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

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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.

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STATEMENT OF INTEREST

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).

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 Counsel for appellants nor appellees oppose the filing of this brief.

INTRODUCTION

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 United States v. Jones*, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring) and 963 (Alito, J., concurring in the judgment). But with the breakthrough in cheap and small electronic devices, courts are beginning to grapple with the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

This case presents an opportunity for this Court to reexamine the government's ability to engage in secret video surveillance of a person's home, "the very core" of the Fourth Amendment's right to be free from unreasonable government searches. *Silverman v. United States*, 365 U.S. 505, 511 (1961). Judge Kozinski has cautioned, "video surveillance can result in extraordinarily serious intrusions into personal privacy." *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (*en banc*) (Kozinski, J., concurring in the judgment). This Court has repeatedly said there are limits to the government's ability to surreptitiously video record, including the concern that it has never "impl[ied] that video surveillance is justifiable whenever an informant is present." *United States v. Nerber*, 222 F.3d 597, 604 n. 5 (9th Cir. 2000); *see also Koyomejian*, 970 F.2d at 542.

For the reasons to follow, this Court should reverse the district court's denial of the suppression motion.

ARGUMENT

A. The Fourth Amendment Applies to Video Surveillance.

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 is when the "Government physically occupie[s] private property for the purpose of obtaining information." *Jones*, 132 S.Ct. at 949. 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).

This Court, sitting *en banc*, has already determined that video surveillance "is of course subject to the Fourth Amendment." *Koyomejian*, 970 F.2d at 541 (citing *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984)); *see also United States v. Taketa*, 923 F.2d 665, 675 (9th Cir. 1991) (covert government "videotaping was a continuous search of anyone who entered the camera's field of vision.") (citing *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987)). In *Koyomejian*, the government installed silent closed circuit televisions in

a business suspected of money laundering drug sale proceeds. *Koyomejian*, 970 F.2d at 537-38. Noting that such silent video surveillance was not prohibited under the Wiretap Act, 18 U.S.C. §§ 2510-2522, or the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801-1811, it did find, however, that the Fourth Amendment regulated such surveillance. *Id.* at 541.

Looking to the Wiretap Act "for guidance in implementing the [F]ourth [A]mendment in an area that [the Wiretap Act] does not specifically cover," this Court, following other Circuit courts, explained the "Constitutional requirements for surveillance conducted for domestic purposes." *Id*. at 541-42 (quoting *United States v. Mesa-Rincon*, 911 F.2d 1433, 1438 (10th Cir. 1990)).

> (1) the judge issuing the warrant must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(3)(c); (2) the warrant must contain "a particular description of the type of [activity] sought to be [videotaped], and a statement of the particular offense to which it relates," *id.* § 2518(4)(c); (3) the warrant must not allow the period of [surveillance] to be "longer than is necessary to achieve the objective of the authorization, [ ]or in any event longer than thirty days" (though extensions are possible), *id.* § 2518(5); and (4) the warrant must require that the [surveillance] "be conducted in such a way as to minimize the [videotaping] of [activity] not otherwise subject to [surveillance] ...," *id.*

Koyomejian, 970 F.2d at 542 (quoting *Cuevas-Sanchez*, 821 F.2d at 252 and citing *Torres,* 751 F.2d at 885; *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986); *Mesa-Rincon*, 911 F.2d at 1437). Additionally, the "ordinary requirement of a finding of probable cause" was necessary as well. *Id.* Concurring, Judge Kozinski

noted if "such intrusions are ever permissible, they must be justified by an *extraordinary* showing of need." *Koyomejian*, 970 F.2d at 551 (Kozinski, J., concurring in the judgment) (emphasis added).

It is clear that the government failed to live up to this exacting standard.

B. Society Reasonably Expects to be Free From Invasive Secret Video Surveillance in the Home.

The "Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590 (1980). Time and again, this Court has noted the "home is perhaps the most sacrosanct domain" and "there, Fourth Amendment interests are at their strongest." *LaLonde v. County of Riverside*, 204 F.3d 947, 954 (9th Cir. 2000) (citing *United States v. Winsor*, 846 F.2d 1569, 1577-78 (9th Cir.1988) (*en banc*)). Given this strong privacy interest in one's home, it is not controversial to say that society recognizes as reasonable an expectation of privacy against covert home video surveillance.

One of the cases relied on by this Court in *Koyomejian* explains why. In *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987), government agents installed a video camera on an electricity pole outside of a suspected drug dealer's house that allowed them to video record the activities inside the defendant's backyard. *Cuevas-Sanchez*, 821 F.2d at 249-50. Commenting that "indiscriminate video surveillance raises the spectre of the Orwellian state," the Fifth Circuit found the surveillance "not minimal" because it was not a singular "glance over the fence

by a passer-by." *Id.* at 251. Rather the video camera allowed the government to "record all activity" in the defendant's backyard. *Id.* As a result, the Fifth Circuit concluded society would find reasonable an "expectation to be free from this type of video surveillance." *Id.* If the Fifth Circuit found that it would be reasonable to be free from video surveillance in a person's backyard, an area at least partially visible to the public, there is an even greater privacy right to be free from video surveillance in the interior of a person's house, which is typically not visible to the public.

