

# THE RUTHERFORD INSTITUTE

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JOHN W. WHITEHEAD  
Founder and President

March 13, 2023

By Electronic Mail

Board of Supervisors  
Santa Clara County  
70 West Hedding Street  
East Wing, 10th Floor  
San Jose, CA 95110

## **Re: Use of Geofencing Surveillance to Monitor Church Activities**

Dear Supervisors:

As a civil liberties organization that works to protect the citizenry's First Amendment rights as well as their freedom from unconstitutional surveillance by government agencies, The Rutherford Institute<sup>1</sup> is gravely concerned that Santa Clara officials used cell phone and geofence data to track the number and movements of congregants on church grounds during the COVID-19 lockdowns.

Indeed, there is a repressive, suppressive effect to mass surveillance that serves to monitor and chill lawful First Amendment activities. These same mass surveillance technologies can also be used to stifle dissent, persecute activists, harass marginalized communities, and link people's health information to other surveillance and law enforcement tools. As such, the use of geofence surveillance to monitor church attendees constitutes an egregious violation of the congregants' Fourth Amendment rights and an attempt to undermine protected First Amendment activities relating to the freedom of speech, the free exercise of religion, and the right of the people peaceably to assemble.

### Mass surveillance is at odds with the Fourth Amendment

The current state of technology enables government agents to monitor unsuspecting citizens in virtually any situation. As such, geofence surveillance, which allows the government to carry out mass surveillance on large groups of people based on their location data, reverses the burden of proof and renders every person in the range of that surveillance a potential suspect.

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<sup>1</sup> The Rutherford Institute, a nonprofit civil liberties organization, provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public on a wide spectrum of issues affecting their freedoms.

While the use of geofence warrants is highly controversial and continues to be debated in the legislatures and challenged in the courts, it constitutes an unprecedented level of mass surveillance that is clearly at odds with the Fourth Amendment's prohibitions on unreasonable searches and seizures by government agents, especially coupled with a particularized lack of probable cause.

Pervasive spying methods that are physically unintrusive and monitor a person's activities in public such as geofencing, which enable the radical expansion of police surveillance operations, signify the virtual evisceration of any meaningful protection of individual privacy. Yet even in public places, every citizen retains a reasonable expectation of privacy that is offended when the government conducts covert, all-encompassing surveillance without judicial oversight.

As the U.S. Supreme Court has stated, a "person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>2</sup> In that case, the Court ruled that "when the Government access[es] CSLI [(“cell-site location information”)] from the wireless carriers, it invade[s a person's] reasonable expectation of privacy in the whole of his physical movements."<sup>3</sup> Significantly, even though the information was obtained pursuant to a subpoena under a federal statute and "the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."<sup>4</sup> Thus, the Court "decline[d] to grant the state unrestricted access to a wireless carrier's database of physical location information."<sup>5</sup> Similarly, at least one California court has found that a broad geofence search warrant violated the Fourth Amendment as well as the California Electronic Communications Privacy Act.<sup>6</sup>

In light of government efforts to surveil its citizens, the Seventh Circuit Court of Appeals has warned that "we are steadily approaching a future with a constellation of ubiquitous public and private cameras [and other tracking technology, like geofence surveillance,] accessible to the government that catalog the movements and activities of all Americans. Foreseeable expansion in technological capabilities and the pervasive use of ever-watching surveillance will reduce Americans' anonymity, transforming what once seemed like science fiction into fact. Constitutionally and statutorily mandated protections stand as critical bulwarks in preserving individual privacy vis-à-vis the government in this surveillance society."<sup>7</sup> For the "Framers of the Constitution sought 'to place obstacles in the way of a too permeating police surveillance.'"<sup>8</sup>

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<sup>2</sup> *Carpenter v. U.S.*, 138 S. Ct. 2206, 2217 (2018).

<sup>3</sup> *Id.* at 2219-20.

<sup>4</sup> *Id.* at 2217, 2221.

<sup>5</sup> *Id.* at 2223.

<sup>6</sup> *People v. Laquan Dawes*, Superior Court of California for the County of San Francisco Dept. 23, Court No. 19002022, SW # 42739 (Sept. 30, 2022).

<sup>7</sup> *U.S. v. Tuggle*, 4 F. 4th 505, 509-10 (7th Cir. 2021).

<sup>8</sup> *Id.* at 510 (quoting *U.S. v. Di Re*, 332 U.S. 581, 595 (1948)).

### Unchecked Surveillance Will Result in the Conceptual Erosion of Liberty

One of the hallmarks of citizenship in a free society is the expectation that one's personal affairs and physical person are inviolable so long as one conforms his or her conduct not to be in violation of the criminal laws. Any meaningful conception of liberty encompasses freedom from constant and covert government surveillance, whether or not that intrusion is physical or tangible and whether it occurs in public or private.

Thus, unchecked technological surveillance is objectionable simply because government has no legitimate authority to covertly monitor the totality of a citizen's daily activities.

