No.

IN THE

Supreme Court of the United States

BRUCE L. HAY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID A. O'NEIL
Counsel of Record
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 383-8000
daoneil@debevoise.com

BENJAMIN LEB
ELISE M. COLETTA
AMELA BAJRAMOVIC
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001

Counsel for Petitioner

MELODY BRANDON
Federal Public Defender

PAIGE A. NICHOLS
Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC
DEFENDER
117 SW 6th Ave., Suite 200
Topeka, KS 66603
(785) 232-9828
paige_nichols@fd.org

QUESTION PRESENTED

Whether the Government's warrantless, long-term video camera surveillance of an individual's home and curtilage constitutes a "search" for Fourth Amendment purposes.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bruce L. Hay was the defendant in the district court and the appellant in the Tenth Circuit.

Respondent United States of America was the plaintiff in the district court and the appellee in the Tenth Circuit.

No party is a corporation.

RELATED PROCEEDINGS

United States District Court for the District of Kansas:

United States v. Hay, No. 19-20044-JAR (Dec. 12, 2022) (judgment);

United States v. Hay, No. 19-20044-JAR (May 5, 2022) (denying motion to suppress).

United States Court of Appeals for the Tenth Circuit:

United States v. Hay, No. 22-3276 (Mar. 19, 2024) (panel opinion affirming the district court judgment).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce L. Hay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is published at 95 F.4th 1304 and is reproduced in the appendix to this petition at Pet. App. 1a–24a. The judgement of the United States District Court for the District of Kansas is unpublished and is reproduced in the appendix to this petition at Pet. App. 25a–30a. The order of the United States District Court for the District of Kansas denying defendant's motion to suppress is published at 601 F. Supp. 3d 943 and is reproduced in the appendix to this petition at Pet. App. 31a–49a.

JURISDICTION

The Tenth Circuit issued its opinion on March 19, 2024 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1). On June 6, 2024, Justice Gorsuch granted Petitioner's application for an extension of time to file a petition for writ of certiorari to July 17, 2024.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. 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 Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

INTRODUCTION

Between 2016 and 2017, the Department of Veterans Affairs ("VA") continuously recorded the front of Petitioner Bruce L. Hay's home and curtilage for approximately eight weeks and two additional one-week periods using a motion-activated, remote-controlled video camera to capture his daily, routine, non-criminal activity—without seeking a warrant. The VA surreptitiously installed a video camera across Mr. Hay's home in rural Kansas, capturing and cataloguing the private and personal details of his and his family's life in a manner beyond the capability of traditional law enforcement surveillance techniques. This warrantless video camera surveillance violated Mr. Hay's Fourth Amendment right against unreasonable government searches.

The Government used this footage to prosecute and convict Mr. Hay of wire fraud and stealing government property in the form of VA benefits. The Government alleged that Mr. Hay exaggerated the symptoms of his highly variable disability, arguing that on certain days, at certain times, Mr. Hay appeared "normal" in the video footage. The Government contended that, in light of Mr. Hay's on-camera behavior, he could not possibly be disabled and therefore was not entitled to benefits previously approved after the VA's independent assessment of

Mr. Hay's medical condition. The District Court denied Mr. Hay's motion to suppress the warrantless surveillance footage, a jury convicted him on a number of counts, and both the Kansas District Court and the Court of Appeals for the Tenth Circuit affirmed.

The Government's warrantless pole camera [1] surveillance violated Mr. Hay's Fourth Amendment rights because he had a reasonable expectation of privacy in the whole of his movements at and around his home over the ten-week period. The home is at the very core of the protections guaranteed by the Fourth Amendment. The technology used to surveil Mr. Hay was particularly invasive and surreptitious, giving the Government real-time, on-demand visibility of Mr. Hay's private home, while simultaneously preserving a repository of historical footage for subsequent analysis. Moreover, the duration of this warrantless surveillance resulted in a cumulative mosaic, capturing all of Mr. Hay's movements and day-to-day activities around his home for nearly ten weeks.

The Tenth Circuit discounted these principles in sustaining Mr. Hay's conviction, holding that the admissibility of the pole camera footage was not a Fourth Amendment search because Mr. Hay did not have a reasonable expectation of privacy in the areas around his home in public view.

In doing so, the Tenth Circuit further divided the split among the federal circuits and state supreme

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[1] Although the camera was not mounted to a public utility pole, this petition will adopt the term used by the District Court in its order denying the motion to suppress, *see* Pet. App. 31a, and will refer to the camera as "pole camera."

courts on this issue. The highest courts of both Colorado and South Dakota and three First Circuit judges have concluded that long-term warrantless pole camera surveillance of the home and curtilage is a search for Fourth Amendment purposes and therefore requires a warrant. Four circuits, however, have held that warrantless pole camera surveillance of the home over an extended period does not constitute a Fourth Amendment search.

