No. 10-

IN THE

Supreme Court of the United States

JUAN PINEDA-MORENO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
jgreen@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

HARRISON LATTO*
LAW OFFICE OF
HARRISON LATTO
1631 NE Broadway, No. 533
Portland, Oregon 97232
(503) 223-0783
hlatto@easystreet.net

Counsel for Petitioner

* Counsel of Record

November 10, 2010

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that the prolonged monitoring of a vehicle's movements, using Global Positioning System tracking devices, does not constitute a "search" within the meaning of the Fourth Amendment, in conflict with the D.C. Circuit.

2. Whether the Ninth Circuit erred in holding that the secret installation of electronic tracking devices to the underside of a vehicle, while parked within the curtilage of the vehicle owner's home, does not constitute a "search" within the meaning of the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

CONSTITUTIONAL AMENDMENT

STATUTES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Pineda-Moreno respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 591 F.3d 1212 (9th Cir. 2010), is reproduced in the Appendix to this petition ("Pet. App.") at 1a. The order denying the petition for rehearing en banc, and the dissent therefrom, reported at 617 F.3d 1120 (9th. Cir. 2010), is reproduced at Pet. App. 22a. The orders of the District Court for the State of Oregon denying Petitioner's motion to suppress were unpublished, but are reproduced at Pet. App. 11a and 19a.

JURISDICTION

The order of the Court of Appeals denying the petition for rehearing en banc was entered on August 12, 2010. The opinion of the Court of Appeals was entered on January 11, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case presents a critical Fourth Amendment challenge to recent and intrusive law enforcement practices and technologies now in wide-spread use. The case addresses precisely the type of "dragnet" monitoring of personal information that this Court expressly noted, in *Knotts*, would warrant further review. *United States* v. *Knotts*, 460 U.S. 276, 284 (1982) (noting that if "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable"). The circuits are in conflict as are state courts on both Questions Presented.

The Ninth Circuit's opinion also furthers a conflict and considerable confusion over the threshold question of the status of curtilage under the Fourth Amendment. The Ninth Circuit likened the actions of officers crossing onto Petitioner's driveway in the middle of the night in order to install tracking devices to a child retrieving a ball from a neighbor's yard. Pet. App. 6a-7a ("If a neighborhood child had walked up Petitioner's driveway and crawled under his Jeep to retrieve a lost ball or runaway cat, Petitioner would have no grounds to complain."). While the Second and Seventh Circuits, in particular, acknowledge that officers may cross onto the curtilage for official business, the sensible limit in those circuits is that officers must respect the curtilage as neighbors would. Such a limit precludes a middle-of-the-night, stealthy incursion and remains true to this Court's prior holdings regarding the privacy interests in the curtilage of one's home.

Review is warranted.

FACTUAL BACKGROUND

At 4:15 in the morning on August 14, 2007, DEA agents entered Petitioner's property and approached his Jeep Cherokee. While Petitioner slept nearby in his home, these agents attached a GPS surveillance device underneath his Jeep's bumper. Pet. App. 4a (Ninth Circuit Opinion, 1213).

This installation was neither the first nor the last time agents would visit Petitioner's car. From June to September 2007, agents made at least seven late-night trips to his car—including two in Petitioner's driveway, three on the curb outside his home, and one at his work—in order to install a series of GPS devices ranging in size from a bar of soap to a pack of gum. Pet. App. 4a. By using GPS technology, the agents were able to record every detail of Petitioner's movements in his car.

The extensive and prolonged investigation of Petitioner began in May 2007 when a DEA agent became suspicious as he observed that several men, including Petitioner, had purchased a large quantity of Vigoro 21-0-0, a fertilizer that the agent knew was commonly used in marijuana farming. The agent followed the men to their vehicle, a Jeep Grand Cherokee, and noted the license plate number. Petitioner was the vehicle's registered owner.

On June 14, 2007, police followed the men to their residence, which was located in a mobile-home park in the southern Oregon town of Phoenix. Petitioner's residence was a single-wide mobile home with a small yard. A driveway led to an open-sided carport, which was connected by a breezeway to the residence. The driveway was the usual route of access between the public street and the mobile home's front door. The

property was not fenced or gated, and no signs warned against trespassing.

Police later learned that men driving Petitioner's Jeep had made an unusually large purchase of groceries, a hand sprayer, and deer repellant. However, police observed that the mobile-home park did not appear to have a deer problem. The police's suspicion was further aroused after following the men to a store that sold irrigation supplies because the mobile-home park had no irrigation system. Based upon the agents' observations, the DEA opened an investigation, which included the installation of GPS devices onto Petitioner's Jeep to monitor his travels. Pet. App. 12a.

