No. 24-72

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

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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This case presents the important and recurring question concerning whether core Fourth Amendment protections for the home survive the government's increasing use of warrantless long-term pole camera surveillance. Contrary to the government's contentions, there is both a persistent split of authority on this issue and a pressing need for this Court to resolve it. Certiorari is warranted.

I. The Federal Courts of Appeals and State High Courts are Divided.

The Colorado and South Dakota high courts, along with three judges of the First Circuit, have concluded that long-term pole camera surveillance of a home is a Fourth Amendment search. *See People v. Tafoya*, 494 P.3d 613 (Colo. 2021) (en banc); *State v. Jones*, 903 N.W.2d 101 (S.D. 2017); *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) (Barron, C.J., and Thompson and Kayatta, JJ., concurring). In contrast, the First, Fifth, Sixth, and Seventh Circuits have held that warrantless long-term pole camera surveillance of the home is not a Fourth Amendment search. *See United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009); *United States v. Dennis*, 41 F.4th 732 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2616 (2023); *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016); *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022). The deepening division among state and

federal courts on this critical constitutional issue warrants this Court's review.

A. The government mischaracterizes state high court decisions.

In *People v. Tafoya*, the Colorado Supreme Court unanimously held that the government's three-month long pole camera surveillance of defendant's home and curtilage was a search, concluding that public exposure was not dispositive of the Fourth Amendment implications of technology-aided police surveillance. 494 P.3d 613, 623 (Colo. 2021) (en banc). That holding conflicts with the decision below.

The government argues that the *Tafoya* decision rested on the presence of a fence around the defendant's backyard. Br. Opp'n 12–13 [hereinafter BIO]. But the fence in *Tafoya* neither surrounded nor blocked public view of the area surveilled, which also included the front yard, house, and driveway. 494 P.3d at 615. The fence, moreover, was interspersed with gaps that allowed passersby to see many parts of the backyard. *Id.* A nearby apartment building allowed those on the second floor to view parts of the defendant's backyard. *Id.* Despite this public exposure, the court concluded that the defendant had a reasonable expectation of privacy in the full area surveilled. *Id.* at 623.

The government similarly mischaracterizes the state high court decisions in *State v. Jones*, 903 N.W.2d 101 (S.D. 2017) and *Commonwealth v. Mora*, 150 N.E.3d 297 (Mass. 2020). *Jones* concerned two months of warrantless pole camera surveillance outside the defendant's unfenced home. 903 N.W.2d at 104. The court concluded that the targeted, long-

term video recording of the home violated the Fourth Amendment even though the recording captured areas visible to the public. *Id.* at 113. The government further argues that *Jones* does not create a split because, *inter alia*, it was decided before *Carpenter*, which did "not 'call into question conventional surveillance techniques and tools, such as security cameras'". BIO 13–14 (quoting *Carpenter v. United States*, 585 U.S. 296, 316 (2017)). *Carpenter*'s dicta regarding "security cameras," however, does not extend as far as the government contends. As explained further below, neither the surveillance in *Jones* nor the long-term dedicated law enforcement device employed in this case concern "security cameras" as discussed in *Carpenter*. *See infra* pp. 9–10.

Since *Carpenter*, moreover, the Massachusetts high court confirmed the reasoning in *Jones*. In *Commonwealth v. Mora*, that court considered the use of long-term pole camera surveillance of residences exposed to the public. 150 N.E.3d at 302. Analyzing the question under the state constitution and applying reasoning drawn from Fourth Amendment jurisprudence, the *Mora* court concluded that the defendant had a subjective expectation of privacy in his residence. *Id.* at 305. The court stressed that "the 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 306 (citing *United States v. Jones*, 565 U.S. 400, 429 (2012) (Alito, J. concurring)).

