No. 21-541

In the Supreme Court of the United States

TRAVIS TUGGLE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

REPLY BRIEF OF PETITIONER

ROBERT J. PALMER
MAY, OBERFELL, LORBER
4100 Edison Lakes Parkway, Ste. 100
Mishawaka, IN 46545

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ANDREW L. HOFFMAN
PETER S. JORGENSEN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

* Admitted in Alaska and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

TABLE OF CONTENTS

Page

I. The Seventh Circuit's Decision Deepened a Clear Split of Authority....2

II. The Seventh Circuit's Decision Is Wrong....7

III. This Case Is an Ideal Vehicle for Reviewing This Exceptionally Important Issue....10

CONCLUSION....12

TABLE OF AUTHORITIES

Page

Cases:

Boyd v. United States, 116 U.S. 616 (1886) 2
California v. Ciraolo, 476 U.S. 207 (1986).............7, 9
Carpenter v. United States,
138 S. Ct. 2206 (2018) ....*passim*
Davis v. United States, 564 U.S. 229 (2011) 11
Dow Chem. Co. v. United States,
476 U.S. 227 (1986) 7
Florida v. Jardines, 569 U.S. 1 (2013)........................9
Florida v. Riley, 488 U.S. 445 (1989)......................7, 9
Oliver v. United States, 466 U.S. 170 (1984)..............8
People v. Tafoya, 494 P.3d 613 (Colo. 2021) 5, 6
State v. Jones, 903 N.W.2d 101 (S.D. 2017) 2, 3, 4
United States v. Cuevas-Sanchez,
821 F.2d 248 (5th Cir. 1987)........................5, 6, 7, 9
United States v. Gonzalez,
328 F.3d 543 (9th Cir. 2003)..................................5
United States v. Houston,
813 F.3d 282 (6th Cir. 2016)..................................5
United States v. Jackson,
213 F.3d 1269 (10th Cir. 2000)...............................5
United States v. Jones, 565 U.S. 415 (2012) 7, 8, 9
United States v. Knotts, 460 U.S. 276 (1983).............7
United States v. May-Shaw,
955 F.3d 563 (6th Cir. 2020)..................................5
United States v. Moore-Bush,
982 F.3d 50 (1st Cir. 2020).............................. 4, 12
United States v. Ross, 456 U.S. 798 (1982) 9
United States v. Trice,
966 F.3d 506 (6th Cir. 2020)..................................5
United States v. Vankesteren,
553 F.3d 286 (4th Cir. 2009)..................................5

Page

Constitution:

U.S. Const. amend. IV .... *passim*

In the Supreme Court of the United States

TRAVIS TUGGLE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

REPLY BRIEF OF PETITIONER

Believing itself bound by this Court's precedents, the Seventh Circuit erroneously concluded that eighteen months' video surveillance of the home is not a search under the Fourth Amendment. If that decision stands, the government will be empowered to monitor indefinitely any American's home that is visible from a public space. The information the government collects could reveal the members of political and civic organizations, *see* Institute for Free Speech Br. 9-10, unmask participants in religious gatherings, *see* American Islamic Conference Br. 8-13, and disclose the confidential sources of journalists, *see* Reporters Committee Br. 4-10—chilling the right of countless citizens to associate, pray, and report. Government agents also would have free rein to peruse ordinary moments that comprise "the privacies of life," *Boyd v.*

United States, 116 U.S. 616, 630 (1886)—what time of day citizens return home, who visits their homes and when, and what groceries they buy. It comes as no surprise that the Seventh Circuit expressed qualms about its holding and urged this Court's review.

The time for the Court's review is now. As technology improves and becomes cheaper, the government's surveillance capabilities will only expand. Electronic Frontier Foundation Br. 10-12. Governments now have cameras with facial recognition technology, powerful lenses that can decipher letters on a postcard, and artificial intelligence to guide the cameras' gaze. EFF Br. 6-10; *see also* IFS Br. 4-5. Once collected, the government can warehouse indefinitely the footage it ingests for subsequent, sophisticated analysis. EFF Br. 8-10. Under the Seventh Circuit's reluctant interpretation of the Fourth Amendment below, all of this can proceed without judicial supervision.