The police used three different devices to track Petitioner's Jeep. Two of the devices used GPS technology; the other one was, in essence, a cellular telephone that used transmissions to and from cell-phone towers. These devices can determine and record their "real-time" location twenty-four hours a day, seven days a week, down to a precise latitude and longitude.[1] The devices record their location during trips on public roads but also on inaccessible private property. The devices enabled police to learn not only the exact locations to which Petitioner traveled over a prolonged period of time, but also the time during which Petitioner's vehicle remained at a particular location.

Using this technology, agents were able to learn the full range of Petitioner's movements during the four

---

1 Additional information and a complete history of GPS technology can be found at the government's "Space-Based Positioning Navigation and Timing" website: http://www.pnt.gov/ (last visited October 24, 2010).

months they employed the devices. Pet. App. 4a. Beginning on July 3, 2007, police on several occasions, and always during the early morning hours (between 2:00 and 5:00 a.m.), either attached one of the devices to Petitioner's vehicle, retrieved it, or changed its batteries. Twice, they did so while the vehicle was parked in the driveway of Petitioner's residence, not in the carport (probably, where another vehicle was parked), but directly behind it, and about five feet from the residence itself. On other occasions, the vehicle was parked on a public street at the time, either in front of the residence or elsewhere.

The DEA agents investigating Petitioner learned that he took two trips at night to remote portions of two national forests. One was near the Madrona Grassy Flats recreation area in California (41'51'29"N, 53'53'0"W), just across the state border. It was a high area with steep terrain on both sides of the road. The other was an "extremely remote" mountainous location, that was served only by unpaved Forest Service roads, located in rural Jackson County in southern Oregon. Pet. App. 12a-13a. During the day police searched both areas, looking for trail heads and marijuana farms, but found neither.

Agents then learned, in early September, that California police had raided a marijuana-growing operation located near the place in California to which Petitioner's vehicle had traveled. California police told the agents that as they were transporting some arrested suspects, one had pointed towards the mountains behind the Grassy Flats area and said that there was an even larger marijuana farm in that area. DEA agents were in the process of raiding several marijuana fields at this time, and several of the growers were in the process of harvesting their

crops. With this information, police concluded that they had sufficient evidence to arrest Petitioner and his associates. After they did so, on September 12, 2007, they requested, and received Petitioner's consent to search his residence, where they found two large garbage bags full of marijuana.

Government prosecutors then relied on the location evidence gathered by the GPS devices to indict Petitioner on charges of conspiracy to manufacture marijuana, and the manufacture of marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(vii), and 21 U.S.C. § 846(a)(1) and (b)(1)(A)(vii). Pet. App. 4a-5a.

PROCEDURAL BACKGROUND

Petitioner and two co-defendants were each charged with one count of conspiracy to manufacture, and with another count of manufacturing, more than 1,000 marijuana plants. Petitioner moved to suppress the evidence gathered by the warrantless search conducted through the use of GPS devices on Fourth Amendment grounds. The district court denied the motion, finding that the DEA's GPS surveillance was not a "search" and therefore did not implicate the Fourth Amendment. Pet. App. 15a-16a.

After the denial of his motion to suppress, Petitioner entered a conditional plea of guilty, preserving his right to appeal the denial of his motion, and was sentenced to 51 months in prison. Pet. App. 5a. On appeal, the Ninth Circuit affirmed the lower court's decision. Pet. App. 10a. Analogizing GPS devices to the radio frequency

beepers used by police in *United States* v. *Knotts*,[2] the Ninth Circuit concluded that the police had merely used sense-enhancing technology that provided a substitute to "following [the] car on a public street." Pet. App. 9a. (citations omitted)).

Petitioner filed a petition for rehearing *en banc*, which the Ninth Circuit denied without comment. Pet. App. 22a. Chief Judge Kozinski, on behalf of himself and four other judges, filed a strongly worded dissent. In the dissenting judges' view, police had violated the Fourth Amendment both when they entered the curtilage of Petitioner's residence to attach the tracking devices *and* when they used the devices to track Petitioner's travels.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S OPINION WIDENS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS AND AMONG THE STATE COURTS STEMMING FROM THE QUESTION LEFT OPEN IN *KNOTTS*.

The two Questions Presented reach from the physical and domestic (curtilage) to the distant and ethereal (GPS monitoring via satellite). Our interests in privacy and security, however, are common to both. In light of modern police practices, both are of great importance as well, because they address whether the Fourth Amendment protects against

---

2 Radio frequency (RF) beepers, like the one at issue in *Knotts*, require police to be in range of the beeper's signal in order to use its technology. GPS technology, by contrast, record all information as to the subject's whereabouts and do not require police tracking.

unwarranted, surreptitious entries by law enforcement officials into the curtilage of personal residences, an area that this Court, in *United States v. Dunn*, 480 U.S. 294, 300 (1987), has stated "should be treated as the home itself," and whether it protects against unwarranted surveillance, through the use of sophisticated technology, of the precise locations to which individuals might travel over an extended period of time. This case, therefore, is exceptionally deserving of this Court's review.