Another case relied on by this Court in *Koyomejian* presaged the situation the Court confronts now. In *Torres*, 751 F.2d at 875, the Seventh Circuit was deciding the constitutionality of covert government video surveillance in a sedition investigation. *Id.* at 876, 882. Although it declined to find such surveillance *per se* unconstitutional, it noted that "in dealing with so intrusive a technique as television surveillance, other methods of control as well, such as *banning the technique outright from use in the home in connection with minor crimes*, will be required, in order to strike a proper balance between public safety and personal privacy." *Id.* (emphasis added).

That is precisely what happened here. The use of covert home video surveillance for the purpose of investigating minor, non-violent crimes – the majority of which were misdemeanors – is the type of practice that must be

controlled by courts. Video surveillance in the home is particularly invasive because a video camera is able to capture a greater level of detail about a person's life than Agent Romero's eyes could. In the home, "all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37-38. Items 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 – can reveal details about a person's religion, politics, and associations. And 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, a person's reading habits, whether they drink alcohol or not – video surveillance can capture all of it in far greater detail, allowing the government to rewind over and again in order to study every little detail.

The fact that video surveillance can be extraordinarily invasive is why the standard in *Koyomejian* for issuance of a warrant authorizing video surveillance is greater than the standard applicable for a traditional search warrant permitting the physical search of a place. Here, where the government has failed to meet the *Koyomejian* standard, warrantless video surveillance should not be permitted.

C. The Fact that Mr. Wachumwah May Have Exposed His Home To Agent Romero Does Not Diminish His Expectation of Privacy.

The fact that Mr. Wahchumwah may have consented to agent Romero entering his home does not change the conclusion that he had a reasonable

expectation of privacy to be free from video surveillance. In *United States v. Nerber*, 222 F.3d at 597, this Court authorized the limited use of warrantless video surveillance. In *Nerber*, FBI agents rented a room in a motel and installed secret video cameras without a warrant to record a drug transaction between a government informant and the defendants. *Nerber*, 222 F.3d at 599. Even after the informants left the motel room, the government continued to record and monitor the activities of the defendants until they left the room three hours later. *Id.* The district court found no constitutional violation with the surveillance that occurred while the informants were in the room, but suppressed the surveillance that occurred after the informants left. *Id.*

This Court affirmed, finding that with regard to the surveillance while the informant was in the room, the defendant's expectations of privacy were "substantially diminished because of *where they were*." *Id.* at 604 (emphasis added). Because the defendants did not live at the hotel or were overnight guests, were only there "solely to conduct a business transaction at the invitation of the occupants," no Fourth Amendment rights were implicated when the informants were present in the room. *Id.* But critically, the Court in *Nerber* noted:

> [w]e do not intend to imply that video surveillance is justifiable whenever an informant is present. For example, we suspect an informant's presence and consent is *insufficient* to justify the warrantless installation of a hidden video camera in a suspect's home.

Id. at n. 5 (emphasis added); *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."). Following this comment in *Nerber*, this Court has yet to decide "the novel issue" of whether a person has an objectively reasonable expectation of privacy when an informant or undercover government agent consents to a video recording of the defendant's residence. *Shryock*, 342 F.3d at 979.[1] This Case presents such an opportunity. And expanding on *Nerber*, it is clear Agent Romero's presence and consent should not be enough to justify the warrantless search of Mr. Wahchumwah's home, where his Fourth Amendment rights are stronger than in another person's motel room. *See LaLonde*, 204 F.3d at 954.

Similar to the situation here, in *United States v. Jones*, 132 S.Ct. 945 (2012), the government also argued that a person has no reasonable expectation of privacy in things exposed to another person. In *Jones*, federal agents installed a GPS device without a search warrant underneath the car of a suspected drug dealer. *Jones*, 132

[1] *Shryock* indicated that *Nerber* left open the question of "whether defendants had an objectively reasonable expectation of privacy where an informant consented to the video recording, but the hotel room was rented by one of the defendants." *Shryock*, 342 F.3d at 979. The Fourth Amendment "is not limited to one's home, but also extends to such places as hotel or motel rooms." *United States v. Young*, 573 F.3d 711, 715 (9th Cir. 2009) (quoting *United States v. Cormier*, 220 F.3d 1103, 1108–09 (9th Cir. 2000) quotations omitted). So to the extent *Nerber* was concerned with hotel rooms, it expressly left open the issue of the reasonable expectation of privacy of not only a person who rents a hotel room, but also a person's residence.