The government does not dispute the importance of the question presented. The government waves away a clear split of authority, misreads this Court's precedents, and posits a frivolous vehicle objection. The split is real, however, and this case is a perfect vehicle to resolve the split and address this tremendously important question. The Court should grant the petition.

I. The Seventh Circuit's Decision Deepened a Clear Split of Authority

1. The decision below squarely conflicts with *State v. Jones*, 903 N.W.2d 101 (S.D. 2017). The government does not dispute that the South Dakota Supreme Court held that video surveillance on facts materially identical to the ones here constituted a search under the Fourth Amendment. *See* Opp. 14. In both cases, the government in-

stalled a camera that recorded the outside of a home non-stop for months on end. *See Jones*, 903 N.W.2d at 103-04; Pet.App.6a. In both cases, the government monitored all comings and goings at the surveilled home. *Jones*, 903 N.W.2d at 111; Pet.App.33a. And in both cases, the government indefinitely stored the footage to scrutinize at its leisure. *See Jones*, 903 N.W.2d at 112; Pet.App.6a. The Seventh Circuit below identified the conflict. Pet.App.30a n.14.

The government (at 14) urges this Court to ignore *Jones* because the South Dakota Supreme Court "lacked the benefit" of dicta in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The government does not deny, however, that whether the government needs a warrant for this type of invasive surveillance currently turns on where one lives. The government also misreads *Carpenter*. The government highlights (at 14) the Court's statement in *Carpenter* that it was not "call[ing] into question *conventional* surveillance techniques and tools, such as security cameras." 138 S. Ct. at 2220 (emphasis added). The next sentence in *Carpenter* similarly states that the Court was not addressing "*other* business records that might *incidentally reveal* location information." *Id.* (emphases added). These passages confirm that the Court had in mind cameras serving a security-related purpose that *incidentally* capture a person's location—not cameras secretly installed by the government to monitor a specific home for eighteen months. *See* Reporters Committee Br. 16. That dicta does not inform the question presented and would not have changed the South Dakota Supreme Court's decision.

The government (at 14) rejects the distinction between incidental capture of location information and targeted surveillance as "tenuous at best," because a security

camera might hypothetically "be placed, without someone's knowledge, somewhere with an open view into his property." That argument—which insists that the 7-Eleven parking lot camera is constitutionally indistinguishable from the hidden FBI pole camera surveilling a specific home and searching for evidence of criminal activity—strains credulity. *See* Reporters Committee Br. 16.

The government (at 14) also urges the Court to ignore *Jones* because the South Dakota Supreme Court, after holding that the surveillance violated the Fourth Amendment, applied the good-faith exception to the exclusionary rule to deny suppression. 903 N.W.2d at 115. That fact provides no reason to deny review. The South Dakota Supreme Court appropriately decided the Fourth Amendment question, in a lengthy analysis, before proceeding to decide whether to order suppression. *See id.* at 106-14. Its Fourth Amendment holding is the law in South Dakota. The government does not contend otherwise. This clean split on such a momentous question is reason enough to grant the petition.

2. The split, however, is much deeper. The First, Sixth, and Seventh Circuits hold that surreptitious, long-term video surveillance of the home is not a search under the Fourth Amendment. The Fifth Circuit, Colorado Supreme Court, and South Dakota Supreme Court disagree. *See* Pet. 9-13. As noted in the petition (at 10), the en banc First Circuit is considering whether to overrule its precedent on this question. *See United States v. Moore-Bush*, 982 F.3d 50 (1st Cir. 2020) (mem.). If the First Circuit keeps its precedent, the split will sharpen; if not, the split will deepen.

