NO. 11-30101

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKY S. WAHCHUMWAH,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of Washington
Case No. 09-cr-02035-EFS-1
Honorable Edward F. Shea District Court Judge

AMICUS CURIAE BRIEF OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

Hanni M. Fakhoury (SBN 252629)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
hanni@eff.org
Counsel for Amicus Curiae Electronic Frontier Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Federal Rules

Constitutional Provisions

Other Authorities

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Electronic Frontier Foundation states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of amicus.

STATEMENT OF AMICUS CURIAE

The Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization working to protect civil liberties in an age of rapid technological change. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy as emerging technologies become more prevalent in society. As part of its mission, EFF has often served as counsel or amicus in privacy cases, such as *United States v. Jones*, 132 S. Ct. 945 (2012), *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746 (2011), and *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). EFF also filed an amicus brief in support of the appellant earlier in this case.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief. Neither party opposes the filing of this brief.

INTRODUCTION

This case, like all others dealing with the Fourth Amendment, is about expectations. Right now, advances in technology have made it easier than ever before for the government to surveil the intimate details of people's lives. Certainly, the government is entitled to use these advances to investigate crime and make us safer. But without the supervision that comes with requiring law enforcement to obtain a search warrant before video recording the interior of a home – the most protected of all places under the Fourth Amendment – this Court risks eroding the privacy expectations of all. The panel's decision here, finding the warrantless home video surveillance did not violate the Fourth Amendment, is precisely the type of decision that reveals the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

En banc review is appropriate if "(1) necessary to secure or maintain uniformity of the court's decisions" or "(2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. Both of these prongs are satisfied here. First, the panel opinion below failed to consider the video surveillance under the trespass theory to the Fourth Amendment, ignoring the instruction of both the Supreme Court in *United States v. Jones*, 132 S. Ct. 945 (2012) and this Court in *United States v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012) that the pre-*Katz* trespass theory of the Fourth Amendment is still alive and well. Second, the panel

gave short shrift to whether Wahchumwah's reasonable expectation of privacy was violated, finding that he had voluntarily exposed the interior of his home to Romero by allowing him in.

Both of these theories of the Fourth Amendment turn on Wahchumwah – and ultimately society's – expectations. While Wahchumwah may have allowed Agent Romero into his home, his reasonable yet mistaken belief that Romero would not be secretly video recording the interior of his home meant that any consent to Romero's trespass was invalidated, resulting in a Fourth Amendment violation. Similarly, because no one reasonably expects that when they allow someone into their home – even an undercover officer – they will secretly be recording every detail in interior of their home, Wahchumwah's Fourth Amendment rights were violated under *Katz*'s reasonable expectation of privacy test.

Since the panel failed to recognize this serious intrusion into the privacy of the home – "the very core" of the Fourth Amendment's right to be free from unreasonable searches – its decision should be reheard by the *en banc* court. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

ARGUMENT

The Fourth Amendment to the United States Constitution states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated." U.S. CONST. AMEND. IV. There are two ways a "search" occurs under the Fourth Amendment. First, the government "searches" when "it physically occupie[s] private property for the purpose of obtaining information." *Jones*, 132 S. Ct. at 949 (2012). Second, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Under either test, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980).

A. The Panel Opinion Failed To Analyze the Home Video Surveillance Under the Trespass Theory to the Fourth Amendment.

In analyzing the home video surveillance, the panel focused only on Wahchumwah's reasonable expectation of privacy. *See United States v. Wahchumwah*, --- F.3d ----, 2012 WL 5951624, *2 (9th Cir. 2012). It failed to consider whether there was a "search" under the trespass theory to the Fourth Amendment. This Court recently explained that following the Supreme Court's decision in *Katz*, there was "some confusion about the interaction between the reasonable expectation of privacy standard and the traditional pre-*Katz* interpretation of the Fourth Amendment." *Perea-Rey*, 680 F.3d at 1185 (quotations omitted). But the Supreme Court's decision in *Jones* made clear that

"the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." *Jones*, 132 S. Ct. at 952; *see also Perea-Rey*, 680 F.3d at 1186.