The root of the problem is not that government is doing something inherently harmful, but rather that government is doing something it has no license to do. For the average American, even surveillance limited to one's movements on public roads provides law enforcement with a comprehensive portrait of one's life. The sense of insecurity and suspicion of government intrusion that results from the government's use of warrantless mass technological surveillance is highly detrimental to the relationship of the citizenry to its government.

This is precisely one of the harms that the Fourth Amendment was crafted to prevent.

A study conducted by Roger Clarke, the famed Australian specialist in data surveillance and privacy, indicates that the costs resulting from the erosion of personal privacy are so significant that they essentially threaten the very foundation of a democratic society.

Some of the most serious harms include:

- A prevailing climate of suspicion and adversarial relationships
- Inequitable application of the law
- Stultification of originality
- Weakening of society's moral fiber and cohesion
- Repressive potential for a totalitarian government
- Blacklisting
- Ex-ante discrimination and guilt prediction
- Inversion of the onus of proof.<sup>9</sup>

The most troubling characteristic of warrantless searches, however, is the extent to which they are capable of serving as the backbone for a totalitarian state. The frightening effects of mass surveillance are somewhat blunted insofar as those entrusted with such awesome powers exercise them responsibly; however, establishing secretive, unchecked mechanisms of state monitoring is essentially an invitation to abuse.

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<sup>9</sup> *The Digital Persona and its Application to Data Surveillance*, The Information Society 10, 2 (June 1994), <http://www.rogerclarke.com/DV/DigPersona.html> (last visited Aug. 29, 2011).

As every student of American history is taught, our governmental system of checks and balances was premised on the awareness that trust in the restraint of those in power is not sufficient to protect liberty. Structural restraints and oversights are imperative. If mass surveillance is allowed, an essential structural protection of liberty—judicial oversight—is lost and the privacy of all citizens is threatened.

### Unchecked Surveillance Will Result in a Chilling Effect on First Amendment Freedoms

Among the most significant detrimental effects of covert, mass government surveillance is the chilling effect it has on free speech and association as well as the resulting harm such deprivations of First Amendment rights has on democratic institutions. *See Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 556-57 (1963). Indeed, when citizens—especially those espousing unpopular viewpoints—are aware that the intimate details of their personal lives may be pervasively monitored by government, they are less likely to freely express their dissident views.

In those instances where government has attempted to compel disclosure of a dissident group's membership, the Supreme Court has recognized it is crucial that speech and association rights be free from government-mandated disclosures that result in a chilling of these core First Amendment rights. For example, in *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), where the State of Alabama moved to compel the NAACP to disclose the names and addresses of its Alabama members, the Court observed that effective advocacy of controversial viewpoints is enhanced by group association. Based on the unpopular nature of the NAACP and the discriminatory treatment that its members received during the civil rights movement, the Court ultimately concluded that disclosure of the NAACP's membership would hinder the ability of the organization to pursue its efforts.

Likewise, in *Gibson*, the Court noted that speech and association rights need breathing space to survive. These freedoms are protected not only against heavy-handed frontal attack, but also from stifling by subtler governmental interference.

The government's desire to monitor and ascertain the membership rosters of dissident or unpopular groups continues today. The values protected by this landmark precedent are endangered by the advent of warrantless technological surveillance. Technologies that permit the police to efficiently obtain detailed information about unpopular groups, including the location of meetings and the identities of attendees, substantially chill speech and association rights. Individuals will undoubtedly be reluctant to associate with socially taboo groups if they know that Big Brother may be compiling and publishing information about their membership.

The chilling effects of pervasive surveillance extend beyond political dissidents and impact all citizens, for the mere possibility of this type of warrantless surveillance will result in a constant, justifiable apprehension in even the most compliant, passive citizen. Americans have heretofore assumed that adherence to the criminal laws of the land earns them a degree of

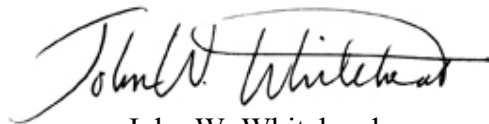
protection from the prying eyes and ears of government, and they should be able to continue to assume this.

Senator Frank Church, who served as the chairman of the Select Committee on Intelligence that investigated the NSA in the aftermath of Watergate, understood only too well the dangers inherent in allowing the government to overstep its authority in the name of national security. Senator Church recognized that such surveillance powers “at any time could be turned around on the American people, and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn’t matter. There would be no place to hide.”

Declaring that he did not “want to see this country ever go across the bridge” of constitutional protection, congressional oversight and popular demand for privacy, Church avowed that “we,” implicating both Congress and its constituency in this duty, “must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss.”

It is our hope that the County will renounce its use of geofence surveillance data to spy on the citizenry, including religious institutions, and cease engaging in behavior that threatens to chill protected First Amendment activities and leave Americans with no privacy rights whatsoever.

Sincerely yours,

A handwritten signature in cursive script that reads "John W. Whitehead". The signature is written in black ink and is positioned above the printed name and title.

John W. Whitehead  
President

cc: James Williams, County Counsel  
[\(by electronic mail\)](#)