The government's contrary counting of the cases is wrong. The government first miscounts the cases on its side of the split. The government (at 10-13) identifies five

other circuits as ruling in its favor on the question presented or what it calls "similar issues." But the cases it cites from the Fourth and Ninth Circuits do not involve the home. *See United States v. Vankesteren*, 553 F.3d 286, 287 (4th Cir. 2009) (open fields); *United States v. Gonzalez*, 328 F.3d 543, 546 (9th Cir. 2003) ("hospital mailroom used by the public"). And its authority from the Tenth Circuit does not address long-term surveillance. *See United States v. Jackson*, 213 F.3d 1269 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033 (2000).[1]

As to the other side of the split, the government erroneously sets aside *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987), and *People v. Tafoya*, 494 P.3d 613 (Colo. 2021) (en banc). The government (at 12) incorrectly distinguishes *Cuevas-Sanchez* on the ground that "the defendant in *Cuevas-Sanchez* had erected a ten-foot-high fence around his backyard." Not so: the defendant maintained a ten-foot fence on only *one side* of his backyard. 821 F.2d at 250 n.1. Another side had a "five to six foot" fence, over which "a person of average height" could see. *Id.* at 250 & n.1. And a third side was shielded only by a chain link (*i.e.*, transparent) fence. *Id.* at 250 n.1. Although the Fifth Circuit invoked the fence in support of its conclusion that the defendant had a subjective expectation of privacy, it also invoked the backyard's constitutional status as curtilage. *Id.* at 251; *see* Pet. 14. The Fifth

[1] The Sixth Circuit in *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), reached the same conclusion as the Seventh Circuit did here. The government cites (at 6) this Court's denial of the petition in another Sixth Circuit case, *United States v. May-Shaw*, 955 F.3d 563 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2763 (2021), but that case concerned surveillance of a detached carport (not a home), *id.* at 569. The government also cites (at 11) *United States v. Trice*, 966 F.3d 506 (6th Cir. 2020), *cert denied*, 141 S. Ct. 1395 (2021), but *Trice* did not involve long-term surveillance, *id.* at 519.

Circuit did not suggest that the partial fencing of the backyard was dispositive.

Additionally, the government distinguishes *Cuevas-Sanchez* because "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.'" Opp. 12-13 (quoting *Cuevas-Sanchez*, 821 F.2d at 250). The same is true here. In the district court, the government argued that "physical surveillance presented a significant challenge for law enforcement" and that it needed to use pole cameras "[i]n order to effectively investigate" Mr. Tuggle. Dist. Ct. Dkt. 51, at 2; *see also* Pet.App.6a ("traditional visual or physical surveillance" would have been "conspicuous[]").

As for the Colorado Supreme Court's decision in *Tafoya*, the government points to the existence of a "six-foot-high privacy fence." Opp. 13 (quoting *Tafoya*, 494 P.3d at 622). The government downplays the fact that neighbors could see into Tafoya's backyard through gaps in the fence and from a stairway in an adjacent building because any "public exposure . . . was 'limited' and 'fleeting.'" Opp. 13 (quoting *Tafoya*, 494 P.3d at 623). But any passerby likewise would have enjoyed only a "limited" and "fleeting" view of Mr. Tuggle's home. At the very least, no neighbor or passerby would have sat "atop three telephone poles to constantly monitor Tuggle's home for eighteen months." Pet.App.36a.

As the Seventh Circuit recognized below, the "complicated Fourth Amendment problems that accompany" the government's use of digital technology will continue to perplex the courts absent this Court's review. Pet.App.40a. The decision below and the deepening divide in the courts demonstrate that the time for this Court's review is now.

II. The Seventh Circuit's Decision Is Wrong

The government's merits argument fares no better. Citizens reasonably expect privacy against eighteen months of surreptitious video surveillance that reveals their intimate associations.