Thus, the panel erred when it failed to consider the trespass theory of the Fourth Amendment in analyzing the home video surveillance. Had it looked at the surveillance through the lens of trespass, it would have been clear the surveillance violated the Fourth Amendment.

1. Despite the Fact Wahchumwah Let Agent Romero Into His House, an Unconsented Trespass Occurred Because Wachumwah Was Mistaken on the Nature and Quality of the Intrusion.

The Supreme Court has made clear when the government physically occupies private property for the purpose of obtaining information, there is "no doubt" that this trespass is a "search" under the Fourth Amendment. *Jones*, 132 S. Ct. at 949. In rejecting Wahchumwah's Fourth Amendment arguments, the panel focused on the fact that "Wahchumwah invited Romero inside his home, voluntarily exposing its contents to Romero." *Wahchumwah*, 2012 WL 5951624 at *3. The government would likely make the same argument regarding the trespass theory; specifically there was no trespass because Wahchumwah allowed Romero – and his hidden video camera – into his home. But this is wrong.

Generally, a "defendant is not liable for trespass if the plaintiff authorized his entry." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1073 (9th Cir. 2004) (citing

Prosser and Keeton on the Law of Torts § 13, at 70 (W. Page Keeton ed., 5th ed. 1984). Yet, consent is ineffective "if the defendant knew, or probably if he ought to have known in the exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality of the invasion intended." *Theofel*, 359 F.3d at 1073 (quotations omitted). The Restatement (Second) of Torts explains that if consent is obtained "by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm." Restatement (Second) of Torts § 892B(2).

In order to invalidate consent, the mistake "must extend to the essential character of the act itself, which is to say that which makes it harmful or offensive, rather than to some collateral matter which merely operates as an inducement." *Theofel*, 359 F.3d at 1073 (quoting *Prosser & Keeton* § 18, at 120) (quotations omitted). In essence, it must be a "substantial mistake" that goes to the "nature of the invasion or the extent of the harm." *Theofel*, 359 F.3d at 1073 (quoting Restatement (Second) of Torts § 892B(2) cmt. g) (quotations omitted).

Here, Wahchumwah's decision to allow Romero to enter his house was based on a "substantial mistake" that went to the "nature of the invasion or the extent of the harm." *Id*. Wahchumwah was unaware that Romero planned to

video record the inside of his home when he let him in. While the panel noted that the recording "reveal[ed] no more than what was already visible to the agent," this fundamentally undermines the true nature of video surveillance. *Wahchumwah*, 2012 WL 5951624 at *3.

While someone who enters a home for a brief period of time may casually take mental note of some things they observe – whether a house is clean or dirty, if they have a big TV or a small one – video surveillance can capture everything in far greater detail. This allows the government to rewind over and again in order to study every little detail, like what items are laid about in the home – books on a shelf, mail or magazines on a coffee table, images open on a computer screen, pictures hanging on the wall – which can ultimately reveal details about a person's religion, politics, and associations.

Ultimately the Fourth Amendment comes down to expectations or foreseeability in both the trespass and reasonable expectation of privacy tests. And while a person may expect that something he tells another or a room he shows someone in a limited sense may be disclosed to the government, a reasonable person would not expect a person to secretly video record every nook and cranny of the house. As this Court noted long ago

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be

> transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select.

Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971). In short, when a person invites another person in to their home, it is reasonable for the homeowner to expect the visitor is not secretly video recording the interior of the home.

This expectation does not change merely because the visitor is an undercover government agent. It is true that the Supreme Court has ruled that the Fourth Amendment does not protect "'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *United States v. White*, 401 U.S. 745, 749 (1971) (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)). But at the same time, the Supreme Court has also placed limits on the government's ability to search consistent with the Fourth Amendment's rationale in eliminating "general searches." As a result, the "the purposes justifying a police search strictly limit the permissible extent of the search." *Maryland v. Garrison*, 480 U.S. 79, 87 (1987).

