No.

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

PETITION FOR A WRIT OF CERTIORARI

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).

QUESTION PRESENTED

Whether long-term, continuous, and surreptitious video surveillance of a home and its curtilage constitutes a search under the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner Travis Tuggle was a defendant in the district court and the appellant in the Seventh Circuit. Joshua Vaultonburg was also a defendant in the district court but was not a party to the appeal in the Seventh Circuit.

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

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States of America v. Tuggle*, No. 20-2352, 7th Cir. (July 14, 2021) (affirming denial of motion to suppress); and
- *United States of America v. Tuggle*, No. 16-cr-20070, C.D. Ill. (July 31, 2018) (denying motion to suppress), *United States v. Tuggle*, No. 16-cr-20070, C.D. Ill. (Jan. 8, 2019) (denying motion to reconsider motion to suppress), and *United States of America v. Tuggle*, No. 16-cr-20070, C.D. Ill. (Aug. 19, 2019) (denying second motion to suppress).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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Petitioner Travis Tuggle respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-42a) is reported and available at 4 F.4th 505. The opinions of the United States District Court for the Central District of Illinois denying petitioner's first and second motions to suppress (Pet.App.43a-56a) are unreported and available at 2018 WL 3631881 and 2019 WL 3915998, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2021. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT

For eighteen months straight, federal agents surreptitiously surveilled petitioner Travis Tuggle's home around the clock using hidden video cameras attached to utility poles. Over that period, the federal government secretly recorded Mr. Tuggle's every coming and going, every private visitor, and every package delivered to his house. And the government did so without ever obtaining a warrant or otherwise justifying to a judicial officer this monumental intrusion into Mr. Tuggle's privacy.

This petition asks whether the government's long-term, continuous, and surreptitious surveillance of Mr. Tuggle's home constituted a search under the Fourth Amendment. In the decision below, the Seventh Circuit lamented that "the status quo in which the government may freely observe citizens outside their homes for eighteen months challenges the Fourth Amendment's stated purpose of preserving people's right to 'be secure in their persons, houses, papers, and effects.'" Pet.App.37a. Notwithstanding its trepidation, the court of appeals held that Mr. Tuggle lacked a reasonable expectation of privacy in his movements around the home because those movements were "observable to any ordinary passerby." Pet.App.16a. It acknowledged that this Court recently

held in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that citizens have a reasonable expectation of privacy in the whole of their long-term movements in public. Pet.App.22a-23a. But the court of appeals "read *Carpenter* as limited to the unique features of the historical [cell-site location information] at issue there." Pet.App.35a. Absent relevant instruction from this Court, *id.*, the court of appeals viewed the question presented to be "above [its] pay grade," Pet.App.37a (citation omitted).

The Seventh Circuit recognized that federal courts of appeals and state courts of last resort have reached divergent conclusions about the question presented. The First, Sixth, and Seventh Circuits hold that long-term, warrantless surveillance of a home does not implicate the Fourth Amendment, although the First Circuit is now reconsidering the question en banc. By contrast, the Fifth Circuit and Colorado and South Dakota Supreme Courts hold that such surveillance is a search. These courts rightly hold that long-term, around-the-clock video surveillance of a home—surveillance that could never be conducted by traditional methods without detection—infringes expectations of privacy that society is prepared to recognize as reasonable.

This case is the ideal vehicle for this Court to resolve the split in authority on this important question. The implications of the decision below are staggering. The Fourth Amendment protects citizens against "a too permeating police surveillance." *Carpenter*, 138 S. Ct. at 2214 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). That protection stands at its zenith in the home, where individuals raise families and form their most private associations. But, under the decision below, police may use ever more sophisticated video technology to monitor secretly any citizen's home for months or years on end, with no judicial scrutiny of any kind.

The Fourth Amendment must shield against such "dragnet type" surveillance of the home. *United States v. Knotts*, 460 U.S. 276, 282 (1983). The Seventh Circuit felt constrained by its reading of this Court's precedents. Only this Court can definitively resolve this issue. The Court thus should grant the petition.

A. Factual Background

Travis Tuggle resided in Mattoon, Illinois. Pet.App.44a. The front of his home was exposed and connected to a public street via a short and wide driveway. *Id.* The streets of Mr. Tuggle's quiet, residential neighborhood were "lightly traveled." Pet.App.6a.