This Court should resolve the conflicting jurisprudence on the constitutionality of warrantless long-term pole camera surveillance of the home and reaffirm the privacy protections guaranteed by the Fourth Amendment.

STATEMENT OF THE CASE

I. Factual Background

Bruce L. Hay is a U.S. Army veteran and served nine years on active duty, including a tour in Iraq. *See* Pet. App. 2a; R3. at 172, 349. In 2005, Mr. Hay was involved in a serious car accident with his two young daughters and developed a series of symptoms affecting his mobility. *See* Pet. App. 2a. Mr. Hay was referred to specialists, including a neurologist, to ascertain the extent of his injuries. R3. at 462–69. After extensive testing, Mr. Hay was diagnosed with functional neurologic disorder ("FND").[2] *Id.*; Pet. App. 2a. FND is a psychological disorder without an underlying anatomical abnormality causing the illness. R3. at 1209. Patients with FND suffer

[2] Witnesses at trial referred to Mr. Hay's disability as "conversion disorder." This term is considered outdated and most experts now refer to the disability as FND. R3. at 1203–04.

numerous symptoms that are often variable and unpredictable, including tremors, weakness, and fainting. R3. at 1207, 1213. An individual with FND may have full mobility one day and, without warning, be forced to use a cane the next. *Cf. id.*

Given his illness, Mr. Hay applied for benefits from the VA. Pet. App. 2a. Typically, the VA awards benefits after reviewing a veteran's claim, his medical and non-medical records, and the results of his compensation and pension ("C&P") exam. R3. at 294–27, 300–01. A C&P exam involves a thorough investigative process where a VA doctor reviews the veteran's claim folder and relevant medical records and then interviews the veteran concerning their symptoms. R3. at 295–98. The VA doctor then submits their findings to a VA rating specialist who determines the veteran's level of disability and corresponding entitlement to benefits. R3. at 298–301. To make this determination, the rating specialist considers the VA doctor's C&P report alongside the veteran's medical records. R3. at 294–97, 300–01. Upon reviewing Mr. Hay's records, Mr. Hay was determined to be permanently disabled and thus entitled to benefits. Pet. App. 2a. Mr. Hay began receiving benefits in 2006. *Id.*; *see also* R3. at 318.

In 2012, the Department of Veterans Affairs Office of the Inspector General ("VA OIG") received an anonymous tip that Mr. Hay was not permanently disabled, despite the VA's previous determination. *See* Pet. App. 3a. The VA OIG launched a full investigation in response and began surveilling Mr. Hay in person at his residence and in his community with handheld video cameras. *Id.*; R3. at 207–09. Over the course of several days, VA OIG agents recorded Mr. Hay outside his residence, on his porch,

and on his driveway, as well as in his community to and from medical appointments and other errands with his wife. *See* Pet. App. 3a; *see also* R3. at 489–96. The agents concocted a sham deer poaching investigation to question Mr. Hay on land that he and his father owned in order to "get better footage . . . of [Mr. Hay's] movements." R3. at 229–33; *see also* Pet. App. 3a.

The investigation of Mr. Hay paused in 2012. *See* R3. at 181–82. In 2015, VA agents resumed their surveillance of Mr. Hay to record his routine movements and daily activities. *See* R3. at 482. Unable to get the footage they needed, VA agents installed a motion-activated, remote-controlled video camera on top a building approximately 200 feet directly across Mr. Hay's home. R1. at 98–99. The camera gave agents near-continuous footage of the front of Mr. Hay's home, front porch, curtilage, and driveway. R1. at 98–99; Pet. App. 3a. In some instances, the camera captured the inside of Mr. Hay's home. Pet. App. 14a. Agents could monitor and operate the camera remotely and had the ability to zoom and pan the camera in any direction at any time. Pet. App. at 3a, 33a. The surveillance footage was digitally stored, allowing agents to download and replay it at later times. *Id.* at 33a. The VA did not seek a warrant before installing the camera. *Id.* Between 2016 and 2017, the Government conducted continuous warrantless video surveillance of Mr. Hay and his home over eight weeks and two additional one-week periods, capturing over 1,000 total hours of footage. *Id.* at 3a, 32a–33a; *see* R3. at 567.

II. District Court Proceedings

On July 19, 2019, the Government charged Mr. Hay with four counts of stealing government property under 18 U.S.C. § 641, alleging that Mr. Hay stole and converted money from the United States in the form of VA benefits. R1. at 21–29. The Government alleged that Mr. Hay "falsely claim[ed]" to have FND—despite the fact that (1) Mr. Hay was diagnosed with FND following a series of tests conducted by independent medical professionals, and (2) the VA had previously made its own determination that Mr. Hay was permanently disabled and thus entitled to benefits. R3. at 1348.