Despite chiding Mr. Tuggle (at 12) for citing the Fifth Circuit's "decades-old decision" in *Cuevas-Sanchez*, the government rests its merits argument on three cases from the same decade. Opp. 7-8 (discussing *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *Florida v. Riley*, 488 U.S. 445 (1989)). None of those three cases, however, involved long-term surveillance. In each case, the practical limitations of aerial surveillance and pre-digital photography constrained the government's ability to surveil the property long-term. Just as the time-limited location monitoring sanctioned in *United States v. Knotts*, 460 U.S. 276 (1983), did not control the outcome in *Carpenter*, *see* 138 S. Ct. at 2215, precedent permitting isolated instances of warrantless aerial photography does not greenlight eighteen months of nonstop video surveillance.

The government's attempts to distinguish *Carpenter* and *United States v. Jones* are similarly unpersuasive. The government (at 9) argues that pole cameras cannot follow individuals everywhere they go. That contention erroneously assumes that "public movements"—but not the home and its curtilage—receive special Fourth Amendment solicitude. Opp. 9 (quoting *United States v. Jones*, 565 U.S. 415 (2012) (Sotomayor, J., concurring)). To support this argument, the government badly paraphrases Justice Sotomayor's concurring opinion in *Jones*. The government asserts that Justice Sotomayor warned against collection of data "'that reflects a wealth of detail' about *places visited*." Opp. 9 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)) (emphasis added). But

Justice Sotomayor disapproved of warrantless government aggregation of data "that reflects a wealth of detail *about [a target's] familial, political, professional, religious, and sexual associations*." *Jones*, 565 U.S. at 415 (emphasis added). Similarly, the Court in *Carpenter* found a reasonable expectation of privacy in the *associations* revealed "through" a target's "particular movements." 138 S. Ct. at 2217

Pole-camera surveillance captures the same private associations in even more vivid detail. The government's assertion that the pole cameras "could not have been . . . used to peer into the privacy of anyone's home or otherwise uncover intimate details of petitioner's private life," Opp. 9 (cleaned up), is wrong. In the curtilage, Americans partake in "the intimate activity associated with 'the sanctity of a man's home and the privacies of life.'" *Oliver v. United States*, 466 U.S. 170, 180 (1984) (citation omitted). For example, pole-camera surveillance of a home and its curtilage could expose the identity of sexual partners visiting a home, the purchasing habits of its occupants, and the nude appearance of backyard sunbathers. *See* EFF Br. 16; Cato Br. 3. And, over the past two years, the COVID-19 pandemic and associated restrictions on public gatherings have driven more and more activity into the home, including religious gatherings. *See* EFF Br. 5; American Islamic Conference Br. 6-7.

The government also argues that pole cameras do not "represent a '[d]ramatic technological change' that might violate reasonable expectations of privacy." Opp. 10 (quoting *Jones*, 565 U.S. at 427 (Alito, J., concurring in judgment)). The cameras here, however, were just as revolutionary as the GPS device in *Jones*. Government agents could watch the camera footage remotely in real time, without exposing themselves to Mr. Tuggle's gaze, and they could zoom, tilt, and pan the cameras from afar.

Pet. 4-5. The cameras created a secret, eighteen-month record of every coming and going at Mr. Tuggle's home. "Traditional surveillance" of this magnitude would have been prohibitively costly and nearly impossible to conduct without detection. *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment).

To the extent the government invokes the lack of fencing for the proposition that its surveillance of Mr. Tuggle's home was not a search, it offers no coherent rationale for a Fourth Amendment rule that would distinguish between homes with and without fences. "[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). "[F]actors entirely unrelated to someone's reasonable expectation of privacy," including "terrain, population density, aesthetics, community ordinances, costs, and whether someone is a landowner or a tenant," influence individuals' fence-building decisions. EFF Br. 19. All citizens reasonably expect that the government will not conduct "Orwellian" surveillance of their home and curtilage for extended periods of time, *Cuevas-Sanchez*, 821 F.2d at 251—fence or no fence.