A. A Direct Conflict Exists Among The Federal Circuit Courts of Appeals.

Four circuit court opinions demonstrate conflict and growing inconsistency in the federal courts on the issue of Fourth Amendment protection in cases of GPS monitoring. The D.C. Circuit has held—in direct conflict with the Ninth Circuit panel in this case—that warrantless GPS surveillance violates the Fourth Amendment, echoing some of the concerns expressed by Chief Judge Kozinski below. Pet. App. 32a-33a. By contrast, the Seventh Circuit and the Ninth Circuit here have upheld warrantless GPS monitoring against Fourth Amendment challenges. Finally, the Eighth Circuit has approved the use of warrantless GPS monitoring, but only if several conditions are met.

In *United States* v. *Maynard*, the D.C. Circuit held that warrantless GPS surveillance violates the Fourth Amendment where the police used the technology around the clock for nearly a month. 615 F.3d 544 (D.C. Cir. 2010). A distinction in scope triggered the D.C. Circuit's decision. While police-monitoring of individual trips may be permissible, blanket surveillance is different—not in quantity, but in kind:

> Two considerations persuade us the information the police discovered in this case—the totality of Jones's movements over the course of a month—was not exposed to the public: First, unlike one's movements during a single journey, 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. Second, the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than the sum of its parts.

Id. at 558. The D.C. Circuit's holding is in direct conflict with the Ninth Circuit below and with the Seventh Circuit in *United States* v. *Garcia*.

The Seventh Circuit has held that warrantless GPS monitoring by the police does not violate the Fourth Amendment. *United States* v. *Garcia*, 474 F.3d 994 (7th Cir. 2007), *cert. denied,* 552 U.S. 883 (2007). In *Garcia*, the police placed a commercially-available GPS device onto the car of a suspected methamphetamine producer to collect information as part of a warrantless investigation. Where the D.C. Circuit saw a difference in kind between old tracking technology and GPS surveillance, the Seventh Circuit saw only a difference in degree:

> There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether

> mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

Id. at 997. Similarly, the Ninth Circuit below used this same rationale—that the technology was different only in degree—in holding that the DEA's GPS-tracking device surveillance was not a "search" that implicated the Fourth Amendment, implicitly rejecting the D.C. Circuit's reasoning that a distinction exists between short- and long-term surveillance. Pet. App. 7a.

Lastly, the Eighth Circuit has also opined on the constitutionality of GPS technology in a case where officers placed a GPS device on the bumper of a suspect's truck. *United States* v. *Marquez*, 605 F.3d 604 (8th Cir. 2010). Despite holding that the appellant lacked standing to challenge the use of the GPS device at issue, the Eighth Circuit nevertheless stated in dicta that the officers' use of a GPS device did not require a warrant because it was not a search that implicated the Fourth Amendment. Still, the Eighth Circuit resisted the blanket approval articulated by the Seventh and Ninth Circuits; rather, the Eighth Circuit noted that "a warrant is not required when, while the vehicle is *parked in a*

public place, they install a *non-invasive* GPS tracking device on it for a *reasonable period of time*." *Id.* at 610 (emphasis added).

B. The State Courts Are Also In Conflict And Require Clarification From This Court.

Many state courts have reviewed the issue of police use of GPS surveillance and these courts, like the federal courts, have reached inconsistent decisions: four state courts have found the practice impermissible,[3] while four have approved it.[4] As befits the importance of the legal issue involved and the nature of the privacy interests at stake, six states have outlawed warrantless GPS surveillance by statute.[5]

On one side of the issue, states courts in Washington, New York, Oregon, and Massachusetts require a warrant for police surveillance via GPS devices. *State* v. *Jackson*, 76 P.3d 217 (Wash. 2003)

---

3 *State* v. *Jackson*, 76 P.3d 217 (Wash. 2003) (en banc); *People* v. *Weaver*, 909 N.E.2d 1195, 1201-03 (N.Y. 2009); *State* v. *Campbell*, 759 P.2d 1040 (Or. 1988); *Commonwealth* v. *Connolly*, 913 N.E.2d 356 (Mass. 2009).

4 *Osburn* v. *State*, 44 P.3d 523 (Nev. 2002); *Foltz* v. *Commonwealth*, 698 S.E.2d 281 (Va. Ct. App. 2010); *State* v. *Sveum*, 769 N.W.2d 53 (Wis. Ct. App. 2009); *Stone* v. *State*, 941 A.2d 1238 (Md. Ct. Spec. App. 2008).

5 Police are prohibited from the warrantless use of GPS technology in Utah, Minnesota, Florida, South Carolina, Hawaii, and Pennsylvania: Utah Code Ann. §§ 77-23a-4, 77-23a-7, 77-23a-15.5; Minn. Stat. §§ 626A.37, 626A.35; Fla. Stat. §§ 934.06, 934.42; S.C. Code Ann. § 17-30- 140; Okla. Stat. tit. 13, §§ 176.6, 177.6; Haw. Rev. Stat. §§ 803-42, 803-44.7; 18 Pa. Cons. Stat. § 5761.

