No. 21-541

In the Supreme Court of the United States

TRAVIS TUGGLE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by law-enforcement use of video cameras, placed on utility poles on public property, with the same views of petitioner's home as on the public street.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 4 F.4th 505. The orders of the district court (Pet. App. 43a-51a, 52a-56a) are unreported but are available at 2018 WL 3631881 and 2019 WL 3915998.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2021. The petition for a writ of certiorari was filed on October 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of conspiring to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii), 846, and maintaining a drug-involved premises, in violation

of 21 U.S.C. 856(a)(1). Judgment 1; see Pet. App. 7a. The district court sentenced petitioner to 360 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-42a.

1. Between November 2013 and February 2016, petitioner participated in a large-scale methamphetamine trafficking operation. Presentence Investigation Report (PSR) ¶¶ 17-18, 51. He used his residence as a meeting and receiving point for multi-pound quantities of methamphetamine, which he then distributed to co-conspirators to sell. *Ibid.* Over the course of the charged conspiracy, petitioner was responsible for possessing with intent to distribute and distributing more than 20 kilograms of methamphetamine. *Id.* ¶ 51.

As part of its investigation of the drug ring, the government installed three pole cameras on public property near petitioner's residence. Pet. App. 5a-6a. Two cameras, installed in August 2014 and December 2015 respectively, were placed on a telephone pole in an alley next to petitioner's house and viewed petitioner's driveway and the front of his house. *Id.* at 5a-6a, 44a-45a. In September 2015, a third camera was installed on a pole approximately one block south of petitioner's residence, from which a co-defendant's shed, and also petitioner's house, could be seen. *Ibid.*

Petitioner's residence had "no fence, wall, or other object that would obstruct the view of a passerby." Pet. App. 45a. The cameras captured only "the outside of [petitioner]'s house and his driveway," areas that are "plainly visible to the public." *Id.* at 12a; see *id.* at 45a (finding that the cameras did not have "any capabilities to view or capture anything inside [petitioner]'s residence that he did not expose to the public"). The

cameras captured more than 100 instances of suspected methamphetamine deliveries. *Id.* at 6a, 45a-46a. The footage showed individuals arriving and entering petitioner's home carrying an item, and then leaving empty-handed or with a smaller version of the item. *Id.* at 6a-7a, 45a. Several witnesses corroborated that the recordings showed deliveries and distribution of methamphetamine. *Id.* at 7a, 45a-46a.

2. A grand jury in the Central District of Illinois charged petitioner with conspiring to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii), 846, and maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1). Second Superseding Indictment 1-5. Petitioner filed a motion to suppress the evidence from the pole cameras, arguing that the surveillance violated his reasonable expectation of privacy under the Fourth Amendment. D. Ct. Doc. 50, at 3 (July 6, 2018); see Pet. App. 47a.

The district court denied the motion, explaining that petitioner had no reasonable expectation of privacy in the areas captured by the cameras. Pet. App. 43a-51a. The court observed that "the pole cameras could only view the exterior of [petitioner]'s residence and the surrounding area of the house." *Id.* at 50a. And the court found that because petitioner's residence "had no fence, wall, or other object that would obstruct the view of a passerby," the "cameras only captured what would have been visible to any passerby in the neighborhood." *Id.* at 49a-50a. The court rejected petitioner's attempt to analogize the cameras to GPS tracking, explaining that "[p]ole cameras are limited to a fixed location and capture only activities in camera view, as opposed to GPS, which can track an individual's movement anywhere in the world." *Id.* at 51a.

The district court subsequently denied petitioner's motion for reconsideration, Pet. App. 57a, as well as petitioner's second motion to suppress, *id.* at 52a-56a, because they raised no new arguments. The day before his trial, petitioner pleaded guilty to conspiring to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii), 846, and maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1), reserving the right to appeal the denial of his suppression motion. Judgment 1; 16-cr-20070 Docket entry (Sept. 20, 2019); D. Ct. Doc. 103 (Sept. 20, 2019); see Pet. App. 7a-8a. The district court sentenced him to a total term of 360 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3; see also Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-42a. Emphasizing that the government used "a technology in public use, * * * occupying a place it was lawfully entitled to be, to observe plainly visible happenings," the court observed that the "pole camera surveillance in this case did not constitute a search under the current understanding of the Fourth Amendment." *Id.* at 5a.

