# 08-30385

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

– against –

JUAN PINEDA-MORENO,

*Defendant-Appellant.*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
CASE NO. 1:07-CR-30036-PA-1

## BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ACLU OF OREGON SUPPORTING DEFENDANT-APPELLANT AND URGING REVERSAL

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## STATEMENT PURSUANT TO FRAP 29(C)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amici Curiae the American Civil Liberties Union and ACLU of Oregon (collectively "Amici") state that they are non-profit corporations; that none of Amici has any parent corporations; and that no publicly held company owns any stock in any of Amici.

/s/ Lisa Hill Fenning
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## INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union Foundation of Oregon, Inc., is the ACLU's Oregon affiliate. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as amicus curiae, including in numerous cases involving the Fourth Amendment. In particular, the ACLU and its members have long been concerned about the impact of new technologies on the constitutional right to privacy. The ACLU filed an amicus brief in *United States v. Jones*, 132 S. Ct. 945 (2012), the decision that prompted the Supreme Court to remand this case for further consideration. It also filed an amicus brief in *In the Matter of the Application of the United States of America for Historical Cell Site Data*, Case No. 11-20884 (5th Cir. appeal docketed Dec. 14, 2011), which addressed the applicability of *Jones* to the related context of cell phone tracking.

# ARGUMENT

## A. A FOURTH AMENDMENT SEARCH OCCURRED

In *United States v. Jones*, 132 S. Ct. 945, 954 (2012), the Supreme Court held that a Fourth Amendment search occurred when the government placed a GPS tracking device on the defendant's car and monitored his whereabouts nonstop for 28 days. A majority of the Justices also stated that "the use of longer term GPS monitoring . . . impinges on expectations of privacy" in the location data downloaded from that tracker. *Id*. at 955 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring). As Justice Alito explained, "[s]ociety's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalog every single movement of an individual's car, for a very long period." *Id.* at 964.

## B. THE WARRANTLESS GPS SURVEILLANCE OF DEFENDANT VIOLATED THE FOURTH AMENDMENT

"Ordinarily, the reasonableness of a search depends on governmental compliance with the Warrant Clause . . . ." *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004) (en banc). Thus, the Supreme Court has repeatedly reminded that:

> Our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

*Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote and internal quotations omitted)). *See also City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) ("warrantless searches are *per se* unreasonable under the Fourth Amendment . . .") (internal quotation omitted); *United States v. Karo*, 468 U.S. 705, 717 (1984) ("Warrantless searches are

quotations omitted); *United States v. Brunick*, 374 Fed. Appx. 714, 715 (9th Cir. 2010) (same).

The function of the warrant clause is to safeguard the rights of the innocent by preventing the state from conducting searches solely in its discretion:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal

language . . . .  It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."  *Id.*

possible danger); *Wyo. v. Houghton*, 526 U.S. 295, 300 (1999) (holding that "contraband goods concealed and illegally transported in an automobile or other

Indeed, the underlying justifications for the automobile exception do not apply to the "24/7" surveillance of a car. Some automobile cases stress that given the extensive regulation of automobiles, car owners have a reduced expectation of privacy. *See*, *e.g.*, *California v. Carney*, 471 U.S. 386, 392 (1985). But a driver's expectation that his vehicle might be inspected on discrete occasions for various regulatory purposes in no way encompasses an expectation that such momentary intrusions might entitle the state to continuously monitor his whereabouts for months on end. Moreover, the possibility that an automobile might move on before it can be searched, *Carroll v. United States*, 267 U.S. 132, 153 (1925), is entirely misplaced in the case of GPS tracking, where the essential point is that the car should move so that the state can monitor its driver's whereabouts. Of course, if there were a true exigency, the police could attach a GPS tracker absent a warrant under the existing exigent circumstances exception, *Kentucky v. King*, 131 S. Ct. 1849, 1854 (2011), but the kind of long term surveillance here is by its very nature wholly inconsistent with an exigency.

### C. THE GPS SEARCH CANNOT BE JUSTIFIED BY ANY *AD HOC* BALANCING TEST

Because the search does not fit any recognized exception to the warrant requirement, the government must urge an entirely new exception to the warrant clause. The government can be expected to argue, as it did in *Jones,* that the Court should apply a "totality of the circumstances" balancing test to uphold its search as

> chooses to track–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) (quotations omitted).

At the same time, the warrant requirement imposes no great burden on the state. In *Jones*, Justice Alito observed that the "police may always seek a warrant." 132 S. Ct. at 964 (Alito, J., concurring). In fact, the police obtained a warrant in *Jones*, although they did not adhere to its requirements. *Id.* at 917. Obtaining a warrant to conduct months of GPS tracking is no more burdensome for the state than the warrant required by the Supreme Court to conduct the phone wiretap in *Katz*, and the expectation of privacy attendant to placing calls on a public phone is no greater than the expectation that the state will not, absent a warrant, monitor a

## CONCLUSION

The four month warrantless surveillance of Defendant's car violated the Fourth Amendment. The judgment of the District Court should be reversed.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, 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.

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.

/s/ Lisa Hill Fenning
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