(en banc) (search under state constitution where GPS device used to track a suspect for more than two weeks); *People* v. *Weaver*, 909 N.E.2d 1195, 1201-03 (N.Y. 2009) (search under state constitution); *State* v. *Campbell*, 759 P.2d 1040 (Or. 1988) (search under state constitution); *Commonwealth* v. *Connolly*, 913 N.E.2d 356 (Mass. 2009) (seizure under state constitution).

In direct conflict with those state courts requiring a warrant, state courts in Nevada, Virginia, Wisconsin, and Maryland have held that blanket surveillance through GPS technology does not constitute a search. *Osburn* v. *State*, 44 P.3d 523 (Nev. 2002); *Foltz* v. *Commonwealth*, 698 S.E.2d 281 (2010); *Stone* v. *State*, 941 A.2d 1238, 1250 (Md. Ct. Spec. App. 2008) (GPS device "is simply the next generation of tracking science and technology from the radio transmitter 'beeper' in *Knotts*"); *State* v. *Sveum*, 769 N.W.2d 53 (Wis. Ct. App. 2009).

Recent decisions by state courts in New York, Wisconsin, and Virginia underline the need for clarification by this court. The New York Court of Appeals' opinion in *Weaver* demonstrates that state courts are looking for guidance from this Court and the Circuit Courts, but finding none. "In light of the unsettled state of federal law on the issue," the *Weaver* court premised its ruling on the New York State Constitution alone. 909 N.E.2d at 1202.

In *Sveum*, before the Court of Appeals of Wisconsin, the prosecution presented evidence obtained from a GPS tracking device that police secretly attached to the suspect's car. 769 N.W.2d at 56-57. The Wisconsin court reasoned that the Fourth Amendment is not violated when police attach a GPS device to the outside of a vehicle, "as long as the information obtained is the same as could be gained

by the use of other techniques." *Id.* at 59. Similar to the language used by the Eighth Circuit in *Marquez*, the Wisconsin court's reasoning leaves open the question of whether it would agree with the D.C. Circuit under the facts in *Maynard* where the police used round-the-clock surveillance for an extended period.

Finally, in *Foltz* v. *Virginia*, the Court of Appeals of Virginia held that police did not violate the Fourth Amendment by using a GPS device to track a suspect. 698 S.E.2d 281 (2010). In its reasoning, the *Foltz* court addressed *Maynard*. In a footnote, the court explained that "whereas in *Maynard* the police used GPS technology to track the whole of defendant Jones's movements in his own Jeep around the clock for nearly a month, the police here used GPS technology for less than a week to track appellant while he was driving a company van that had advertising intended to reach the public on it." *Id.* at 291 n.12. Such a fine factual distinction—without a clearly defined legal standard—further suggests that this Court must provide some clarity on the issue of GPS surveillance.

As exemplified by the growing inconsistency among the lower courts, further percolation among the federal and state courts is unlikely to resolve the current split. Constitutional guarantees should not vary by location. However, until this Court clarifies the issue presented here, the constitutional protection of an individual's privacy will vary depending on the circuit and state where the invasion of privacy occurs.

C. This Case Addresses The Question Left Open In *Knotts* Regarding The Permissibility Of Indiscriminate "Dragnet" Surveillance.

Knotts expressly avoided a broad holding that would allow "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision," and forewarned "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." 460 U.S. at 283-84.

The Seventh and Ninth Circuits, approving the use of GPS surveillance by the police, have relied on *Knotts* as controlling precedent.[6] The analysis in these opinions relies upon facts in common with those in *Knotts* (e.g., "traveling on a public thoroughfare"), but ignores or minimizes the extended nature of constant surveillance that tracks *all* automobile movements (whether on public thoroughfares or private property) over an extended period of months. These courts conveniently ignore the "dragnet" surveillance question that the *Knotts* Court expressly left open.[7]

The thin review by the Seventh and Ninth Circuits contradicts this Court's concerns, expressed in *Knotts* and elsewhere, about police practices used to collect information of an indiscriminate scope and with only

---

6 Pet. App. 8a (disagreeing with Petitioner's position that "*Knotts* should not control his case").

7 *See, e.g.*, Yale Kamisar et al., Modern Criminal Procedure § 6.2 (12th ed. 2008) ("A different form of vehicle tracking is now possible by use of a Global Positioning System device . . . . Does such activity fall within *Knotts*?").

a tenuous nexus to criminal behavior. In *Berger* v. *State of New York*, Justice Douglas drew a parallel between indiscriminate surveillance and the "general warrants out of which our Revolution sprang." 388 U.S. 41, 64 (1967) (Douglas, J., concurring). In this respect, a difference in quantity makes a difference in kind.