B. The government relies on cases that do not implicate the important question here.

In a further effort to downplay the split of authority, the government relies on *United States v. May-Shaw*, 955 F.3d 563 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2763 (2021) and *United States v. Gonzalez*, 328 F.3d 543 (9th Cir. 2003) to suggest the federal courts are aligned in its favor. *See* BIO 11–12. Neither of these cases concern long-term pole camera surveillance of the home and curtilage.

United States v. May-Shaw involved pole camera surveillance of a covered carport in a communal parking lot outside of a multi-unit apartment building. 955 F.3d at 565. The Sixth Circuit reasoned that the surveillance did not constitute a Fourth Amendment search because the defendant had no reasonable expectation of privacy in the carport, which was not within the curtilage of his apartment. *Id.* at 569.

Similarly, *United States v. Gonzalez* concerned less than a single day of government video surveillance of a community hospital mailroom during business hours. 328 F.3d at 545. The court explained that "[v]ideotaping . . . suspects *in public places* [] does not violate the [F]ourth [A]mendment; the police may record what they normally may view with the naked eye." *Id.* at 548 (quoting *United States v. Taketa*, 923 F. 2d 665, 677 (9th Cir. 1991)) (emphasis added).

The straightforward applications of Fourth Amendment doctrine in *May-Shaw* and *Gonzalez* have no bearing on this case, which involves many days of focused surveillance of Petitioner's home with sophisticated remote-controlled equipment.

II. The Decision Below is Incorrect.

The government's warrantless surveillance violated Mr. Hay's Fourth Amendment rights because of the cumulative effect of three crucial facts: (1) the location surveilled, (2) the technology used, and (3) the duration of surveillance. Like the decision below, the government incorrectly analyzes the Fourth Amendment issues here by isolating each component and assessing them individually. A proper Fourth Amendment analysis is inherently contextual, and when the circumstances are viewed in combination, as Mr. Hay experienced them, they clearly demonstrate a violation of Fourth Amendment protections.

A. Area surveilled.

The government fails adequately to acknowledge the heightened Fourth Amendment protections afforded to the area surveilled: Mr. Hay's home and curtilage. The Fourth Amendment's text explicitly protects the home, and this Court has repeatedly affirmed that the home is the apex of Fourth Amendment protection. *See* U.S. Const. amend. IV; *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("when it comes to the Fourth Amendment, the home is first among equals"); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("'[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'") (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

In the government's view, the heightened Fourth Amendment protections regarding the home do not protect Petitioner because law enforcement trained a

remote-controlled, motion-activated recording device at an area "exposed to public view." BIO 4–5. The myopic focus on the public view doctrine is misplaced. As an initial matter, as this Court has acknowledged, "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Carpenter*, 585 U.S. at 310 (citing *Katz v. United States*, 389 U.S. 347, 351–52 (1967)). Even "an area accessible to the public, may be constitutionally protected.'" *Id.*

More important, the public-view cases on which the government relies fundamentally differ from this case in three important respects: duration, technology used, and distance. For example, *California v. Ciraolo*, *see* BIO 7, involved a brief flyover of an individual's yard from 1,000 feet above the property. 476 U.S. 207, 209 (1986). The surveillance used visual observation and photographs, not video footage. *Florida v. Riley* involved "naked eye observations" from a helicopter momentarily passing over a residential greenhouse, approximately 400 feet above the property. 488 U.S. 445, 448–50 (1989) (plurality opinion).

These brief observations, captured by the human eye and photography stills, are materially less invasive than the 1,000-plus hours of total video footage recorded by the pole camera across from Petitioner's home. *Compare Ciraolo*, 476 U.S. at 213–14 and *Riley*, 488 U.S. at 448–50, *with* Pet. 24.

In contrast to the 1,000 and 400-foot perspectives in *Ciraolo* and *Riley*, moreover, the video camera here was a mere 200 feet away from Mr. Hay's property and could therefore capture significantly more intimate details about his daily activity. Pet. 6. The zoom and pan features of the surveillance equipment only

increased the government's ability to invade Petitioner's reasonable expectation of privacy at and around his home. *See* R3. at 524, 531 (stating that the VA agents zoomed in for closer picture on at least two occasions).