Before trial, Mr. Hay moved to suppress the pole camera footage, arguing that the warrantless, near-constant surveillance constituted an unlawful search under the Fourth Amendment under the reasoning of *Carpenter v. United States*, 585 U.S. 296 (2018). R1. at 98–106. The District Court denied the motion to suppress, holding that Tenth Circuit precedent precluded Mr. Hay's argument. Pet. App. 34a–37a, 45a–47a. In doing so, the District Court allowed the Government to build its case around this unconstitutionally obtained footage, depriving Mr. Hay of a fair trial. *See generally id.* at 31a–49a. In its opinion, however, the District Court acknowledged that Tenth Circuit precedent may need reconsideration in light of this Court's ruling in *Carpenter*. *Id.* at 47a.

The warrantless pole camera footage was crucial to the Government's theory of the case. Answering Brief for the United States at 24, *United States v. Hay*, 95 F.4th 1304 (10th Cir. 2024) (No. 22-3276); *see also* R3. at 1277–1317. The Government's expert witness

testified that, although FND is variable and unpredictable, Mr. Hay's presentation on the pole camera footage was inconsistent with his diagnosis. R3. at 869–70. The Government also asked the jury to assess the credibility of Mr. Hay's disability by comparing trial witness testimony to the pole camera video footage that showed Mr. Hay walking without a cane over short distances. R3. at 1277–81. In its closing argument, the Government urged the jury to contrast the pole camera footage with reports prepared by VA doctors and claim administrators describing Mr. Hay's symptoms. R3. at 1277–81.

The jury convicted Mr. Hay on all counts. Pet. App. 25a; R3. at 1332–34. Mr. Hay was sentenced to 37 months in prison followed by three years of supervised release, and he was ordered to pay restitution of $537,915.87. Pet. App. 27a–29a; R3. at 1362. During the sentencing hearing, the District Court itself acknowledged the significance of the pole camera footage, describing it as "damaging." R3. at 1359.

III. Tenth Circuit Appeal

On appeal, Mr. Hay argued that he was entitled to a new trial because, *inter alia*, the District Court erred in admitting the warrantless pole camera footage, which "constitute[d] an unreasonable search under emerging Supreme Court case law." Pet. App. 11a.

The Tenth Circuit affirmed the District Court's admission of the pole camera footage. *Id.* at 24a. The court held that Mr. Hay did not have a reasonable expectation of privacy in activity conducted in the public view. *Id.* at 21a. The court reasoned that,

because the camera captured only activity within public view, the Government's use of the footage did not violate Mr. Hay's Fourth Amendment rights. *Id.* at 14a.

The Tenth Circuit also held that Mr. Hay's argument was precluded by a prior circuit precedent: *United States v. Jackson*, 213 F.3d 1269 (10th Cir.), *cert. granted, judgment vacated*, 531 U.S. 1033 (2000). In *Jackson*, the Tenth Circuit determined that "[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." *Id.* at 1280. The Tenth Circuit's reasoning in *Jackson* hinged on the proposition that the Fourth Amendment does not protect activity "knowingly expose[d] to the public". *Id.* at 1281. Here, even though the warrantless pole camera surveillance of Mr. Hay occurred for an extensive period of time and provided the Government with details of Mr. Hay's private life otherwise undiscernible from mere "public view," the Tenth Circuit maintained that such surveillance is constitutional as long as it captures "public" activities. Pet. App. 14a, 17a–18a.

The Tenth Circuit further reasoned that this Court's decision in *Carpenter v. United States*, 585 U.S. 296 (2018), did not apply. Pet. App. 17a–19a. *Carpenter* held that surveillance that provides "an intimate window into a person's life" violates an individual's constitutionally protected expectation of privacy in the whole of their physical movements. 585 U.S. at 311. The Tenth Circuit distinguished *Carpenter* on the ground that while *Carpenter* acknowledged a privacy interest in the whole of an individual's physical movements, the pole camera at issue in Mr. Hay's case captured Mr. Hay's

movements only in a single location (his home) and not once he left the pole camera's view. Pet. App. 18a–19a.

In dismissing Mr. Hay's Fourth Amendment arguments, the Tenth Circuit articulated an especially concerning view that, "as video cameras proliferate throughout society, regrettably, the reasonable expectation of privacy from filming is diminished." *Id.* at 20a–21a. In support of this view, the court cited not only examples of personal video cameras, such as cell phones or personal security cameras, but also various forms of modern police surveillance technology, such as body and drone cameras. *Id.* at 20a. Thus, the Tenth Circuit suggested that law enforcement's increasing utilization of new technology may surveil Americans right out of their reasonable expectation of privacy from such invasive technological government surveillance. That circular diminished-expectation theory warrants this Court's attention.