That means that although undercover government agents "may accept an invitation to do [criminal] business and may enter upon the premises for the very purposes contemplated by the occupant," that "does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials." *Lewis*

v. United States, 385 U.S. 206, 211 (1966). After all, "[t]here would be nothing left of the Fourth Amendment right to privacy if anything that a hypothetical government informant might reveal is stripped of constitutional protection." *United States v. Karo*, 468 U.S. 705, 716 n. 4 (1984); *see also Wilson v. Layne*, 526 U.S. 603, 611 (1999) (violation of Fourth Amendment for police to bring media members along while executing a search warrant).

This Court recognized as much in *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000) when it noted its decision approving of the warrantless installation of a video camera and surveillance in a hotel room used for drug transactions was not meant "to imply that video surveillance is justifiable whenever an informant is present." 222 F.3d at 604 n. 5. This Court suspected that an "informant's presence and consent is insufficient to justify the warrantless installation of a hidden video camera in a suspect's home," though it has never fully answered that question. *Id.*; *see also United States v. Shryock*, 342 F.3d 948, 979 n. 5 (9th Cir. 2003) (*Nerber* "not addressing whether an informant's consent is sufficient to allow warrantless videotaping in all circumstances.").

The panel below dismissed *Nerber* by noting that case involved the *installation* of the camera, which "could continuously record activities in the suspect's home without the presence of an agent to personally observe what the camera shows." *Wahchumwah*, 2012 WL 5951624 at *3 (citing *Nerber*, 222 F.3d

at 599). In contrast, "Agent Romero did not install any video cameras in Wahchumwah's home and only wore the audio-video device on his own clothing during his visit." *Wahchumwah*, 2012 WL 5951624 at *3 (citing *Nerber*, 222 F.3d at 599). But these are distinctions without a difference.

Whether installed in the home physically or attached to Agent Romero's clothing, the camera had the ability to peer into areas not voluntarily exposed by Wahchumwah. As to whether Wahchumwah "voluntarily" exposed the interior of his home to Romero by allowing him to enter the house, Romero could have entered into areas of the house unaccompanied with Wahchumwah, like a bathroom, or could have quickly peered into a side room, capturing for time immemorial with the video camera what his naked eye may not have been able to capture as quickly.

Wahchumwah's reasonable but ultimately mistaken belief that a person would not enter his home for the purpose of video recording its contents means that any "consent" given by Wahchumwah was invalid, creating a warrantless trespass, and in turn, a Fourth Amendment violation. Because the panel failed to even consider the trespass theory to the Fourth Amendment, the panel decision must be reheard *en banc*.

B. People Have A Reasonable Expectation of Privacy That Agents Will Not Enter Their Home With Hidden Video Cameras.

Turning to the reasonable expectation of privacy test, the panel found Wachumwah "forfeited his expectation of privacy as to those areas that were "'knowingly expose[d] to' Agent Romero" and which "reveal[ed] no more than what was already visible to the agent." *Wahchumwah*, 2012 WL 5951624 at *3 (quoting *Katz,* 389 U.S. at 351). But Wahchumwah did not "knowingly expose" the level of detail a video camera could capture to Agent Romero.

The D.C. Circuit considered and rejected a similar argument when it found that 28 days of constant, warrantless GPS surveillance violated the Fourth Amendment. *See United States v. Maynard*, 615 F.3d 544, 556 (D.C. Cir. 2010). It did this despite the Supreme Court's prior holding in *United States v. Knotts*, 460 U.S. 276 (1983) finding that a person had no reasonable expectation of privacy in movements he exposed to the public while driving on public streets. *Id.* To the D.C. Circuit, *Knotts* did not approve of continuous GPS surveillance because even if individual movements at a particular time are exposed to the public, aggregating those movements "reveals more – sometimes a great deal more – than does the sum of its parts," including "what a person does repeatedly, what he does not do, and what he does ensemble." *Maynard*, 615 F.3d at 558, 562. The key inquiry for whether or not information is exposed to the public is not whether another person can possibly discover the information, but whether the defendant reasonably

expects that another person might *actually* discover the information. *Id*. at 559. While portions of a person's daily travels are often exposed to some people, pervasive and invasive surveillance has an entirely different character. The result was an "unknown type of intrusion into an ordinarily and hitherto private enclave." *Id*. at 565.

