No. 22-481

IN THE

Supreme Court of the United States

DAPHNE MOORE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

Jessie J. Rossman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108

Linda J. Thompson
John M. Thompson
THOMPSON & THOMPSON, P.C.
75 Market Place, Third Floor
Springfield, MA 01103

Paul Rudof
ELKINS, AUER, RUDOF & SCHIFF
31 Trumbull Road, Suite B
Northampton, MA 01060

Matthew R. Segal
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
One Center Plaza, Suite 850
BOSTON, MA 02108

Nathan Freed Wessler
Counsel of Record
Brett Max Kaufman
Laura Moraff
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
nwessler@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Other Authorities

REPLY TO BRIEF IN OPPOSITION

This case presents a pressing question of Fourth Amendment protections in the digital age. The government's opposition disregards both a circuit split and this Court's repeated instruction to not mechanically extend older Fourth Amendment precedents to newer privacy-invading surveillance technologies. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018); *Riley v. California*, 573 U.S. 373, 393 (2014). But like prolonged location tracking, long-term pole-camera surveillance of the home violates reasonable expectations of privacy by amassing a previously unobtainable compendium of a person's private activities at home. For that reason (and others, *see* Pet. 25–34), long-term pole-camera surveillance of the home is a Fourth Amendment search. The lower courts are split on the question presented, and this Court should take the opportunity to resolve the issue.

I. The Lower Courts Are Divided.

The government acknowledges a split in authority among the lower courts, but tries to minimize it. *See* BIO 12 (asserting that there is "no conflict in the lower courts *that would warrant this Court's review*" (emphasis added)). But as explained in the Petition, Pet. 12–19, the split was already entrenched before the en banc First Circuit deadlocked on the Fourth Amendment question in this case, and that court's dueling opinions only deepen the divide and underscore the need for this Court's intervention. Indeed, lower courts on both sides of the question recognize the "disagreement among [the] circuits and counterparts in state courts." *United States v. Tuggle*,

4 F.4th 505, 511 (7th Cir. 2021); *accord People v. Tafoya*, 494 P.3d 613, 621 (Colo. 2021) (en banc).

The government does not dispute that the First Circuit's rule (adopted in *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009), and left in place by the divided en banc court here) is in direct conflict with the opinion of the South Dakota Supreme Court in *State v. Jones*, 903 N.W.2d 101 (S.D. 2017). *Jones* involved facts materially indistinguishable from those both in this case and in *Bucci*: months-long pole-camera surveillance of a home and curtilage using a remotely operated camera surreptitiously installed on a nearby utility pole. *Compare State v. Jones*, 903 N.W.2d at 104, *with* App. 7a–9a, *and Bucci*, 582 F.3d at 116.

The government seeks to distract from the acknowledged split with *Jones* by pointing out that *Jones* was decided before this Court's decision in *Carpenter*, in which the Court noted that it was not "call[ing] into question conventional surveillance techniques and tools, such as security cameras." BIO 16. But as Chief Judge Barron explained in his concurring opinion in this case, police pole cameras are neither a conventional surveillance technique (like a police stakeout), nor a "security camera" (a term that generally refers to cameras that monitor a person's own property). App. 63a–72a. The relevant question under *Carpenter* is whether "conventional surveillance techniques" available prior to the advent of the technology at issue would have been expected to provide law enforcement with a similar ability to obtain private information. This Court's reasoning in *Carpenter* does not diminish the holding of *Jones*—it bolsters it. Before the advent of this technology police

simply could not surreptitiously record every activity around a private home twenty-four hours a day, month after month, without distraction, detection, or error. *State v. Jones*, 903 N.W.2d at 111. *Cf. Carpenter*, 138 S. Ct. at 2217; *United States v. Jones*, 565 U.S. 400, 420 & n.3 (2012) (Alito, J., concurring in judgment).

The government also attempts to distinguish the First Circuit's rule from other cases holding that long-term pole-camera surveillance is a search by pointing to the presence of fencing around the homes in those cases. *See* BIO 14–15; *see also* Pet. 15–18 (discussing *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987), and *Tafoya*, 494 P.3d 613). But the split cannot be resolved based on that distinction. In *State v. Jones*, there was no fencing. 903 N.W.2d at 116 (Gilbertson, C.J., concurring in the result). And the South Dakota Supreme Court expressly reasoned that a person need not "attempt[] to conceal every activity outside his home" in order to maintain a reasonable expectation of privacy against the government "accumulat[ing] the vast array of information that targeted, long-term video surveillance can capture." *Id.* at 110 (majority opinion).