REASONS FOR GRANTING THE WRIT

I. There is a Split of Authority among the Federal Courts of Appeals and State High Courts on the Legality of Warrantless Long-Term Pole Camera Surveillance of the Home.

The Court should grant this petition to resolve the split among federal and state courts about whether long-term pole camera surveillance of the home constitutes a search under the Fourth Amendment.

A. The high courts of Colorado and South Dakota, along with three judges of the First Circuit, have rejected the reasoning below.

The Colorado Supreme Court unanimously held that over three months of warrantless pole camera surveillance of the defendant's home and curtilage, including the front yard, driveway, and fenced backyard, violated the Fourth Amendment. *People v. Tafoya*, 494 P.3d 613 (Colo. 2021) (en banc). The Colorado Supreme Court reasoned that, in *Carpenter v. United States*, 585 U.S. 296 (2018), and *United States v. Jones*, 565 U.S. 400 (2012), the Supreme Court "clarified that public exposure is not dispositive" on the question of whether technology-aided police surveillance is a search under the Fourth Amendment, *see Tafoya*, 494 P.3d at 619, 621, and that these landmark Supreme Court cases suggest that when the government uses technology to conduct "continuous, long-term surveillance, it implicates a reasonable expectation of privacy," *id.* at 620.

Similarly, the Massachusetts Supreme Judicial Court has unanimously concluded that long-term pole camera surveillance of a home is a search under Article 14 of the Massachusetts Constitution[3] and may well constitute a search within the meaning of the Fourth Amendment. *Commonwealth v. Mora*, 150 N.E.3d 297 (Mass. 2020). The *Mora* court declined to directly address the Fourth Amendment question, noting that "the status of pole camera surveillance

[3] Article 14 of the Massachusetts Constitution is analogous to the federal Fourth Amendment, and states that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." MASS. CONST. Pt. 1, art. XIV.

remains an open question as a matter of Fourth Amendment jurisprudence," *id.* at 365 (citations omitted), but the court explained that the analysis under both constitutions was similar, *id.* at 364. First, the court held that defendants had a subjective expectation of privacy, rejecting the argument that defendants' lack of "fencing or other efforts to shield [their] residences from view" negated their subjective expectation of privacy. *Id.* at 366. Reasoning from the concurrences in *Jones*, the court explained that "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," *id.* at 366–67, and that to require a physical manifestation of a subjective expectation of privacy "would make [Fourth Amendment] protections too dependent on the defendants' resources," *id.* at 367. The court further held that defendants had a reasonable expectation of privacy as to the targeted surveillance of defendants' homes, crediting the fact that "[p]rotecting the home from arbitrary government invasion always has been a central aim of both art. 14 and the Fourth Amendment," *id.* at 370, and that the duration of the surveillance "in the aggregate, exposed otherwise unknowable details of a person's life. . . . implicat[ing] a person's reasonable expectation of privacy," *id.* at 373.

The South Dakota Supreme Court held that long-term pole camera surveillance of the home is a Fourth Amendment search. *State v. Jones*, 903 N.W.2d 101 (S.D. 2017). In *State v. Jones*, a warrantless police pole camera "continuously recorded activity outside of [the defendant's] residence" for nearly two months. *Id.* at 104. The court explained that, unlike the Supreme Court's decision in *California v. Ciraolo*, 476

U.S. 207 (1986), the pole camera at issue allowed the government to "capture[] something not actually exposed to public view—the aggregate of all of [the defendant's] coming and going from the home, all of his visitors, all of his cars, all of their cars, and all of the types of packages or bags he carried and when." 903 N.W.2d at 111 (citation omitted). In its analysis, the court underscored the importance of this Court's decision in *United States v. Jones*, and how this Court "brought into question the legality of warrantless, long-term video surveillance of an individual's activities or home." *Id.* at 107.

The First Circuit has divided on the question of whether long-term video surveillance of the home and its curtilage is a Fourth Amendment search. *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022), *cert. denied sub nom. Moore v. United States*, 143 S. Ct. 2494 (2023). Three judges, including Chief Judge Barron, concluded that long-term pole camera surveillance of the home and curtilage is a search because it reveals numerous "privacies of life" that law enforcement could not have captured prior to newly available small, cheap, and powerful digital cameras. *See id.* at 345 (Barron, C.J., and Thompson and Kayatta, JJ., concurring) (citation omitted). These judges explained that people have a reasonable expectation of privacy in their comings and goings from their home over long periods of time, and that government invasion of that privacy constitutes a search under the Fourth Amendment. *See id.* at 335–37, 340. Three judges disagreed, concluding that because passersby could see the home's exterior and curtilage, there was no reasonable expectation of privacy—even as to the eight months of nonstop surreptitious police video surveillance at issue. *See*

id. at 367–68 (Lynch, Howard, and Gelpí, JJ., concurring).[4]

B. The First, Sixth, Seventh, and Fifth Circuits have held that long-term pole camera surveillance of the home is not a Fourth Amendment search.