The court of appeals first observed that the Fourth Amendment "clearly" did not "preclude law enforcement officers from the isolated use of pole cameras on public property without a warrant to observe [petitioner]'s private home" for at least some length of time. Pet. App. 10a. The court found that petitioner "knowingly exposed the areas captured by the three cameras"; that "the outside of his house and his driveway were plainly visible to the public"; and that petitioner did not have a reasonable expectation of privacy "in what happened in front of his home." *Id.* at 12a. And the court explained that because "the government used

a commonplace technology, located where officers were lawfully entitled to be, and captured events observable to any ordinary passerby," it "did not invade an expectation of privacy that society would be prepared to accept as reasonable." *Id.* at 16a-17a.

The court of appeals then rejected petitioner's contention that the government's "prolonged and uninterrupted use" of the cameras constituted a search in violation of the Fourth Amendment. Pet. App. 17a; see *id.* at 42a. The court observed that, "far from capturing the 'whole of his physical movements' or his 'public movements,'" the "cameras only highlighted [petitioner]'s *lack* of movement, surveying only the time he spent at home and thus not illuminating what occurred when he *moved* from his home." *Id.* at 32a-33a (citations omitted). Noting that unlike technologies found problematic in earlier cases, the cameras here "exposed no details about where [petitioner] traveled, what businesses he frequented, with whom he interacted in public, or whose homes he visited, among many other intimate details of his life." *Id.* at 32a. The court explained that the pole cameras "did not paint the type of exhaustive picture of [petitioner's] every movement that the Supreme Court has frowned upon." *Id.* at 32a; see also *id.* at 31a-36a (contrasting pole cameras with the surveillance at issue in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), *Riley* v. *California*, 573 U.S. 373 (2014), and *United States* v. *Jones*, 565 U.S. 400 (2012)). And because the court determined that the government's use of pole cameras in this case did not constitute a search under the Fourth Amendment, the court did not reach the government's argument "that, even if there were a Fourth Amendment search, the good faith exception to the exclusionary rule would apply." Pet. App. 42a.

ARGUMENT

Petitioner renews his contention (Pet. 19-23) that the police violated his Fourth Amendment rights by placing pole cameras on public property that could provide video footage of the same views of the exterior of his home that would be visible to an ordinary passerby. The court of appeals correctly rejected that contention, and its fact-bound application of Fourth Amendment precedent does not conflict with any decision of this Court or any other court of appeals. In addition, this case would be a poor vehicle for addressing the question presented. The Court recently denied a petition for a writ of certiorari in a case that presented similar issues, see *May-Shaw* v. *United States*, 141 S. Ct. 2763 (2021) (No. 20-6905), and the same result is warranted here.

1. a. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. Where, as here, action challenged under the Fourth Amendment does not involve a trespass or physical intrusion, see Pet. App. 9a, a search occurs only "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo* v. *United States*, 533 U.S. 27, 33 (2001); see *United States* v. *Jones*, 565 U.S. 400, 405-406 (2012); *Katz* v. *United States*, 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring).

The court of appeals correctly recognized that the use of video cameras—which were placed on utility poles on public property to capture the same views available to an ordinary passerby—did not intrude on any reasonable expectation of privacy. Pet. App. 16a-17a, 32a-37a. This Court has repeatedly explained that activities that a person "knowingly exposes to the public" are "not a subject of Fourth Amendment protec-

tion." *Katz*, 389 U.S. at 351. The prohibition on unreasonable searches "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986). Thus, surveillance of activities that are "clearly visible" "from a public vantage point" does not violate any expectation of privacy "that society is prepared to honor" as "reasonable." *Id.* at 213-214.