As Chief Judge Kozinski noted, "[t]he electronic tracking devices used by the police in this case have little in common with the primitive devices in *Knotts*." Pet. App. 29a. Similarly, the D.C. Circuit points out that *Knotts* "explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case." *Maynard*, 615 F.3d at 556.

Additionally, the privacy interests at stake are massive. As noted, legislatures in six states have enacted statutes that forbid the use of this technology, and they have done so on the ground—foreshadowed by Justice Douglas[8]—that such technology represents too great an intrusion into our settled notions of privacy.[9]

---

8 "If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment." *Berger*, 388 U.S. at 66.

9 Police are prohibited from the warrantless use of GPS technology in Utah, Minnesota, Florida, South Carolina, Hawaii, and Pennsylvania: Utah Code Ann. §§ 77-23a-4, 77-23a-7, 77-23a-15.5; Minn. Stat. §§ 626A.37, 626A.35; Fla. Stat. §§ 934.06, 934.42; S.C. Code Ann, § 17-30- 140; Okla. Stat. tit. 13, §§ 176.6,

D. Certiorari Is Warranted Because Circuit Courts Have Contradicted This Court By Limiting This Court's Holding In *Kyllo*.

The analyses offered by the Seventh and Ninth Circuits also ignore this Court's watershed holding in *Kyllo*. *Kyllo* v. *United States*, 533 U.S. 27 (2001). There, the Court addressed the "power of technology to shrink the realm of guaranteed privacy" and created a "gloss" for courts to apply when considering the impact of new technology on police investigations. *Id.* at 34. Future courts should assess (1) what information was collected and (2) whether that information could have been collected without the device. *Id.*

While circuit courts have acknowledged that the heat signature technology utilized by police in *Kyllo* "provided a substitute for a search unequivocally within the meaning of the Fourth Amendment," Pet. App. 9a., courts have failed to analyze new GPS technologies in light of *Kyllo* or to "take the long view, from the original meaning of the Fourth Amendment forward." *Kyllo*, 533 U.S. at 40.

Both the Seventh and Ninth Circuits dismiss the relevance of *Kyllo* without meaningful analysis. The Ninth Circuit simply held that this Court's decision in *Knotts* foreclosed any challenge to police use of GPS tracking devices. Pet. App. 8a. (disagreeing with Petitioner's position that "*Knotts* should not control his case"). The Seventh Circuit unsuccessfully distinguished *Kyllo* by begging the very question at issue. *Garcia*, 474 F.3d at 997 ("But

---

177.6; Haw. Rev. Stat. §§ 803-42, 803-44.7; 18 Pa. Cons. Stat. § 5761.

Kyllo does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment.").

In *Kyllo*, the "thermography device" was new, but the information it collected and the privacy area it invaded were well-understood. Similarly while GPS technology is new, the type of information discovered by the device is easily understandable, and, as numerous states have mandated, similarly private.

This Court should grant certiorari to give *Kyllo* its intended effect in light of the current threat to privacy posed by police use of GPS technology.

II. THE FEDERAL CIRCUITS DISAGREE ABOUT THE TREATMENT OF CURTILAGE.

The Ninth Circuit's ruling is in tension with the reasoning of the Second and Seventh Circuits and with a recent ruling in the Fourth Circuit under similar facts. Additionally, the Ninth Circuit's "curtilage plus" approach is not universally adopted among the circuits. Such differences among the circuits require doctrinal clarification by this Court.

A. The Circuits Tolerate Different Degrees Of Warrantless Police Activity Within The Curtilage Of A Home.

This Court stated that curtilage "warrants the Fourth Amendment protections that attach to the home." *Oliver* v. *United States*, 466 U.S. 170, 180 (1984). The decision in *United States* v. *Dunn*, 480 U.S. 294 (1987), reaffirmed the inclusion of curtilage within "the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301. Since *Dunn*, most circuits have adopted an exception to the Fourth

Amendment's protection for curtilage in order to permit police access to the residence. This exception, often referred to as "knock and talk," is permitted under the theory of "implied consent." The circuits are generally willing to allow police access to the curtilage of a person's home through the same route that the public would use—a route where, barring visible signs to the contrary, the resident has impliedly consented to entry onto his property. There is confusion, however, about what activities the police can conduct once within the home's curtilage.

The Second and Seventh Circuits, in finding police entry onto a home's curtilage permissible in certain circumstances, rely on the fact that police are generally allowed to enter a home's curtilage, without a warrant, if the area they are entering is also an access route to the home. See *United States* v. *Hayes*, 551 F.3d 138, 146 (2d Cir. 2008); *United States* v. *French,* 291 F.3d 945, 953-55 (7th Cir. 2002). This exception only allows police to use the route "any visitor or delivery man would use . . . [and only] for the purpose of making a general inquiry or for some other legitimate reason." *French*, 291 F.3d at 953 (quoting *United States* v. *Evans*, 27 F.3d 1219, 1229 (7th Cir. 1994)).