It is true that there were fences around the homes in *Cuevas-Sanchez* and *Tafoya*. The government argues that "the defendant in *Cuevas-Sanchez* had erected a ten-foot-high fence around his backyard" and that the home in *Tafoya* "was surrounded by a 'six-foot-high privacy fence.'" BIO 14–15. But the courts in both cases observed that the fences were far from insuperable barriers to public observation of the properties. In *Cuevas-Sanchez*, the ten-foot fence extended along only one side of the property; a shorter

(five-to-six–foot) metal fence ran along another side, and a transparent chain link fence along a third. 821 F.2d at 250 n.1. As a result, the government argued, "activities in the driveways and on the southwestern portion of the property were visible from the street; . . . some of the activity in the rear portion was visible from the street; [and] . . . because the east fence was only five to six feet high, a person of average height could observe activity from that vantage point." *Id.* at 250. And in *Tafoya*, "people in the neighboring yard could peer through the gaps [in the fence] to see into Tafoya's backyard," and a vantage point on the exterior stairway of a neighboring apartment building afforded a view over the fence. *Tafoya*, 494 P.3d at 615 & n.3.

In neither case did the expectation of privacy from long-term pole-camera surveillance turn on the presence of a fence. The Colorado high court relied on the fact that the "area surveilled by the pole camera was curtilage," as well as the "duration, continuity, and nature of the surveillance." *Tafoya*, 494 P.3d at 622. Likewise, the Fifth Circuit identified the constitutionally protected status of curtilage, and the "indiscriminate" nature of the video surveillance as bases for its conclusion that the government's use of the pole camera was a search. *Cuevas-Sanchez*, 821 F.2d at 251.[1]

---

[1] The government asserts that the Fifth Circuit's recent decision in *United States v. Dennis*, 41 F.4th 732 (5th Cir. 2022), *petition for cert. filed*, No. 22-6473 (Dec. 29, 2022), supports its narrow reading of *Cuevas-Sanchez*. BIO 14–15. In *Dennis*, the Fifth Circuit held that it was not plain error for the district court to deny as untimely a defendant's motion to suppress one-and-a-half months of pole-camera footage. As part of its plain-error review, the panel distinguished *Cuevas-Sanchez* on the basis that

Moreover, the rule suggested by the government's reasoning is entirely impracticable and at odds with bedrock Fourth Amendment precedents. Requiring a warrant for long-term pole-camera surveillance only when a homeowner has erected tall, impermeable fencing around their entire property would make a mockery of the Fourth Amendment's promise that "the 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). Individuals need not build fences to enjoy basic Fourth Amendment rights at home. Many homes simply can't be fenced in because of their physical configuration. Renters cannot build fences around their homes. And even homeowners who face no architectural impediments might lack the funds or legal permission to build a fence. Indeed, Petitioner could not have built a fence around her home if she wanted to, because of a local zoning ordinance. Springfield, Mass., Zoning Ordinances, art. 7, § 7.4.23(A) (prohibiting construction of fences at the front of residential properties in Petitioner's zoning district). It makes good sense that the *Cuevas-Sanchez*

---

the fence around Dennis's property contained gaps through which passersby could view the property, while the fence in *Cuevas-Sanchez* did not. That is factually incorrect. *See supra* (discussing public's view over and through Cuevas-Sanchez's fence). And *Dennis*'s one-paragraph discussion in the context of plain-error review does not purport to (and could not) overrule the Fifth Circuit's earlier, binding holding in *Cuevas-Sanchez*, which considered and rejected precisely the argument that the ability of passersby to see over the front fence negated the expectation of privacy against prolonged pole-camera surveillance. *Cuevas-Sanchez*, 821 F.2d at 251 (explaining that "indiscriminate video surveillance" is unlike "a glance over the fence by a passer-by").

and *Tafoya* courts did not rest their decisions on the presence of fencing alone.