Even as this Court has held that the use of other observation techniques, such as thermal imaging, may constitute a search, this Court has reaffirmed "the lawfulness of warrantless visual surveillance of a home." *Kyllo*, 533 U.S. at 32; see *Jones*, 565 U.S. at 412 ("This Court has to date not deviated from the understanding that mere visual observation does not constitute a search."). In *California* v. *Ciraolo*, for example, the Court held that a flyover from 1000 feet in the air to observe marijuana plants in a home's fenced-in backyard did not constitute a Fourth Amendment search because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S. at 213-214. The Court later applied *Ciraolo* to uphold the warrantless use of a helicopter flying at 400 feet to observe a partially covered greenhouse in a residential backyard. *Florida* v. *Riley*, 488 U.S. 445, 448-450 (1989) (plurality opinion); see *id.* at 453-455 (O'Connor, J., concurring in the judgment). And the Court has also upheld the warrantless use of an aerial mapping camera to photograph a company's 2000-acre manufacturing complex, even though that technology provided "more detailed information than naked-eye views." *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 238 (1986). In line with

these decisions, the court of appeals correctly recognized that the use of pole cameras to video areas visible from a public street did not constitute a warrantless search prohibited by the Fourth Amendment. Pet. App. 42a.

b. Petitioner errs in asserting (Pet. 19-23) that the court of appeals decision is inconsistent with this Court's decisions in *United States* v. *Jones*, *supra*, and *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). As the court of appeals observed, pole-camera surveillance of publicly visible areas "pales in comparison" to the technological monitoring at issue in *Jones* and *Carpenter*, and this Court's "precedent does not support [petitioner]'s argument." Pet. App. 32a.

In *Jones*, this Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" based on the government's "physical intrusion" into and "occup[ation of] private property for the purpose of obtaining information." 565 U.S. at 404. Four Justices would have deemed use of a GPS tracking device a Fourth Amendment search under the reasonable-expectation-of-privacy test. See *id.* at 418-431 (Alito, J., concurring in the judgment); see also *id.* at 430 (finding it significant that by using a GPS device, "law enforcement agents tracked every movement that [the defendant] made in the vehicle he was driving"). While raising (without resolving) questions regarding the degree of intrusion produced by GPS monitoring under that test, Justice Sotomayor noted "unique attributes of GPS surveillance," including its ability to "generate[] a precise, comprehensive record of a person's public movements." *Id.* at 415 (Sotomayor, J., concurring).

In *Carpenter*, a decision that expressly declined to "call into question conventional surveillance techniques and tools, such as security cameras," the Court concluded that an individual has a "legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]," such that "accessing seven days of [such information] constitutes a Fourth Amendment search." 138 S. Ct. at 2217 & n.3, 2220. In reaching that conclusion, the Court noted "the unique nature of cell phone location records," and explained that cell-site location information is generated by "modern cell phones" in "increasingly vast amounts of [an] increasingly precise" nature, and can yield "a comprehensive chronicle of the user's past movements." *Id.* at 2211-2212, 2217.

The pole-camera use here is not analogous to the technologies this Court considered in *Jones* and *Carpenter*. Unlike GPS tracking or historical cell-site location information, cameras affixed to stationary utility poles cannot track a person's location—or in any way capture a person's activities—outside the cameras' field of vision. See Pet. App. 32a-33a (emphasizing that "the cameras only highlighted [petitioner]'s *lack* of movement, surveying only the time he spent at home and thus not illuminating what occurred when he *moved* from his home"). Furthermore, contrary to petitioner's suggestion (Pet. 22), the pole cameras were not—and could not have been—used to peer into "the privacy of [anyone's] home[]" or otherwise uncover intimate details of petitioner's private life. Far from "generat[ing] a precise, comprehensive record of a person's public movements that reflects a wealth of detail" about places visited, *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring), or constructing "an all-encompassing record of [a

cell-phone] holder's whereabouts" akin to "attach[ing] an ankle monitor to the phone's user," *Carpenter*, 138 S. Ct. at 2217-2218, the pole cameras here recorded only "plainly visible" areas outside a house that petitioner "knowingly exposed" to the public, Pet. App. 12a.

Nor does the use of cameras installed on a public way that see what is already in open view represent a "[d]ramatic technological change" that might violate reasonable expectations of privacy. *Jones*, 565 U.S. at 427 (Alito, J., concurring in the judgment). As the decision below noted, cameras "clearly qualify as a 'conventional surveillance technique[].'" Pet. App. 36a (quoting *Carpenter*, 138 S. Ct. at 2220) (brackets in original); see *id.* at 15a ("acknowledg[ing] the commonplace role cameras have in our society"). Thus, as the courts of appeals have correctly recognized for decades, "[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." *United States* v. *Jackson*, 213 F.3d 1269, 1280 (10th Cir.), judgment vacated on other grounds, 531 U.S. 1033, cert. denied, 531 U.S. 1038 (2000); see *United States* v. *Vankesteren*, 553 F.3d 286, 291 (4th Cir.), cert. denied, 556 U.S. 1269 (2009); *United States* v. *Taketa*, 923 F.2d 665, 677 (9th Cir. 1991).