Here, the Ninth Circuit noted that "'an individual going up to the house to deliver newspaper or to visit someone would have to go through the driveway.'" Pet. App. 6a. While the Seventh Circuit did find police "are free to keep their eyes open" when within the home's curtilage, *French* 291 F.3d at 953 (quoting *Evans*, 27 F.3d at 1229), the agents here did more than simply keep their eyes open. Nonetheless, the Ninth Circuit found no violation of the Fourth Amendment, a ruling which is in tension with the

reasoning developed by the Second and Seventh Circuits.

A Fourth Circuit opinion addressing similar facts also stands in conflict with the Ninth Circuit's ruling here. *Pena* v. *Porter,* 316 F. App'x 303, 313 (4th Cir. 2009). In *Pena*, police officers conceded that they entered the curtilage of the defendant's home without a warrant. *Id.* In determining whether the warrantless entry into the curtilage was permissible, the Fourth Circuit noted that "[a]lthough police officers have the same right as any private citizen to approach a residence to 'knock and talk' with inhabitants, this right does not confer authority on police officers to make general investigation of the curtilage." *Id.* The Fourth Circuit then concluded that the police violated the Fourth Amendment because, although they originally entered the curtilage to effectuate a "knock and talk," their activities "exceeded this legitimate purpose." *Id.* at 314.

The Ninth Circuit's decision in this case ignores the fact that the agents were not entering the property for a "knock-and-talk" purpose and thus is in direct conflict with the Fourth Circuit's decision in *Pena*. Like the police in *Pena*, the agents here did far more than "keep their eyes open" during their stealthy nighttime mission to install GPS tracking devices to the underside of Petitioner's Jeep. Pet. App. 4a. This purpose falls far outside any legitimate purpose that might otherwise make the agents' entry into the curtilage permissible. This Court has recognized that "even a few inches" can make a difference between constitutional and unconstitutional activity. See *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987). Therefore, this Court should also grant certiorari to distinguish between permissible and impermissible

police activity when within the curtilage of a home without a warrant.

B. The Circuits Inconsistently Apply A "Curtilage Plus" Analysis.

The Second, Sixth, and Seventh Circuits, like the Ninth Circuit in this case, use a "curtilage plus" analysis. See *United States* v. *Titemore*, 437 F.3d 251 (2d Cir. 2006); *Knott* v. *Sullivan*, 418 F.3d 561 (6th Cir. 2005); *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010). These courts do not treat the bright-line question of whether an area is within the home's curtilage as dispositive. Instead, they undertake a reasonable expectation of privacy analysis *after* an area has been properly defined as curtilage. In this case, it is undisputed that the police entered the curtilage of Petitioner's home. Pet. App. 6a. Although "[t]here's no disputing that [this] Court considers the curtilage to stand on the same footing as the home itself for purposes of the Fourth Amendment," Pet. App. 25a. (Kozinski, J. dissent), at 11506, the Ninth Circuit found "whether a portion of [Petitioner's driveway] was located within the curtilage of his home" to be irrelevant. Pet. App. 7a.

In contrast, the Tenth Circuit did not require an additional requirement to its curtilage analysis in *Lundstrom* v. *Romero*. 616 F.3d 1108 (10th Cir. 2010). In *Lundstrom*, the Tenth Circuit recognized that "[i]ndividuals have a reasonable expectation of privacy in the curtilage of their homes." *Id.* at 1128. In order to determine whether an area is within a home's curtilage, the Tenth Circuit applied the four principles laid out by this court in *Dunn*. 480 U.S. at 301; see also *United States* v. *Cousins*, 455 F.3d 1116, 1121-22 (10th Cir. 2006), *cert. denied*, 549 U.S. 866 (2006). The court reasoned that, because it is "clearly established that the same Fourth Amendment

protections attaching to the home extend to curtilage," once an area is determined to be curtilage it is, by definition, covered by the Fourth Amendment. *Lundstrom*, 616 F.3d at 1129; but see *United States* v. *Timley*, 338 F. App'x 782, 787-88 (10th Cir. 2009) (requiring a showing of a reasonable expectation of privacy in trash bags within the curtilage of a home and, thereby, demonstrating confusion even within the Tenth Circuit), *cert. denied*, 130 S. Ct. 769 (2009).

Courts engaging in a "curtilage plus" analysis are significantly raising the bar a defendant must reach in order to receive Fourth Amendment protection *within* the curtilage of his home. What these courts are doing is analogous to "requiring the homeowner to establish reasonable expectation of privacy in his bedroom." Pet. App. 25a (Kozinski, J. dissent). This Court should clarify which instances—if any—require a "curtilage plus" analysis.

III. THE NINTH CIRCUIT RULED INCORRECTLY ON THE MERITS.

A. The Ninth Circuit Erroneously Held That Fourth Amendment Protection Did Not Extend To The Curtilage Of Petitioner's Home.