The First Circuit, in a three-paragraph analysis, upheld the constitutionality of a government-installed pole camera pointed at defendant's home for eight months, finding that the public view doctrine was "dispositive." *United States v. Bucci*, 582 F.3d 108, 117 (1st Cir. 2009). The court reasoned that because there were "no fences, gates or shrubbery located in front of [Bucci's residence] that obstruct the view of the driveway or the garage from the street," the defendant "failed to establish either a subjective or an objective expectation of privacy in the front of his home." *Id.* at 116–17.

A divided Sixth Circuit held that ten weeks of warrantless pole camera surveillance of defendant's personal property was not a search for Fourth Amendment purposes. *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016). The defendant was convicted of being a felon in possession of a firearm based largely on footage of him handling firearms on his rural Tennessee farm. The government amassed that footage through ten weeks of warrantless pole camera surveillance of buildings and curtilage on his

[4] Notwithstanding the views of Chief Judge Barron and two other judges, the First Circuit ultimately reversed a decision suppressing the fruits of the pole camera surveillance on the basis of that court's previous decision in *United States v. Bucci*, 582 F.3d 108, 117 (1st Cir. 2009).

property. On appeal, the panel majority held that "long-term warrantless surveillance via a stationary pole camera does not violate a defendant's Fourth Amendment rights when it was possible for any member of the public to have observed the defendant's activities during the surveillance period." *Id.* at 290. One judge disagreed, doubting the majority's contentions both that the same surveillance could have been conducted by an agent (as opposed to the camera) and that the fixed nature of the camera made it less invasive, emphasizing the importance of the home. *See id.* at 296 (Rose, J., concurring) ("The privacy concerns implicated by a fixed point of surveillance are equal, if not greater, when it is one's home that is under surveillance.").

In *United States v. Tuggle*, the Seventh Circuit held that 18 months of continuous surveillance from three pole cameras directed at defendant's home was not a Fourth Amendment search, primarily because it "did not paint the type of exhaustive picture of [defendant's] every movement that the Supreme Court has frowned upon." 4 F.4th 505, 524 (7th Cir. 2021) (referencing *Jones*, 565 U.S. 400, and *Carpenter*, 585 U.S. 296). But the court cautioned that it was "not without unease about the implications of [long-term pole camera] surveillance [of the home] for future cases," *id.* at 526, opening its opinion by painting a harrowing picture of "future Americans . . . travers[ing] their communities under the perpetual gaze of cameras," *id.* at 509. The court noted that the "eighteen-month duration of the government's pole camera surveillance—roughly four and twenty times the duration of the data collection in *Carpenter* and *Jones*, respectively—is concerning, even if permissible," but declined to engage with the "obvious

line-drawing problem" to avoid risk of "violating Supreme Court precedent." *Id.* at 526.

A recent Fifth Circuit decision found no Fourth Amendment violation with pole cameras directed at the front and back of defendant's property for two months of continuous surveillance. *United States v. Dennis*, 41 F.4th 732 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2616 (2023). In *Dennis*, the court considered whether the district court erred in denying defendant's untimely motion to suppress under the "good cause" standard in Fed. Crim. P. 12(c)(3). The Fifth Circuit affirmed the lower court ruling and reviewed the Fourth Amendment merits question only for plain error. Dennis argued that "the prolonged and continuous nature of the surveillance violated his Fourth Amendment rights." *Id.* at 741. The court, after one paragraph of analysis, found no Fourth Amendment violation because "[s]urveillance of areas open to view of the public without any invasion of the property itself is not alone a violation". *Id.* The court disagreed with Dennis' reliance on *United States v. Cuevas-Sanchez*, which held that nearly two months of pole camera surveillance of defendant's fenced-in backyard and driveway was a Fourth Amendment search. 821 F.2d 248, 251 (5th Cir. 1987). The *Cuevas-Sanchez* court found that "the government's intrusion infringe[d] upon the personal and societal values protected by the Fourth Amendment," explaining that the "indiscriminate video surveillance" at issue "raises the spectre of the Orwellian state" and "provokes an immediate negative visceral reaction." *Id.* The *Dennis* court distinguished *Cuevas-Sanchez*, noting that, in Dennis' case, passersby could "see through [defendant's] fence

and that the cameras captured what was open to public view from the street". 41 F.4th at 740.