S.Ct. at 948. Agents tracked Jones' public movements for 28 days throughout the District of Columbia and Maryland. *Id.* Ultimately, Jones was arrested and convicted of conspiracy to distribute drugs, and sentenced to life in prison. *Id.* at 948-49. Defending the search on appeal, the government argued that *United States v. Knotts*, 460 U.S. 276 (1983) held that a person had no reasonable expectation of privacy in movements he exposed to the public while driving on public streets. *United States v. Maynard*, 615 F.3d 544, 556 (D.C. Cir. 2010).[2]

In rejecting this argument, the D.C. Circuit noted that *Knotts* did not contemplate the prolonged visual surveillance enabled by a GPS device. *Id. Knotts* was concerned with "movements during a discrete journey." *Maynard*, 615 F.3d at 556 (citing *Knotts*, 460 U.S. at 283). But the GPS device attached to Jones' car revealed much more than his movements during a "discrete journey" because "the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *Maynard*, 615 F.3d at 558. Although the Supreme Court affirmed the D.C. Circuit on different grounds, finding the warrantless trespass onto Jones' property for the purpose of obtaining information for a criminal investigation

[2] Maynard was Jones' codefendant and the D.C. Circuit consolidated their cases on appeal. *Maynard*, 615 F.3d at 548. The issue regarding the GPS applied only to Jones, and that was the sole ground of reversal by the D.C. Circuit. *Id.* at 568. Because it was the government that sought *certiorari*, the case became *United States v. Jones* in the Supreme Court. *See United States v. Jones*, 131 S.Ct. 3064 (2011) (granting certiorari).

constituted a "search" under the Fourth Amendment, the D.C. Circuit's observation is astute. *Jones*, 132 S.Ct. at 954.

Like constant monitoring of a person's public movements, 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. In fact, thirteen states have enacted laws that prohibit and criminalize secret video recordings in a private place.[3] In short, the question left open in *Nerber* was answered by the decision in *Maynard*: a person can still maintain a reasonable expectation of privacy in things exposed to the public when society would deem it unlikely that more than small discrete things would be observed.

Thus, the presence and consent of Agent Romero is insufficient alone to justify the warrantless video surveillance of Mr. Wahchumwah's house.

[3] *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*, --- P.3d ----, 2012 WL 1151824 (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.

D. Just Because Agent Romero Could Have Testified to Some of the Observations He Recorded, the Use of Invasive Surveillance Technology Can Nonetheless Violate a Reasonable Expectation of Privacy When Aggregated.

In denying Mr. Wahchumwah's motion to suppress, the district court cited *United States v. White*, 401 U.S. 745 (1971) and ruled that since Agent Romero could have testified to the events in person, capturing them on video was not a violation of the Fourth Amendment. *See* CR 107 at 6.[4] This slippery slope argument, which fails to take into account the great changes in law enforcement investigation technology has enabled, should be rejected.

Again, *Maynard* and *Jones* are instructive. In finding that *Knotts* did not control the situation of 28 days worth of constant GPS surveillance, the D.C. Circuit noted that 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 556, 563. Technological advances that allowed for the aggregate, wholesale collection of information in a way otherwise impractical by physical means, created an "unknown type of intrusion into an ordinarily and hitherto private enclave." *Id.* at 565.

[4] Consistent with Appellant's Opening Brief, "CR" refers to the district court clerk's record.

The concurring opinions of Justices Sotomayor and Alito in *Jones* echoed the D.C. Circuit's concern with the capabilities of technology to cheaply and efficiently aggregate reams of data. *See Jones*, 132 S.Ct. at 956 (Sotomayor, J., concurring) and 963 (Alito, J., concurring in the judgment). To Justice Sotomayor, technology advances such as GPS 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 omitted). And she was skeptical that people reasonably expected their movements to be recorded in a wholesale, aggregate manner. *Id.*

Most critically, she did "not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques." *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."). Justice Alito, too, was concerned that the "constant monitoring" of Jones' car "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance" and noted that "only an investigation of *unusual importance* could have justified such an expenditure of law enforcement resources." *Jones*, 132 S.Ct. at 964-65 (emphasis added).

Turning to the case before this Court, when considering the decision in *Maynard*, and the comments of Justices Sotomayor and Alito in *Jones*, it becomes clear that the district court's conclusion that the fact Agent Romero could have written down everything he had observed is not "dispositive" in determining whether Mr. Wahchumwah had a reasonable expectation of privacy in being free from covert video surveillance. *See Jones*, 132 S.Ct. at 956 (Sotomayor, J., concurring).