The government has failed to explain away the sharp split between the opinions of the Fifth Circuit and Colorado and South Dakota Supreme Courts on one side, and the holdings of the First, Sixth, and Seventh Circuits on the other, which found no Fourth Amendment constraint whatsoever on long-term pole-camera surveillance. Pet. 12. The inability of the en banc court of appeals to resolve the split even for their own circuit underscores that only this Court can provide the necessary guidance to lower courts, the public, and the police "to ensure that the 'progress of science' does not erode Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2223 (quoting *Olmstead v. United States*, 277 U.S. 438, 473–474 (1928) (Brandeis, J., dissenting)).

II. The Decision Below Is Wrong.

The government does not respond to Petitioner's argument that long-term pole-camera surveillance interferes with people's Fourth Amendment right to be "secure" against unreasonable searches of their homes—a constitutionally sacrosanct area. Pet. 26–27. *See also generally* Cato Institute Amicus Br.; Institute for Justice Amicus Br. Nor does it address the various sources of positive law Petitioner cited as shaping and confirming people's reasonable expectation that they will not be subject to surreptitious, targeted long-term recording at their homes by a government camera. Pet. 32–34.

The government advocates an extreme version of the public-exposure doctrine, whereby people would lose their expectation of privacy against even

prolonged technological surveillance as soon as they venture out their front door. BIO 8–9. The Court has repeatedly rejected that contention. As far back as *Katz*, the Court explained that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351 (1967). And in *Carpenter*, echoing the five concurring Justices in *United States v. Jones*, the Court explained that the fact that our activities and movements are exposed to members of the public does not vitiate our reasonable expectation of privacy against prolonged location surveillance using novel technological means. *See Carpenter*, 138 S. Ct. at 2217 ("A person does not surrender all Fourth Amendment protection by venturing into the public sphere.").

That is why the 1980s aerial surveillance cases cited by the government, BIO 9 (citing *California v. Ciraolo*, 476 U.S. 207 (1986), *Florida v. Riley*, 488 U.S. 445 (1989) (plurality opinion), and *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986)), do not dictate the outcome here. Pet. 31. Each of those cases involved only short-duration visual observation from transiting aircraft. To accept the government's logic would mean there is no material difference between a brief fly-over by a piloted aircraft, and months-long recording of activity in one's curtilage by a solar-powered hovering drone. That is "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley v. California*, 573 U.S. at 393.

The government further suggests that, when a person does not manage to surround their home with opaque barriers, it denotes tacit approval for the continuous, prolonged, and digitized recording of all

events that occur on their curtilage and around their front door. BIO 8, 11. But that is not the law. As the Massachusetts Supreme Judicial Court put it, "[t]he traditional barriers to long term surveillance of spaces visible to the public have not been walls or hedges—they have been time and police resources." *Commonwealth v. Mora*, 150 N.E.3d 297, 306 (Mass. 2020) (citing *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment)). It is those practical constraints that mean people simply "do not expect that every . . . action [around their home] will be observed and perfectly preserved for the future." *Id.*

The government tries to characterize the prolonged digital video surveillance here as the kind of "conventional surveillance technique[]" that this Court emphasized it was not addressing in *Carpenter*. BIO 10–11. That is not the case, as Chief Judge Barron's concurring opinion below extensively explains. App. 63a–72a. The Fourth Amendment's protections do not hinge on a totting up of the number of years police have had access to a particular technology before this Court grants review. *Contra* BIO 11–12. Indeed, the cell phone location data at issue in *Carpenter* had been accessible to police for many years before the Fourth Amendment question ripened such that this Court could grant review. App. 64a.

This Court's duty is to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. at 2214 (cleaned up). Government use of pole-camera technology upends long-settled expectations of privacy by enabling pervasive, indefinite, and perfectly recorded

surveillance that was previously impossible to conduct. And it infringes on privacy in a way that traditional "security cameras" do not. *Contra* BIO 16. The pole camera here was deployed to capture an indelible and permanent record of every activity and association at the threshold of Petitioner's home. Such surveillance implicates just the kinds of "privacies of life" that so concerned this Court in *Carpenter* and *Jones*. *Carpenter*, 138 S. Ct. at 2214 (quoting *Riley v. California*, 573 U.S. at 403); Pet. 30–31. And in doing so, it threatens to chill the exercise of First Amendment freedoms. *See* Reporters Committee for Freedom of the Press et al. Amicus Br.; Muslim Public Affairs Council Amicus Br. This Court should reject the crabbed vision of the Fourth Amendment advanced by the government and by Judge Lynch's concurring opinion below.