II. The Decision Below is Incorrect.

A. This Court's Fourth Amendment jurisprudence has long emphasized the sanctity of the home.

In considering whether the warrantless pole camera surveillance constituted a search, the Tenth Circuit failed to afford appropriate weight to the area surveilled: Mr. Hay's home and curtilage. This Court has repeatedly affirmed that "when it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). This Court has also long treated the curtilage—the area "'immediately surrounding and associated with the home'"—"as 'part of the home itself for [Fourth Amendment] purposes.'" *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)); *see also Collins v. Virginia*, 584 U.S. 586, 592 (2018) ("[T]he Fourth Amendment's protection of curtilage has long been black letter law."). Indeed, "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and be free from unreasonable government intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

The fact that some of the activity captured by the pole camera was visible to passersby does not undermine Mr. Hay's expectation of privacy around his home and curtilage. This Court has recognized that "by venturing into the public sphere," a "person does not surrender all Fourth Amendment

protection." *Carpenter v. United States*, 585 U.S. 296, 310 (2018). While it is true that "people subjectively may lack an expectation of privacy in some discrete actions they undertake in unshielded areas around their home," the type of round-the-clock, surreptitious surveillance at issue here falls far outside what an individual reasonably expects passersby to observe. *See Commonwealth v. Mora*, 150 N.E.3d 297, 306 (Mass. 2020) (explaining that individuals "do not expect that every such action [around one's home] will be observed and perfectly preserved for the future").

The Tenth Circuit noted this Court's recognition that "privacy interests in the home do[] not 'require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.'" Pet. App. 19a (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). But the continuous video surveillance here provided the Government with a significantly more intimate picture of Mr. Hay and his family's life than officers would obtain from merely "passing by [his] home on public thoroughfares," or even through a traditional police stakeout. Unlike a fleeting observation of publicly visible portions of a person's property, using "a video camera that allow[s] [police] to record *all* activity" around one's home and curtilage is a categorically greater intrusion. *See United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (emphasis added) ("It does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible.").

In any event, the Government sought to install this pole camera because it wanted to capture what the Agents themselves (or the public, for that matter) could not:

> Q [United States]. Why did you want a pole camera across from his residence at that time?
>
> A [VA Agent]. I wanted to be able to see Mr. Hay's residence. I mean, **I needed to see his activity, because up to that point we really didn't have a date -- a day in the life of Mr. Hay, and so I kind of needed to see him** -- I really needed to see him to see if he had disabilities that we could identify, to see if he had any of these very noticeable muscle spasms, anything like that that we could identify.

R3. at 488–89 (emphasis added). Justifying the extended surveillance of Mr. Hay's home under a public view theory is undermined by the Government's own testimony that this camera was necessary to capture what their months-long traditional on-foot surveillance could not. *Cf. Cuevas-Sanchez*, 821 F.2d at 250 (noting the "juxtaposition" of the government's position and highlighting how, in applying for authorization of the video surveillance, officers "swore the 'conventional law enforcement techniques, such as debriefing defendants, undercover investigations, informants, and surveillance had been attempted but had failed,'" but that "the government [now] argues, in effect, that conventional surveillance would have revealed the activities that led to [defendant's] arrest. It cannot have it both ways.").

B. The surveillance here exceeded the capability of ordinary law enforcement and violated Founding-era expectations.

The Tenth Circuit also failed to appreciate the invasive nature of pole camera surveillance

technology. Fourth Amendment analysis must consider "'what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.'" *Kyllo*, 533 U.S. at 40 (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). Keeping with this principle, this Court has stated that technology enabling Government surveillance beyond the capacity of traditional surveillance techniques raises serious Fourth Amendment concerns. *See Kyllo*, 533 U.S. at 36 (explaining that Fourth Amendment analyses "must take account" of both "relatively crude" technology as well as "more sophisticated systems that are already in use or in development"); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring in the judgment) (discussing how GPS monitoring encroaches on privacy expectations, unlike short-term monitoring of public movements); *Carpenter*, 585 U.S. at 311 (recognizing that retrospective CSLI surveillance is cheap, easy, efficient, and provides the government with an exponentially greater amount of information).

Long-term pole camera surveillance of the home allows the government to observe citizens in a way that traditional stakeouts or nosy neighbors never could. As the Government explained at trial, *see* R3. at 498, the pole camera technology in Mr. Hay's case was used because it allowed them to comprehensively capture Mr. Hay's routine, non-criminal behavior in and around his most private area—his home—over an indeterminate and extended period of time. For ten weeks, the pole camera trained on Mr. Hay's home was always ready to record—no bathroom breaks,

lunch hours, errands, or tired eyes to interrupt its surveillance.