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 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. This Court has already acknowledged this fact, noting in the context of installation of a video camera in an office, "the silent, unblinking lens of the camera was intrusive in a way that no temporary search of the office could have been." *Taketa*, 923 F.2d at 677. 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. And while this Court's previous cases on the issue of video surveillance all concerned the physical installation of video cameras, technology has advance to the point where physical installation is no longer necessary and Fish and Wildlife Agents can carry video cameras hidden on their clothes.

Thus, for the district court to rely on a forty year old Supreme Court case to claim that there is no reasonable expectation of privacy simply because Agent Romero could write certain details down, is to ignore the march of technological progress in those forty years. *See* CR 107 at 6 (citing *White*, 401 U.S. at 745). After all, if Agent Romero's observations were sufficient, then there would be no need to use secret video suveillance anyway.

The district court's conclusion that there was no reasonable expectation of privacy here was error, and this Court should reverse.

E. The Warrantless Search Violated the Fourth Amendment.

Having established that a "search" occurred within the meaning of the Fourth Amendment, the final question becomes whether it was "reasonable."

"With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. The government bears the burden of proving that a "specifically established exception to the warrant requirement" applies. *United States v. Rodgers*, 656 F.3d 1023, 1028 n. 5 (9th Cir. 2011) (citing *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (citations and brackets omitted)).

Before the district court, the government never argued an "established exception" to the warrant requirement to justifying the search. *See* CR 76. And it is not the Court's "role to engineer a path for the Government to meet that burden." *Rodgers*, 656 F.3d at 1028 n. 5. Without either a warrant or an "established exception" to this requirement, the video recorded search of the house was unconstitutional, and reversal is necessary.

F. At a Minimum, Remand is Necessary Because the District Court Did Not Consider Whether a Search Occurred Under the Fourth Amendment's Trespass Theory.

The district court's decision was issued before the Supreme Court's decision in *Jones* reintroduced the trespass theory of the Fourth Amendment, and thus the district court did not consider the issue under that theory. For that reason, remand is necessary.

Prior to the Supreme Court's opinion in *Katz*, the test for determining whether government conduct violated the Fourth Amendment was tied to the law

of trespass. For example, in *Olmstead v. United States*, 277 U.S. 438 (1928), the Supreme Court held that a wiretap installed on public telephone wires did not constitute a search under the Fourth Amendment because "[t]here was no entry of the houses or offices of the defendants." *Olmstead*, 277 U.S. at 464.

Almost forty years later, the Supreme Court ruled in *Katz* "the Fourth Amendment protects people, not places," and introduced the well-known reasonable expectation of privacy test. *Katz*, 389 U.S. at 351. For another forty years, the *Katz* reasonable expectation of privacy test was seen as the exclusive test for determining whether a Fourth Amendment "search" occurred.

But Justice Scalia's majority opinion in *Jones* makes clear "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 (emphasis in original). In other words, while "property rights are not the sole measure of Fourth Amendment violations," anymore, the *Katz* reasonable expectation of privacy test did not "snuf[f] out the previously recognized protection for property." *Soldal v. Cook County*, 506 U.S. 64 (1992). Under the trespass theory, the Supreme Court held the agents violated Jones' Fourth Amendment rights when they encroached on his personal property – his car – to install a GPS device for the purpose of obtaining information against him.

The district court did not have the benefit of the *Jones* decision when it analyzed Agent Romero's entrance into Mr. Wahchumwah's house for the purpose of obtaining information. At a minimum, remand is necessary for the district court to determine in the first instance, whether a Fourth Amendment "search" occurred under the trespass theory.

CONCLUSION

At first blush, the facts of this case seem trivial, involving a two-hour surveillance video made during the investigation of a minor, non-violent crime. But its triviality underscores the problem: the ability of the government to cheaply and easily surreptitiously record the intimate details of an individual and the contents of their house during the investigation of a minor crime. In the past, the use of this invasive technology was reserved for drug dealers, *Nerber*, 222 F.3d at 599 and money launderers, *Koyomejian*, 970 F.2d at 537, or cases involving murder, *Shryock*, 342 F.3d at 959-60 and sedition, *Torres*, 751 F.2d at 876. Today, Fish and Wildlife agents are using this invasive technology on individuals accused of non-violent misdemeanors. Advances in technology will make the government's ability to secretly record the intimate details of a person's home – and essentially their life – cheaper, easier, and routine.

As one judge of this court noted in discussing the erosion of Fourth Amendment protections in a different context, the "time to put the cork back in the

brass bottle is now—before the genie escapes." *United States v. Kincade*, 379 F.3d 813, 875 (9th Cir. 2004) (*en banc*) (Kozinski, J., dissenting). The district court's decision denying the motion to suppress should be reversed.

Dated: May 1, 2012

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**CERTIFICATE OF COMPLIANCE
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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 complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,391 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: May 1, 2012

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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 May 1, 2012.

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.

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