The Supreme Court affirmed the *Maynard* decision in *Jones*, albeit by finding the installation of the GPS device was a trespass for the purpose of obtaining information. *Jones*, 132 S. Ct. at 949. Nonetheless, in concurring opinions by Justices Sotomayor and Alito, a majority of the justices echoed the D.C. Circuit's concern with the capabilities of technology to cheaply and efficiently aggregate reams of data to create new and unknown intrusions into previously private places. *See Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) and 963 (Alito, J., concurring in the judgment).

To Justice Sotomayor, technology advances that make "available at a relatively low cost such a substantial quantum of intimate information about any person" to the Government "may alter the relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (citations and quotations omitted). The fact that the government could obtain similar information through "lawful conventional surveillance techniques" rather than new technologies was not "dispositive" of the

Fourth Amendment issue. *Id.*; *see also Kyllo*, 533 U.S. at 35, n. 2 (leaving open possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy."). In short, *Maynard* and the concurring opinions in *Jones* make clear that a person can still maintain a reasonable expectation of privacy in things exposed to others when society would deem it unlikely that anything more than small, discrete things would be observed.

Under that rubric, Wahchumwah certainly had a reasonable expectation of privacy that the interior of his home would not be videotaped without his knowledge. The likelihood that someone will enter into another person's house with a tiny video camera installed on their person and record everything they observe is "effectively nil." *Maynard*, 615 F.3d at 558.[1] As explained above, video surveillance is capable of capturing an enormous amount of detailed information, much more than what Agent Romero's eyes could capture, and his mind could remember. Like the public movements in *Jones*, this information is

[1] In fact, thirteen states have enacted laws that prohibit and criminalize secret video recordings in a private place. *See* Ala. Code §§ 13A-11-31; Ark. Code Ann. § 5-16-101; Cal. Penal Code § 632, *see also People v. Gibbons*, 263 Cal. Rptr. 905 (Cal. Ct. App. 1989); *but see Wilkins v. NBC, Inc.*, 84 Cal. Rptr. 2d 329 (Cal. Ct. App. 1999), Del. Code Ann. tit. 11, § 1335; Ga. Code Ann. § 16-11-62; Haw. Rev. Stat. § 711-1111; Kan. Stat. Ann. § 21-6101, *see also State v. Martin*, 658 P.2d 1024 (Kan. 1983), *overruled on other grounds State v. Berreth*, 273 P.3d 752 (Kan. 2012); Me. Rev. Stat. Ann. tit. 17-A, § 511; Mich. Comp. Laws Ann. § 750.539d; Minn. Stat. § 609.746; N.H. Rev. Stat. Ann. § 644:9; S.D. Codified Laws § 22-21-1; Utah Code Ann. §§ 76-9-402, 76-9-702.7.

visible to the naked eye, and a person who invites someone into their home, could reasonably expect the visitor to casually observe a discrete amount of information. But like the surveillance at *Jones*, a reasonable person would not expect this information to be collected and aggregated wholesale, particularly considering that a video camera does not forget minute details the way the human mind does.

The surveillance here is all the more intrusive when it is remembered it took place inside the home, a far more private place than the public roads at issue in *Jones*. As these minor details are aggregated, the government is able to piece together a more complete portrait of who a person is; their reading habits, what they eat, who calls them on the telephone and at what time.