Finally, the government has no response to the local law in Mr. Tuggle's hometown that prohibits installation of video cameras on telephone poles. *See* Pet. 22. As this Court has repeatedly recognized, positive law can influence the reasonableness of a person's expectation of privacy. *See, e.g.*, *Jones*, 565 U.S. at 404-11 (trespass law); *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (same); *Riley*, 488 U.S. at 451 (plurality opinion) (airspace regulations); *Ciraolo*, 476 U.S. at 213-215 (same); *cf. Carpenter*, 138 S. Ct. at 2267-72 (Gorsuch, J., dissenting). Citizens in Mattoon, Illinois reasonably expect that others will not watch

them for eighteen months by unlawfully attaching a video camera to a telephone pole.

III. This Case Is an Ideal Vehicle for Reviewing This Exceptionally Important Issue

The decision below sanctions pervasive government surveillance of the homes of countless Americans. The Seventh Circuit rightly expressed grave misgivings about its decision. As the court of appeals recognized, "[n]ew technologies of this sort will not disappear, nor will the complicated Fourth Amendment problems that accompany them." Pet.App.40a. Instead, surveillance technology will "continue to grow exponentially," which "will predictably have an inverse and inimical relationship with individual privacy from government intrusion." Pet.App.40a-41a. This case, the court observed, is a "harbinger of the challenge to apply Fourth Amendment protections" in this new age. Pet.App.4a.

This case is an excellent vehicle to decide this undeniably important question. The government does not dispute that the question presented was outcome-determinative. Pet. 18. Nor does it dispute the relevant facts. *Id.* And this case presents an ideal opportunity to decide this question on a set of facts that requires no difficult line drawing about fence heights or the length of surveillance. Pet. 19.

The government nonetheless argues (at 14-15) that this case is a poor vehicle because "the evidence still would have been admissible under the good-faith exception to the exclusionary rule." The potential application of the good-faith exception is no reason to deny review.

The question presented by the petition is whether "long-term, continuous, and surreptitious video surveillance of a home and its curtilage constitutes a search under the Fourth Amendment." Pet. i. The Court should

grant review and answer that question. If the Court rules in petitioner's favor on that question, the Seventh Circuit on remand can consider the government's good-faith exception argument in determining whether suppression is required. *See* Pet.App.42a (noting the argument but not deciding it). If the potential application of the good-faith exception were sufficient reason to deny review, this Court would rarely grant review to decide important Fourth Amendment questions, freezing Fourth Amendment jurisprudence in place, except perhaps when the government is the petitioning party. The government unsuccessfully advanced the same vehicle argument in opposing review in *Carpenter*. *See* Opp., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402), 2017 WL 411305, at *29-31 (cert. granted). No reason for a different result exists here

In any event, the good-faith exception does not apply in this case. The government failed to invoke the exception in the district court and thus forfeited it. Additionally, the government cannot satisfy the exception on the merits. In *Davis v. United States*, 564 U.S. 229 (2011), this Court held that the exclusionary rule does not apply "when the police conduct a search in objectively reasonable reliance on binding appellate precedent." *Id.* at 249-50. As both the Seventh Circuit and the district court explained, no such "binding appellate precedent" existed here. *See* Pet.App.4a ("Tuggle's case presents an issue of first impression for this Court."); Pet.App.51a ("The Seventh Circuit has not made a dispositive ruling on the long-term warrantless use of pole cameras.").

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should hold this petition until the en banc First Circuit rules in *United States v. Moore-Bush*. The en banc court heard oral argument over ten months ago, so a decision is likely imminent.

Respectfully submitted,

ROBERT J. PALMER
MAY, OBERFELL, LORBER
4100 Edison Lakes
Parkway, Ste. 100
Mishawaka, IN 46545

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ANDREW L. HOFFMAN
PETER S. JORGENSEN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

JANUARY 26, 2022

* Admitted in Alaska and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).