Pole cameras, like the one used to surveil Mr. Hay, are efficient and invasive. They can be motion-activated, and, unlike traditional police stakeouts, therefore exclusively focus on the most "interesting" activity. The remote-controlled nature of pole cameras exacerbates the intrusiveness of the surveillance. Here, the agents turned the camera on when they saw fit, recording in three separate phases, first for about eight weeks in fall 2016, then for two one-week periods in March 2017 and May 2017. Pet. App. 32a–33a; R3. at 554.

Pole cameras also allow for surreptitious and inexpensive surveillance. Here, the Government went out of its way to avoid detection, installing the camera atop a building across the street instead of on a utility pole to avoid detection. R3. at 487 (VA Agent explaining that they "ruled . . . out" placing the camera on a power pole because they did "not know[] who knows Mr. Hay"). Pole cameras are also relatively inexpensive and can be reused across multiple investigations, and do not require nearly the same magnitude of labor costs as traditional police stakeouts.

Each of these qualities, compared to traditional police surveillance techniques, enables pole camera surveillance to "evade[] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster,* 540 U.S. 419, 426 (2004)).

The digital quality of pole camera footage allows for retrospective analysis and cataloguing, enabling the government to discern patterns and other

intimate behavior that would be "otherwise unknowable" to passersby. *See Carpenter*, 585 U.S. at 312 (expressing concern over the retrospective quality of CSLI because it gives police access to a category of information otherwise unknowable); *see also Kyllo*, 533 U.S. at 38; *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986). Artificial intelligence and other emerging technologies make analyzing and detecting patterns over vast quantities of video surveillance even easier. *See* Pet. App. 20a (noting that "[a]rtificial intelligence software accelerates facial identification and pattern recognition to a previously unimaginable degree"); *see also* Rahul Yadav, *How AI is Transforming the Video Surveillance Sector*, Security InfoWatch.com (Dec. 26, 2023), https://www.securityinfowatch.com/video-surveillance/video-management-software-vms/article/53081272/how-ai-is-transforming-the-video-surveillance-sector (explaining how AI analytics already "enhances security operations" and how "AI-driven video analytic solutions . . . can be integrated within a video management platform and deployed across a near-limitless number of cameras for full 24/7 coverage").

In analyzing how technology impacts Fourth Amendment protections, this Court must account for both "relatively crude" surveillance technology and the "more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. This means that courts should not dismiss Fourth Amendment concerns raised by more common forms of technology-enabled government surveillance just because the technology may be "relatively crude." *See id.* The fact that the video camera at issue here was not unusually sophisticated does not mitigate the invasiveness of this particular surveillance. *Cf. id.* at

38 (explaining that "there is no necessary connection between the sophistication of the surveillance equipment and the 'intimacy' of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful").

The opinion below rests on a particularly concerning premise—that "the reasonable expectation of privacy . . . is diminished" in light of society's ever-evolving technology. *See* Pet. App. 20a–21a. To be sure, Fourth Amendment analyses should consider and contextualize technological advancements. *Cf. Kyllo*, 533 U.S. at 33–34 ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."). But the Tenth Circuit's "diminished expectation" theory would turn the Fourth Amendment on its head. The Tenth Circuit's reasoning would mistakenly focus the "reasonable expectation of privacy" analysis on how prolific particular modes of surveillance technology are throughout modern-day society—including by crediting the *government's* own surveillance technology trends. *See* Pet. App. 20a (noting the "precarious circularity" of Fourth Amendment jurisprudence and how "[c]utting-edge technologies will eventually and inevitably . . . [change] society's expectations of privacy," including through police use of body-worn cameras, "[c]utting edge drone technology," "satellite images of homes," and artificial intelligence (citation omitted)). This would twist the Fourth Amendment from a bulwark against

unreasonable government surveillance into a relic whose ever-shrinking contours are defined by the government's own surveillance techniques. The Fourth Amendment should not be so readily discarded as technology advances.

C. The duration of the surveillance created a cumulative mosaic capturing the whole of Mr. Hay's movements.

The Tenth Circuit did not properly credit the duration of the surveillance, and how the surveillance's duration, combined with the location and technology used, violated Mr. Hay's reasonable expectation of privacy.

The pole camera trained on Mr. Hay's house continuously recorded for eight weeks in 2016 and for two one-week periods in 2017. Pet. App. 32a–33a. At the Government's whim, the camera recorded for a total of 68 days, capturing over 1,000 hours of footage. Pet. App. 3a; *see* R3. at 567.

The duration of government surveillance is constitutionally significant. A majority of the Court has recognized this principle since at least 2012. *See Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) ("I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" (citation omitted)); *id.* at 430 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer, and Kagan, JJ.) (explaining that long-term government surveillance "impinges on expectations of privacy" because "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly

monitor and catalogue every single movement of an individual[] . . . for a very long period," and that "where uncertainty exists with respect to whether a certain period of . . . surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant").