Finally, the government's reliance on *Dow Chem. Co. v. United States* is unavailing. 476 U.S. 227 (1986). In *Dow Chem.*, the Court upheld the government's "warrantless use of an area mapping camera to photograph a company's 2000-acre manufacturing complex." *Dow Chem.*, 476 U.S. at 238. The dispositive difference between warrantless government surveillance of a commercial property and an individual's home hardly needs explanation.

The government further argues that, unlike *Jones* and *Carpenter*, the surveillance here was not a search because it did not capture a comprehensive record of Mr. Hay's public movements. BIO 9. But the fact that this surveillance was specifically focused on and captured a comprehensive record around Petitioner's *home* raises greater constitutional concern, not less. The government dismisses this point by arguing this area was "'visible to any passerby,'" BIO 9, but it fails to acknowledge that "passersby" do just that—they *pass by*. They do not sit across from homes, uninterrupted for weeks with ability to zoom, pan, tilt, and indefinitely store what they have seen for later dissection and analysis. *See* Pet. 20–21.

The government contends that the camera "was not—and could not have been—used to peer into the unexposed interior of petitioner's home or otherwise uncover intimate details of his private life." BIO 9. In fact, the camera did, on at least one occasion, capture the inside of Mr. Hay's home. Pet. App. 14a (noting that the pole camera incidentally captured

activity in Mr. Hay's home). This is not surprising; a motion-activated camera trained at an individual's home and curtilage for months is bound to occasionally record the home's interior when doors, windows, or blinds are open (especially at night when it is dark outside and light inside).

Second, this pole camera was well positioned to "uncover intimate details of [Mr. Hay's] private life." BIO 9; *see* Pet. App. 48a. It was always ready to record and captured his daily movements around his home, front porch, curtilage, and driveway. Pet. 6. In any event, a Fourth Amendment violation hinges not on the content of what is captured by a search, but rather on whether one has a reasonable expectation of privacy in the total area surveilled. *See Carpenter*, 585 U.S. at 315 (rejecting the dissent's argument that CSLI data is "'not particularly private,'" explaining that "this case is not about 'using a phone' or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns"); *see also Moore-Bush*, 36 F.4th at 337 (recognizing that the expectation of privacy is "not in a discrete activity or event discrete pattern of activities," but rather is the actions and movements occurring in and around one's home and curtilage).

B. Technology used.

The government attempts to minimize the pole camera technology used to surveil Mr. Hay's home, arguing that it was a "'conventional surveillance technique[]'" and therefore no cause for alarm. BIO 9–10. The fact that video cameras generally may be

considered "conventional" does not mean that the use of such devices in this particular way is "conventional," let alone constitutional. What the government fails to confront is that this pole camera allowed the government to surreptitiously record and store indefinitely footage of Mr. Hay's non-criminal activity at and around his home for months-long periods, "evad[ing] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *See Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster,* 540 U.S. 419, 426 (2004)).

The government repeatedly emphasizes that *Carpenter* did not "call into question conventional surveillance techniques and tools, such as security cameras." BIO 4, 8, 10, 13. But the surveillance here did not involve a security camera. Security cameras serve the defensive purpose of protecting a particular location or property; they typically *guard* the home from intruders or other danger. In contrast, this pole camera was used offensively, targeting Mr. Hay's home to capture his non-criminal behavior. Pet. 2, 20. Deploying pole cameras in this way implicates the exact "privacies of life" concerns animating this Court in *Carpenter* and *Jones*. *Carpenter*, 585 U.S. at 305 (explaining a "basic guidepost" that the Fourth Amendment "seeks to secure 'the privacies of life' against 'arbitrary power'"), 311 (explaining how CSLI data, similar to the GPS data in *Jones*, "hold for many Americans the 'privacies of life'" (citation omitted)); *Jones*, 565 U.S. at 415 (Sotomayor, J. concurring).