The Ninth Circuit's failure to extend Fourth Amendment protections to the curtilage of Petitioner's home directly contradicts this Court's decision in *Oliver* v. *United States*, 466 U.S. 170 (1984). Glossing over the government's concession that the area accessed by DEA agents was within the curtilage of Petitioner's home, the Ninth Circuit conducted a reasonable expectation of privacy analysis. Pet. App. 6a. However, according to this Court, "the curtilage . . . warrants the Fourth

Amendment protections that attach to the home." *Oliver*, 466 U.S. at 180. Once an area is established as curtilage, it should be placed under the home's "umbrella" of Fourth Amendment protection and an individual's reasonable expectation of privacy is presumed. *Dunn*, 480 U.S. at 301; see Pet. App. 25a (Kozinski, J. dissent). ("There's no disputing that the Court considers curtilage to stand on the same footing as the home itself for purposes of the Fourth Amendment."). Therefore, under both *Oliver* and *Dunn*, the Ninth Circuit erroneously concluded that Petitioner did not have a reasonable expectation of privacy in his driveway.

Even accepting the Ninth Circuit's position that a reasonable expectation of privacy analysis is necessary when the area in question is within the curtilage, the Ninth Circuit's conclusion is still erroneous. "[A]n individual reasonably may expect that [the] area immediately adjacent to a home will remain private." *Oliver*, 466 U.S. at 180. When Petitioner's car was parked in the driveway next to his mobile home, it was within an area immediately adjacent to his home. Pet. App. 4a. "Whatever else one may say about Petitioner, it's perfectly clear that he did not expect—and certainly did not consent—to have strangers prowl his property in the middle of the night and attach electronic tracking devices to the underside of his car. No one does." Pet. App. 27a-28a (Kozinski, J. dissent). Not only did Petitioner have a reasonable expectation that the area within mere feet of his home would remain private, he also reasonably expected that his car, while located within the area "immediately adjacent" to his home, would also remain private and thus protected by the Fourth Amendment.

The Ninth Circuit also misapplied the doctrine of "implied consent," by which police officers are permitted to enter private property for "knock-and-talk" purposes. The Ninth Circuit erroneously expanded the Fourth Amendment's "implied consent" exception by failing to distinguish between permissible and constitutionally barred activity. Implied consent does not extend to DEA agents entering the curtilage of Petitioner's house in the middle of the night. Judge Kozinski correctly points out that "there are many parts of a person's property that are accessible to strangers for limited purposes." Pet. App. 26a. The Ninth Circuit's expansion of implied consent would swallow the rule that the curtilage is a private area that is "off-limits" to the government in the absence of a warrant.

After conducting a reasonable expectation of privacy analysis, the Ninth Circuit came to the following conclusions: a) DEA agents did not violate the Fourth Amendment when they entered Petitioner's driveway, and b) DEA agents did not violate the Fourth Amendment when placing a tracking device on the undercarriage of Petitioner's car. Pet. App. 7a-8a. The Ninth Circuit, however, failed to consider the cumulative effect of the DEA's surveillance activities. DEA agents not only entered the curtilage of Petitioner's home in the middle of the night, they also deviated from what would have been an acceptable "knock-and-talk" path, *and* they installed a GPS-surveillance device to the underside of his car. Even if one accepts the Ninth Circuit's two conclusions as independently sound, Petitioner *did* have a reasonable expectation that police would not enter his home's curtilage in order to place a GPS tracking device on the underside of his car.

Additionally, the Ninth Circuit ignored the fact that police effected a warrantless "seizure" of Petitioner's vehicle when police attached the tracking device to it, regardless of where the vehicle was located at the time.

B. The Ninth Circuit Erroneously Held That The Police Do Not Need A Warrant To Continually Track A Vehicle's Movements For More Than Two Months, Using GPS-Surveillance Devices.

This Court has made it clear that a person's right to be free from unreasonable searches and seizures is at the heart of the Fourth Amendment protections. See *United States* v. *Katz*, 389 U.S. 347, 359 (1967) ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."). *Katz* also provides that "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351.

Even before the advent of GPS, this Court recognized that "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979). "[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles." *Id.* at 663. This view has recently been reaffirmed in *Arizona* v. *Gant*, where this Court noted that "[a]lthough we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home . . . the former interest is nevertheless important and deserving of

constitutional protection." 129 S. Ct. 1710, 1720 (2009); see also *Weaver*, 909 N.E.2d at 1201 (noting that the "residual privacy expectation defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his constitutional right to be free of unreasonable searches and seizures").

While a person may reasonably expect to be seen while embarked upon a discrete journey, no one reasonably expects the movement of their vehicle to be followed *twenty-four hours a day, seven days a week, for over two months*. GPS technology "has virtually unlimited and remarkably precise tracking capability." *Weaver*, 909 N.E.2d at 1199. Consequently, GPS technology captures the same information as, "at a minimum, millions of additional police officers and cameras on every street lamp." *Id.*

> Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.