Carpenter, building on this analysis, recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements, and that long-term surveillance can infringe upon one's reasonable expectation of privacy where shorter-term surveillance might not. *See* 585 U.S. at 310.

The Tenth Circuit below rejected the application of this principle to Mr. Hay's case, finding that it was precluded by the Tenth Circuit's decision in *Jackson*. *See* Pet. App. 17a. But *Jackson* was decided in 2000 without the benefit of this Court's analysis in *Kyllo* (decided in 2001), *Jones* (2012), and *Carpenter* (2018). Even the District Court suggested that *Jackson* may need to be reevaluated in light of *Carpenter*. Pet. App. 47a ("Hay may well be right that the Tenth Circuit should, in light of *Carpenter*, reconsider *Jackson* and broaden the application of *Carpenter*'s mosaic reasoning to pole camera surveillance.").

The pole camera surveillance here implicates the same concerns animating the decisions in *Carpenter* and *Jones*, and a proper application of those precents to Mr. Hay's case should similarly result in the invalidation of the Government's warrantless long-term pole camera surveillance. Indeed, the duration of this surveillance is in some respects worse because of its location and the technology involved; it captured Mr. Hay's home (compared to activity on public roads) and involved video recordings (compared to GPS or CSLI data). Just as the *Carpenter* court distinguished

between "'pursu[ing] a suspect for a brief stretch,' which fell within a societal expectation of privacy, from 'secretly monitor[ing] and catalog[ing] every single movement of an individual's car for a very long period,' which fell outside of it," Pet. App. 16a (quoting *Carpenter*, 585 U.S. at 310 (quoting *Jones*, 565 U.S. at 429–30 (Alito, J., concurring in the judgment))), so too should this Court recognize that the continuous, long-term video surveillance at issue here falls outside society's reasonable expectation of privacy in and around a person's home.

Furthermore, the purpose of this pole camera was not to capture a specific criminal act but rather to create a mosaic of Mr. Hay's at-home life and behavior. R3. at 489. The surveillance allowed the Government to capture documentary-like footage of Mr. Hay, his life, his movements, and his patterns—all without a warrant.

III. This Reoccurring Question Presents an Important Issue Worthy of This Court's Careful Review.

Long-term pole camera surveillance of the home raises the same concerns about technology, surveillance, and the Fourth Amendment that this Court has considered for nearly 100 years and re-emphasized in *Carpenter*. Pole cameras are a "powerful new tool" available to law enforcement to help it "carry out its important responsibilities." *See Carpenter*, 585 U.S. at 320 ("Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, 'after consulting the lessons

of history,' drafted the Fourth Amendment to prevent.") (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1947)). But their usage cannot go unchecked. Courts must "ensure that the 'progress of science' does not erode Fourth Amendment protections" "as '[s]ubtler and more far-reaching means of invading privacy have become available to the Government.'" *Id.* at 320 (*quoting Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)).

Long term pole camera surveillance of the home is increasingly common, and lower courts continue to diverge in how to apply Fourth Amendment jurisprudence to this method of surveillance absent this Court's guidance. *See supra* Section I. This Court should grant the petition to address this important and uncertain question of constitutional law.

By addressing the question presented here, the Court can continue its efforts to reconcile the relationship between the Fourth Amendment and government use of advancing surveillance technology.

IV. This Case Presents an Ideal Vehicle for Deciding the Question Presented.

Mr. Hay's case presents an ideal vehicle for assessing the pure legal issue of whether warrantless long term pole camera surveillance of the home constitutes a search under the Fourth Amendment. The factual record is undisputed, and this issue was raised and squarely decided on the merits below. *See* Pet. App. 11a, 21a (considering Mr. Hay's argument that "constant video surveillance of his home over several months constitutes an unreasonable search under emerging Supreme Court case law" and holding

that Mr. Hay had "no reasonable expectation of privacy in a view of the front of his house" and that the "district court did not err in denying suppression of that footage").

Additionally, the Tenth Circuit squarely addressed the merits issue and therefore the case does not present any threshold questions that would preclude the court from resolving the question presented.

CONCLUSION

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

Respectfully submitted,

DAVID A. O'NEIL
Counsel of Record
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 383-8000
daoneil@debevoise.com

BENJAMIN LEB
ELISE M. COLETTA
AMELA BAJRAMOVIC
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001

MELODY BRANDON
Federal Public Defender

PAIGE A. NICHOLS
Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC DEFENDER
117 SW 6th Ave., Suite 200
Topeka, KS 66603
(785) 232-9828
paige_nichols@fd.org

Counsel for Petitioner

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