2. Petitioner identifies no conflict in the lower courts that would warrant this Court's review.

a. As the decision below recognized (Pet. App. 28a), "no federal circuit court has found a Fourth Amendment search based on long-term use of pole cameras on public property to view plainly visible areas of a person's home."

Like the court of appeals in this case, the Sixth Circuit recently upheld the warrantless use of pole-camera surveillance in *United States* v. *May-Shaw*, 955 F.3d

563 (2020), cert. denied, 141 S. Ct. 2763 (2021), noting that "the cameras observed only what 'was possible for any member of the public to have observed . . . during the surveillance period.'" *Id.* at 568-569 (quoting *United States* v. *Houston*, 813 F.3d 282, 290 (6th Cir.), cert. denied, 137 S. Ct. 567 (2016)); see *United States* v. *Trice*, 966 F.3d 506, 509-510 (6th Cir. 2020), cert. denied, 141 S. Ct. 1395 (2021) (applying similar principles to find no Fourth Amendment violation resulting from the warrantless use of a camera installed in a common hallway in an unlocked apartment building).

The Tenth Circuit likewise has rejected a Fourth Amendment challenge to the warrantless use of pole cameras overlooking a residence. See *Jackson*, *supra*. The court observed that "[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." 213 F.3d at 1280. The First Circuit has also upheld the warrantless use of a pole camera to surveil the front of a defendant's home, reasoning that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." *United States* v. *Bucci*, 582 F.3d 108, 117 (2009). The en banc First Circuit is considering a similar question in *United States* v. *Moore-Bush*, 982 F.3d 50 (2020) (granting rehearing en banc) (argued Mar. 23, 2021), but the court has not yet issued a decision in that case.

Furthermore, as the court of appeals noted (Pet. App. 27a), several other circuits' analyses of similar issues accord with its decision here. The Ninth Circuit has explained that "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy" and that "the police may record what they normally may view with the naked eye." *United States* v. *Gonzalez*,

328 F.3d 543, 548 (2003) (quoting *Taketa*, 923 F.2d at 677) (brackets in original). And it has applied that principle to reject a defendant's assertion of "a temporary zone of privacy" within a "quasi-public mailroom at a public hospital," where the court concluded that "the defendant had no objectively reasonable expectation of privacy that would preclude video surveillance of activities already visible to the public." *Id.* at 547-548; see *Vankesteren*, 553 F.3d at 292 (rejecting claim that camera surveillance of open-field property was Fourth Amendment search).

b. Petitioner also does not show any conflict involving state courts of last resort that requires this Court's intervention. As a threshold matter, petitioner's reference (Pet. 13 n.2) to *Commonwealth* v. *Mora*, 150 N.E.3d 297 (Mass. 2020), shows no conflict because the Court there rested its decision on the Massachusetts State Constitution rather than the federal Constitution. *Id.* at 305.

Petitioner errs in asserting (Pet. 10-11) that the Fifth Circuit's decades-old decision in *United States* v. *Cuevas-Sanchez*, 821 F.2d 248 (1987), conflicts with the decision below. In that case, the Fifth Circuit rejected a Fourth Amendment challenge to the government's use of a pole camera, concluding that "the government followed the proper procedures in obtaining a court order for video surveillance." *Id.* at 252. Although the court stated that the use of the camera qualified as a search, *id.* at 251, that involved facts that are not present in this case. Most importantly, the defendant in *Cuevas-Sanchez* had erected a ten-foot-high fence around his backyard, which "screen[ed] the activity within from views of casual observers." *Ibid.* In addition, the Fifth Circuit noted aspects of the government's

application for video surveillance that undermined the claim that "conventional surveillance would have revealed the activities that led to [the defendant's] arrest." *Id.* at 250. In petitioner's case, by contrast, the Seventh Circuit determined that the pole cameras captured "the outside of [petitioner]'s house and his driveway," areas "plainly visible to the public." Pet. App. 12a. Petitioner has identified no Fifth Circuit decision that either addresses similar facts or adopts his position to in fact suppress video-camera evidence, and the Seventh Circuit correctly found no conflict between the decision below and *Cuevas-Sanchez*. See *id.* at 28a.