The panel, however, discounted *Jones* by noting that compared to the constant 28-day surveillance at issue in that case, "the recording by Agent Romero lasted for only a few hours and for no longer than Romero remained an invited guest in Wahchumwah's home." *Wahchumwah*, 2012 WL 5951624 at *3. But determining whether a search is "reasonable" under the Fourth Amendment is not dependent on the discrete length of the surveillance – whether it was a few hours or 28 days – but rather on whether the "search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967)); *see also Florida v. Royer*, 460 U.S. 491, 500 (1983)

(Fourth Amendment protections are "not diluted in those situations where it has been determined that legitimate law enforcement interests justify a warrantless search: the search must be limited in scope to that which is justified by the particular purposes served by the exception."). And while the surveillance here was physically shorter than the surveillance in *Jones*, it was far more intrusive and clearly far beyond the scope of the circumstances the government would claim justified the interference in the first place.

As explained above, the video recording provided in high definition the details of Wahchumwah's home at a level of detail greater than the human eye because video cameras are not hindered with the human mind's tendency to forget. Even though it lasted a few hours, that time provided far more detail than the GPS evidence at issue in *Jones*. After all, the reason the government needed to surveil Jones for such an extended period of time was to learn his pattern of movements, which necessarily required extensive monitoring. With the video surveillance, the sensitive, personal information about Wahchumwah could be captured much more quickly, and without needing to observe Wahchumwah for an extended period of time.

Moreover, the video surveillance was not reasonably related in scope to the circumstances justifying Romero's visit to Wahchumwah's house in the first instance: to obtain evidence of Wahchumwah's illegal feather and pelt sales. After

all, Romero had already bought eagle wings from Wahchumwah in the past, and had communicated with him about buying more pelts and feathers. *See Wahchumwah*, 2012 WL 5951624, at *1. With every step in Wahchumwah's home – looking into rooms, books on shelf, mail on a table, pictures on a wall – Agent Romero captured more than just information about illegal pelt and feather sales. In essence, he became a walking general search, electronically rummaging at will through Wahchumwah's home. This went beyond the scope of the search, violating Wahchumwah's reasonable expectation of privacy and the Fourth Amendment.

CONCLUSION

For much of the last fifty years, the major constraint on the government's use of surveillance was practical; it cost precious time and resources to engage in invasive and pervasive surveillance. *See Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) and 963 (Alito, J., concurring in the judgment). But with the breakthrough in cheap and small electronic devices, the government's ability to easily surreptitiously record the intimate details of an individual and the contents of their house will only lead to the routine use of this technology. This case epitomizes that phenomenon. In the past, the use of invasive video surveillance was reserved for drug dealers, *Nerber*, 222 F.3d at 599 and money launderers, *United States v. Koyomejian*, 970 F.2d 536, 537 (9th Cir. 1992) (*en banc*), or cases

involving murder, *Shryock*, 342 F.3d at 959-60 and sedition, *United States v. Torres*, 751 F.2d 875, 876 (7th Cir. 1984). Today, Fish and Wildlife agents are using this technology on individuals' accused of non-violent misdemeanors involving the sale of eagle feathers. The panel's decision will only empower the government to more frequently use these technological advances without judicial oversight.

Thus, in order to safeguard privacy, the *en banc* court should rehear and reverse the panel decision.

Dated: February 4, 2013

By: */s/ Hanni M. Fakhoury*

Hanni M. Fakhoury
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
hanni@eff.org

Counsel for Amicus Curiae
Electronic Frontier Foundation

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Curiae In Support Of Defendant-Appellant's Petition for Rehearing En Banc complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,935 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 4, 2013

By: */s/ Hanni M. Fakhoury*__

Hanni M. Fakhoury
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
hanni@eff.org

Counsel for Amicus Curiae
Electronic Frontier Foundation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 4, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 4, 2013

By: */s/ Hanni M. Fakhoury*__

Hanni M. Fakhoury
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
hanni@eff.org

Counsel for Amicus Curiae
Electronic Frontier Foundation