Id. Employing the use of such sophisticated and powerful technology, the DEA's activities in this case went far beyond anything an objectively reasonable person would expect: comprehensive *and* sustained tracking of Petitioner's movements.

The Ninth Circuit has given electronic surveillance license to government officials by declaring that "an individual has no reasonable expectation of privacy in his movements through public spaces where he might be viewed by an actual or hypothetical observer." Pet. App. 32a-33a (Kozinski, J. dissent). The government can now track a private citizen's movements twenty-four hours a day, seven days a week, without a warrant. The hallmark of the Fourth Amendment—a person's right to be free from unreasonable searches—has been ignored in favor of allowing police to use any new technological device that follows a person around. After this decision, a person in the Ninth Circuit has no reasonable expectation of privacy in *any* of his travels.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING ONES, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THEM.

The Ninth Circuit's opinion acknowledges and squarely implicates both the circuit conflict over the GPS monitoring issue and the need for doctrinal clarification regarding the curtilage issue. Those issues have been appropriately preserved in the District Court and Ninth Circuit proceedings below.

The issue of GPS monitoring was dispositive in this case. The DEA agents were able to discover the incriminating marijuana in Petitioner's home only after they stopped and questioned Petitioner on September 12, 2007. Pet. App. 13a. The DEA stopped Petitioner only minutes after its monitoring team received signals sent from a GPS tracking device attached to Petitioner's vehicle. *Id.* The signals indicated that Petitioner was leaving a suspected marijuana growing area in Del Norte County, California. *Id.* Information of Petitioner's

travels—gathered over more than two months from early July, when the first tracking device was deployed, until September 12, 2007, when the stop and questioning happened—gave the officers the information necessary to make the stop that resulted in Petitioner's arrest. Pet. App. 12a-13a.

Continuation of the circuit split would further encourage the government's reliance on the use of GPS tracking devices to monitor private activities across wide areas of the country. Although GPS is an advanced technology, it is available at low cost to the general public and law enforcement. See *Garcia*, 474 F.3d at 995; David Pogue, *Peekaboo, Zoombak Sees You*, N.Y. Times, Apr. 23, 2009, at B1, B8. The number of cases involving GPS tracking devices has ballooned in recent years. See*, e.g.*, *Maynard*, 615 F.3d 544; *Weaver,* 909 N.E.2d. Indeed, the government has acknowledged, in its petition for rehearing en banc in *Maynard*, that it conducts surveillance using GPS tracking devices "with great frequency." Pet. Reh., *United States v. Jones*, D.C. Circuit No. 08-3034, filed Sept. 20, 2010. Thus, given the rapid advancement in telecommunication technologies, an on-going split will nurture a great divergence in the Fourth Amendment protection of privacy.

Additionally, the confusion among the courts over the application of Fourth Amendment protection to curtilage has extended to police officers in the field. In the Ninth Circuit, for example, officers may act in ways that neighbors cannot, and officers may also undertake activities that are far different from a "knock-and-talk." But in the Fourth and Tenth Circuits, officers' activities are much more circumscribed and curtilage is afforded much stronger protections. Given the importance that the

Court has attached to the Fourth Amendment protection of residences, the Court should use this case to clarify the constitutional protection guaranteed to curtilage as well. See *Kyllo,* 533 U.S. 27.

Finally, the strength of the public's response to *Pineda-Moreno* counsels against waiting to resolve the Questions Presented. The Ninth Circuit's Chief Judge has stated a fear that many have echoed: "1984 may have come a bit later than predicted, but it's here at last." Pet. App. 23a (Kozinski, J. dissent). [10]

---

10 Other public commentators have expressed similar, passionate responses. *See, e.g.*, Adam Cohen, *The Government's New Right to Track Your Every Move With GPS*, TIME (Aug. 25, 2010) *available at* http://www.time.com/time/nation/article/0,8599,2013150,00.html (last visited Sep. 11, 2010) ("[W]e are one step closer to a classic police state—with technology taking on the role of the KGB or the East German Stasi"); Gizmodo, "Our Worst Nightmares About the Government Tracking Us Just Came True," http://gizmodo.com/5622800/our-worst-nightmares-about-the-government-tracking-us-just-came-true (last visited Sep. 11, 2010) ("Our darkest nightmares come true."); John W. Whitehead, *GPS and the Police State We Inhabit: Living in Oceania*, Huffington Post (Sept. 28, 2010) *available at* http://www.huffingtonpost.com/john-w-whitehead/gps-and-the-police-state-_b_740348.html (last visited Oct. 8, 2010) ("The bottom line: there really is no place to hide in the American Oceania.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
jgreen@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

HARRISON LATTO*
LAW OFFICE OF
HARRISON LATTO
1631 NE Broadway, No. 533
Portland, Oregon 97232
(503) 223-0783
hlatto@easystreet.net

Counsel for Petitioner

November 10, 2010 * Counsel of Record