III. This Case Is an Excellent Vehicle for Deciding the Question Presented.

The government does not contest the importance of the question presented. Instead, it argues that possible *later* resolutions of this case on other grounds on remand would somehow make *this* appeal an unsuitable vehicle for certiorari. BIO 16–19. To the contrary, the factual and legal development of this case makes it an excellent vehicle for deciding whether long-term pole-camera surveillance of homes is a Fourth Amendment search. Pet. 23–24.

The possible applicability of the good-faith exception to the exclusionary rule is no bar to review. The district court held that the government had waived invocation of the good-faith exception by not raising it until after the decision on the motion to

suppress. App. 136a. The Court of Appeals did not decide the issue—only Chief Judge Barron's concurring opinion (for three members of the six-member court) even addressed the exception. App. 82a–83a. The government suggests that because "half of the judges [found] no Fourth Amendment violation to begin with and the other half explicitly recogniz[ed] that the good-faith exception applies," granting certiorari would "result in an opinion that would necessarily be advisory." BIO 17–18. By that logic, this Court should not have decided *Carpenter*, where two members of the Sixth Circuit panel found no Fourth Amendment violation and one member determined that the good-faith exception applied. *United States v. Carpenter*, 819 F.3d 880, 890 (6th Cir. 2016) (majority opinion); *id.* at 894 (Stranch, J., concurring). As this Court has often done where lower courts are in conflict on an important constitutional question, *see* Pet. 23–24 & n.8, it should decide the Fourth Amendment question and remand for a decision about applicability of the good-faith exception and whether its invocation has been waived—especially where, as here, the court below did not resolve that question.

Even if the good-faith exception might apply on remand, moreover, its specter is not a reason to deny the petition. Otherwise, the government's decision to conduct long-term video surveillance of people's homes without a warrant risks being effectively insulated from appellate review. *Cf. Davis v. United States*, 564 U.S. 229, 247 (2011) ("[T]he good-faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents."). Indeed, if the government's argument were accepted, the mere possibility of a good-faith

exception would likely preclude this Court's resolution of any Fourth Amendment issue as to which there is a circuit split—the very cases this Court needs to decide.

The government is also wrong that the "interlocutory posture" of this appeal renders it unsuitable for review. BIO 18. This Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (11th ed. 2019). It has repeatedly granted interlocutory review in criminal cases when, as here, the government has appealed a trial court's grant of a defendant's motion to suppress. *See, e.g.*, *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020); *Oliver v. United States*, 466 U.S. 170, 184 (1984); *Colorado v. Bannister*, 449 U.S. 1, 4 (1980); *United States v. Kahn*, 415 U.S. 143, 148–49 (1974). *See also Michigan v. Clifford*, 464 U.S. 287, 289 (1984) (granting review after defendant's interlocutory appeal of trial court's denial of suppression motion).

The Court should grant certiorari because this appeal presents an "important and clear-cut issue of law that is fundamental to the further conduct of the case," and on which this Court's guidance is needed. Shapiro*, Supreme Court Practice*, § 4.18. There is no sound reason to delay review, especially when the district court would most benefit from clarity on the Fourth Amendment rule *before* holding a trial in which pole camera–derived evidence is slated to be introduced.

Respectfully Submitted,

Jessie J. Rossman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108

Linda J. Thompson
John M. Thompson
THOMPSON & THOMPSON, P.C.
75 Market Place, Third Floor
Springfield, MA 01103

Paul Rudof
ELKINS, AUER, RUDOF & SCHIFF
31 Trumbull Rd. Suite B
Northampton, MA 01060

Matthew R. Segal
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
One Center Plaza, Suite 850
Boston, MA 02108

Nathan Freed Wessler
Counsel of Record
Brett Max Kaufman
Laura Moraff
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
nwessler@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Dated: May 1, 2023