In a further defense of its position, the government adopts the Tenth Circuit's circular reasoning that the increasing prevalence of video camera usage by law enforcement translates into a

decreasing privacy right, referencing the "routine occurrence" of cameras on front doors that "often capture neighbors' curtilage." *See* BIO 10, 13. But as explained above, a doorbell camera that may incidentally capture a neighbors' curtilage is materially different from a remote-controlled pan-and-zoom surveillance device trained at an individual's home for investigative purposes. The government's reasoning, moreover, would fundamentally and fatally diminish Fourth Amendment protections. Were this mode of analysis correct, the bounds of an individual's reasonable expectation of privacy—and therefore the reach of the Fourth Amendment—would rest on the frequency with which the government resorts to particular surveillance techniques. *See also* Pet. 23–24.

C. Duration of surveillance.

Like the Tenth Circuit decision below, the government fails adequately to address the duration of the surveillance and how the extended use of the device violated Mr. Hay's reasonable expectation of privacy, particularly when combined with the surveillance location and technology used. *See generally* BIO; Pet. App. 1a–24a.

Long-term surveillance is constitutionally suspect. *See Jones*, 565 U.S. 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"); *Carpenter*, 585 U.S. at 310 (adopting Justice Alito's language in *Jones* and recognizing that long-term surveillance can infringe upon one's reasonable expectation of privacy where shorter-term surveillance might not).

Here, the government trained a motion-activated, remote-operated camera on Mr. Hay's home to record his non-criminal activity for eight weeks in 2016 and for two one-week periods in 2017, capturing over 1,000 hours of footage over the course of 68 total days. Pet. App. 3a; *see* R3. at 567. This long-term surveillance is not comparable to the fleeting observations in *Ciraolo* or *Riley*. As with the surveillance in *Jones* and *Carpenter*, society would not expect the government to "secretly monitor and catalogue every single movement" at and around one's home for a total period of 68 days.

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

Mr. Hay's case squarely presents the legal issue without any threshold issues, procedural bars, or other complicating factors (e.g., good faith, harmless error, inevitable discovery, or similar doctrines) that may impede review. Contrary to the government's suggestions, *see* BIO 15, the Tenth Circuit did not make any alternative rulings. Rather, it decided the Fourth Amendment question squarely on the merits. The District Court similarly did not consider the good faith exception. BIO 3 (citing Pet. App. 49a).

To the extent it applies, the good faith exception is an issue for remand and presents no barrier for this Court to review the question presented. The government's arguments about what might happen on

remand are no basis for denying certiorari. Rather, consistent with this Court's "usual practice," it may decide the question presented and "leave [those] dispute[s] for resolution on remand." *Maslenjak v. United States*, 582 U.S. 335, 353 (2017).

The government made a similar vehicle argument in *Byrd v. United States*, 584 U.S. 395 (2018), contending that regardless of the Fourth Amendment question presented, the petitioner would lose on remand, either on consent or probable cause. Brief for the United States in Opposition at 13–15, *Byrd v. United States of America*, 584 U.S. 395 (2018) (No. 16-1371), 2017 WL 3053629, at *13–15. This Court nonetheless granted certiorari, answered the question presented, and left the government's remaining claims for decision on remand. *Byrd*, 584 U.S. at 411; *see also Wyatt v. Cole*, 504 U.S. 158, 168–69 (1992) (deciding 42 U.S.C. § 1983 immunity question even while recognizing that on remand, defendants could be entitled to affirmative defense on good faith grounds).

If this Court grants review, the question presented will be dispositive in this Court regardless of the outcome. This Court should follow its usual practice and reject the government's vehicle argument as a reason to deny this petition.

CONCLUSION

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

Respectfully submitted,

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