


IN THE
Supreme Court of the United States



JUAN PINEDA-MORENO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE, INFORMATION SOCIETY
PROJECT AT YALE LAW SCHOOL FELLOWS
NABIHA SYED, ALBERT WONG, DAVID THAW AND
PRISCILLA SMITH IN SUPPORT OF THE PETITION**

PRISCILLA J. SMITH, ESQ.
Counsel of Record
INFORMATION SOCIETY
PROJECT
319 Sterling Place
Brooklyn, New York 11238
(718) 399-9241
priscilla.smith@yale.edu

TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Fundamental Principles of The Fourth Amendment Require Application of the Warrant Requirement to Prevent Abuse of GPS Surveillance Technology.	5
II. Historically, This Court Has Prevented New Surveillance Technologies From Encroaching Fundamental Constitutional Values	11
III. This Court's Ruling in <i>Knotts</i> Does Not Apply to the Use of GPS Surveillance Technology for Prolonged, Automated Surveillance	17
IV. Warrantless Prolonged GPS Surveillance Invades a Reasonable Expectation of Privacy and Will Chill the Exercise of Core Constitutional Rights	19
a. GPS surveillance technology is more intrusive than primitive beeper technology in constitutionally significant ways	20
b. GPS surveillance technology is not in general public use.	22
CONCLUSION	25

INTEREST OF *AMICI CURIAE*¹

Amici are Fellows of the Information Society Project at Yale Law School (ISP),² an intellectual center addressing the implications of new information technologies for law and society. Nabiha Syed is a Marshall Scholar at Oxford University researching comparative freedom of information laws. Syed holds a J.D. from Yale Law School, a B.A. from Johns Hopkins, and is the author of "Replicating Dreams" (Oxford University Press, 2008). Albert Wong is a Ph.D. student in Cell Biology at Yale University, holds a S.M. in Health Sciences and Technology from MIT, and an Honors B.S. from the University of Texas at Arlington. Wong has published multiple peer-reviewed articles in engineering and biology, and is supported by an NIH National Research Service Award. David Thaw is a Ph.D. candidate in Information Management and Systems at Berkeley, holds a J.D. from Berkeley Law, an M.A. in Political Science from Berkeley, and a B.S. (Computer Science) and B.A. (Government) from the University of Maryland. Thaw practiced information privacy law in Washington, D.C., and has published articles and book chapters based on

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, letters indicating the parties' consent to the filing of this *amicus* brief have been submitted to the Clerk. Fellows of the Information Society Project at Yale Law School, Nabiha Syed, Albert Wong, and David Thaw, helped to prepare this brief under the supervision of Priscilla Smith.

² The Fellows participate in this case in their personal capacity; titles are used only for purposes of identification.

his research in information security and spyware. He will join the University of Maryland Computer Science faculty in spring 2011. Priscilla Smith is a Senior Fellow of the ISP, researching reproductive rights and privacy law, with a particular focus on information policy and new technologies. Smith litigated cases concerning constitutional rights to liberty, privacy and freedom of speech for 13 years at the Center for Reproductive Rights, and has published on these issues. She holds a J.D. from Yale Law School and a B.A. from Yale College.

SUMMARY OF ARGUMENT

When used properly, advanced surveillance technologies significantly enhance the ability of law enforcement to maintain order and public safety. However, in an era of rapidly advancing technologies, from thermal imagers to minuscule automated tracking devices, it is critical to ensure that these technologies, especially given their advanced capabilities, are only used “in a manner which will conserve ... the interests and rights of individual citizens,” *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (internal citation omitted), and preserve core Fourth Amendment values. In most cases, “requiring a warrant will have the salutary effect of ensuring that use of [new technology] is not abused.” *See United States v. Karo*, 468 U.S. 705, 717 (1984). In this case, though, the Government argued and the panel below agreed that Global Positioning System (“GPS”) surveillance technology used for prolonged, automated, remote surveillance should be exempt from the warrant requirement.

Almost thirty years ago, this Court specifically

reserved the question at issue here, whether warrants should be required if technology allowed “twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision,” stating “there will be time enough then to determine whether different constitutional principles may be applicable.” *United States v. Knotts*, 460 U.S. 276, 283-94 (1983); *see also Dow Chemical Co. v. United States*, 476 U.S. 227, 237-38 (1986). Since that time, the use of GPS satellite technology for prolonged surveillance has become reality and is proliferating. Without guidance from this Court, federal and state courts struggle to understand the Fourth Amendment implications of this surveillance. Review of its status by this Court can no longer be delayed.³

Prolonged surveillance using GPS technology should be subject to the warrant requirement for two reasons. First, because surveillance with GPS is conducted *not by people* but by minuscule, advanced tracking devices communicating with satellites in orbit, the potential for law enforcement abuse of GPS technology to conduct automated and prolonged surveillance both against individuals as well as groups of individuals is unprecedented. Evidence exists that such abuse is occurring. Where a technology enables invasion of interests at the heart of the Fourth Amendment’s concern -- protection of citizens from arbitrary government intrusions into their private lives -- this Court requires warrants to prevent abuse.

³ *See* Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 445-47 (2007-2008) (hereafter “*Tied Up*”).

Second, prolonged surveillance using GPS technology provides the government with detailed information about an individual's movements and gathering places and allows the storage, analysis, and comparison of that data with data gathered from others, all with minimal involvement of law enforcement officers. The type and scope of information collected by GPS surveillance enables government to monitor a person's political associations, their medical conditions and their amorous interests, in a way that invades their privacy and chills expression of other fundamental rights. *See NAACP v. Alabama*, 357 U.S. 449 (1958) (forced disclosure of names of members of NAACP violated right to freedom of association protected by federal Constitution). It allows surveillance of citizens on a scale that this country has never seen. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing *en banc*) (making comparison to surveillance under a totalitarian regime).

In relying on *Knotts* to exempt the use of GPS technology for prolonged surveillance from the warrant requirement, the lower court ignored this Court's reservation of the question of prolonged surveillance in *Knotts*. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010). It also ignored that the *Knotts* holding is limited to the use of beeper technology as a sense-enhancement of, *not a replacement for*, visual surveillance,⁴ and that this

⁴ *See Knotts*, 460 U.S. at 282 (beepers enhancing visual surveillance authorized without warrant); *compare Karo*, 468 U.S. at 714-15 (warrant required to monitor beeper signals providing information *not* obtainable by visual surveillance).

Court has always required warrants for the use of technologies that replace human senses with technological ones. See *Kyllo*, 533 U.S. at 40; *Karo*, 468 U.S. at 717; *Katz v. United States*, 389 U.S. 347 (1967); *Walter v. United States*, 447 U.S. 649 (1980).

Therefore, the Court should grant the Petition for Certiorari and finally resolve the important question left open in *Knotts* and *Dow Chemical*, as well as the split in the circuits on this issue.⁵ This Court should clarify that while law enforcement may employ advanced GPS tracking devices in their efforts to enhance public safety, use of this technology for prolonged, automated, remote surveillance is subject to the Fourth Amendment's protections of a warrant issued by a neutral arbiter on probable cause.