Petitioner also cites (Pet. 12-13) *People* v. *Tafoya*, 494 P.3d 613, 615 (2021) (en banc), in which the Colorado Supreme Court determined that the government's use of a pole camera to record activity inside a defendant's fenced-in backyard was a search. There, however, the court found that the defendant had a subjective and reasonable expectation of privacy in his backyard, which was surrounded by a "six-foot-high privacy fence" and not visible to "a person standing on the street." *Id.* at 622; see *id.* at 623 (finding that any public exposure of the backyard due to gaps in the fence or neighboring properties was "limited" and "fleeting"). The pole camera's "elevated position" allowed it to view over the fence and record three months of activities inside the "fenced-in," backyard curtilage "not usually visible to members of the public." *Id.* at 615 & n.2. Based on those "specific facts," the Colorado Supreme Court found that the pole-camera recording qualified as a search under the Fourth Amendment. *Id.* at 623. Unlike the cameras at issue in *Tafoya*, the pole cameras in this case recorded only areas that petitioner "knowingly exposed" and that were "observable to any ordinary

passerby." Pet. App. 12a, 16a. Therefore, as the Colorado Supreme Court itself recognized, there is no conflict between *Tafoya* and the decision below. See *Tafoya*, 494 P.3d at 621 n.6 (distinguishing "the facts in *Tuggle*" based on the unfenced, "plainly visible" nature of the area surveilled).

In *State* v. *Jones*, 903 N.W.2d 101 (2017), cert. denied, 138 S. Ct. 1011 (2018), a bare majority of the South Dakota Supreme Court took the view that the "amassed nature of [the] surveillance" of the defendant's activities violated his subjective and reasonable expectation of privacy, *id.* at 111, but nevertheless affirmed the denial of the defendant's suppression motion based on the good-faith exception to the exclusionary rule, *id.* at 115. To the extent that its analysis was based on this Court's 2012 decision in *United States* v. *Jones*, see *State* v. *Jones*, 903 N.W.2d at 107, it lacked the benefit of this Court's subsequent opinion in *Carpenter*, *supra*, which made clear that the Court was "*not* 'call[ing] into question conventional surveillance techniques and tools, *such as security cameras*.'" Pet. App. 36a (quoting *Carpenter*, 138 S. Ct. at 2220) (brackets in original). Petitioner's asserted distinction (Pet. 23) between a surveillance camera and a security camera—which might likewise be placed, without someone's knowledge, somewhere with an open view into his property—is tenuous at best. At a minimum, any review of this Court would be premature in the absence of a more up-to-date decision that, unlike the one cited by petitioner, actually suppresses evidence.

3. Indeed, it is equally true here as it was in *State* v. *Jones* that if the use of the pole cameras violated petitioner's Fourth Amendment rights, the evidence still would have been admissible under the good-faith

exception to the exclusionary rule. Petitioner could not prevail even if this Court were to decide the question presented in his favor, and this case would be an unsuitable vehicle for further review.

The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted). To justify suppression, a case must involve police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing evidence. *Herring* v. *United States*, 555 U.S. 135, 144 (2009). Suppression may be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." *Davis* v. *United States*, 564 U.S. 229, 238 (2011) (citation omitted). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, * * * the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Ibid.* (citations and internal quotation marks omitted).

Nothing in the government's use of pole cameras here indicates any disregard for the Fourth Amendment, which has never been held by this Court or a court of appeals to bar such surveillance techniques. See p. 8-12, *supra*. To the contrary, multiple courts of appeals have affirmed the constitutionality of pole-camera recording, explaining that, under governing precedents, conventional surveillance of publicly visible areas does not constitute a search under the Fourth Amendment. See p. 10-12, *supra*; see also Pet. App. 27a-28a. At the very least, the fact that both courts below determined

that no Fourth Amendment violation occurred demonstrates that the police could have reached the same conclusion in good faith. Under these circumstances, petitioner has not demonstrated that the officers displayed the sort of "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" that is required to justify the high costs of suppression. *Davis*, 564 U.S. at 238 (citation omitted). Accordingly, the outcome of petitioner's case would be unaffected regardless of how this Court might decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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