 159 F.4th 91.

The First Circuit addressed Thompson’s argument that the *Burger* test “cannot save unreasonable searches . . . from general Fourth Amendment principles.” App.14a-15a. The court also acknowledged Thompson’s argument that Maine’s GPS regime is “per se unreasonable,” particularly in its tracking activities beyond commercial lobster fishing, and that “any analysis cabined within the *Burger* [administrative] test [] would impermissibly overlook the broad protections afforded by the Fourth Amendment.” App.15a.

Second, Thompson argued that, under *Burger*, Maine’s GPS tracking requirement fails constitutional scrutiny for all the same reasons he raised in his first argument based on general Fourth Amendment principles. Plaintiff-Appellant’s Initial Brief at 33,

Thompson, 159 F.4th 91. Thompson relied on *Carpenter*'s and *Jones*'s protections against trespassory surveillance, and emphasized that the regulation was a "constant, unlimited search" and not "sufficiently tailored in scope and time to function akin to an actual specific warrant as contemplated in the Fourth Amendment." *Id.* at 33-34. Thompson's brief also argued that reasonableness under *Burger* had to be assessed in accordance with common-law standards. *Id.* at 12-13, 33-34.

The First Circuit understood Thompson's argument that Fourth Amendment principles under *Carpenter* and *Jones* apply independently to searches outside the scope of *Burger*'s application to closely regulated industries. See App.18a-19a (acknowledging Thompson's arguments but deciding they involve principles that "come pre-baked into the *Burger* test, and need not be repeated outside of its application") (citation omitted). The First Circuit's acknowledgment that Thompson's Fourth Amendment principles "come pre-baked into the *Burger* test" and would not "be repeated" outside its application shows that the court also understood that Thompson tried to raise his *Jones* and *Carpenter* arguments under *Burger* App.19a. But the court ultimately rejected applying "caselaw concerning advanced technologies in government searches" (i.e., *Carpenter* and *Jones* protections against trespassory surveillance) to *Burger*. App.28a n.18.

B. Issues of nationwide importance

Respondent suggests that a few instances do not establish a larger pattern of government agencies requiring boat owners to install tracking devices. BIO

23-24. But the Atlantic States Marine Fisheries Commission includes nine other member states up and down the Atlantic seaboard that are subject to the same federal requirement that precipitated Maine's rule. Pet. 30-31.

Moreover, Respondent frames the issue too narrowly. Thompson points to other closely regulated industries (BIO 23-24), not to challenge their status as such, but to show the sweeping effect of decisions in this area. And as Thompson and amici show, the government's power to perpetrate warrantless administrative searches is greatly enhanced by the First Circuit's decision—to dozens if not hundreds of other industries. Brief Amicus Curiae of The American Farm Bureau Federation, 5-7 (arguing the First Circuit's logic would extend to farmers, ranchers, animal feeding operations, and pesticide users), Brief Amicus Curiae of The Cato Institute, 12-13 (collecting twenty-five industries considered “closely regulated” by lower courts).

Unless this Court reviews the lower court's decision, the government can cast aside *Jones* and *Carpenter* trespass protections pursuant to any administrative search and regulatory scheme and thereby circumvent the Fourth Amendment's minimum constitutional guarantees in any administrative or industry context.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

FRANK D. GARRISON
MATTHEW GILLIAM
DAVIS VAN INWEGEN
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201

MARK MILLER
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL
33410
(916) 503-9001
Mark@pacificlegal.org

MARK PINKERT
Holtzman Vogel
2333 Ponce de Leon Blvd.
Suite 600
Coral Gables, FL 33134

Counsel for Petitioner

JULY 2026