Beginning in late 2013, federal agencies targeted Mr. Tuggle as part of a drug trafficking investigation in central Illinois. Pet.App.44a. Deploying human agents to conduct visual surveillance of Mr. Tuggle's home from his neighborhood's roads would have been "conspicuous[]." Pet.App.6a. To avoid detection, agents surreptitiously installed three video cameras on public utility poles in the area immediately surrounding Mr. Tuggle's home. Pet.App.44a. Agents installed the first of the three cameras in August 2014. Pet.App.46a n.1. They installed the second and third cameras in September and December 2015. *Id.*

Agents positioned the pole cameras to capture the exterior of Mr. Tuggle's residence and the adjacent area. Pet.App.44a. Two cameras were aimed at Mr. Tuggle's driveway and the front of his home while the third camera captured the home and a nearby shed belonging to Mr. Tuggle's neighbor (and eventual co-defendant). Pet.App.44a-45a.

The cameras recorded around the clock. Pet.App.46a. Agents could remotely zoom, pan, and tilt the cameras. Pet.App.45a. The cameras were equipped with lighting

technology to facilitate nighttime coverage. *Id.* Agents in a task force office in Mattoon could view the surveillance footage in real time. *Id.* In addition, all the footage was stored on a server at the FBI's Springfield, Illinois office, where agents could review it at any time. *Id.*

Over the course of approximately eighteen months, the government monitored Mr. Tuggle's home—and his movements in and out of and around his home—nonstop without a warrant or any other judicial authorization. Pet.App.7a, 45a-46a. At any given moment, the government knew if Mr. Tuggle was in his home and if he had visitors. The government could identify his visitors. And the government knew the types of goods Mr. Tuggle brought in and out of or had delivered to his house. In short, the government had a clear picture of all the happenings outside and around Mr. Tuggle's home. And it obtained this information surreptitiously without ever needing to deploy agents to perform traditional surveillance.

Relying principally on video evidence obtained from the pole cameras, federal agents secured and executed search warrants for Mr. Tuggle's home. Pet.App.7a. A grand jury subsequently indicted Mr. Tuggle for conspiring to distribute, and possessing with intent to distribute, methamphetamine and for maintaining a drug-involved premises. *Id.*

B. Procedural History

1. Before trial, Mr. Tuggle moved to suppress the evidence obtained from the pole cameras, arguing that use of the cameras constituted a warrantless search in violation of the Fourth Amendment. *Id.* The district court denied the motion, finding that Mr. Tuggle did not have a subjective expectation of privacy and that society would not find an expectation of privacy reasonable because the

pole cameras "only captured what would have been visible to any passerby in the neighborhood." Pet.App.50a. Mr. Tuggle moved for reconsideration and later moved again for suppression, but the court denied both motions for the reasons stated in its first order. Pet.App.52a-57a.

The day before trial, Mr. Tuggle entered a conditional guilty plea to both counts of the indictment, preserving his right to appeal the court's suppression rulings. Pet.App.7a-8a. The court sentenced him to 360 months' imprisonment on the drug conspiracy count and a concurrent 240 months' imprisonment for maintaining a drug-involved premise. Pet.App.8a.

2. The Seventh Circuit affirmed, though only after expressing serious reservation. The court opened its decision describing how advances in technology have placed Americans at risk of constant and ubiquitous government observation. Pet.App.1a-2a. The Fourth Amendment, the court acknowledged, "stand[s] as [a] critical bulwark[] in preserving individual privacy vis-à-vis the government in this surveillance society." Pet.App.2a. Despite its concerns, the court held "that the extensive pole camera surveillance in this case did not constitute a search under the current understanding of the Fourth Amendment." Pet.App.5a.

The court of appeals first addressed the constitutionality of what it called "isolated" surveillance of the home. Pet.App.10a-17a. Applying this Court's precedents involving isolated photographic surveillance, the court of appeals held that "the isolated use of pole cameras here did not run afoul of Fourth Amendment protections." Pet.App.15a-16a (citing *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), and *California v. Ciraolo*, 476 U.S. 207 (1986)). According to the court, because the cameras recorded movements that were "observable to any ordi-

nary passerby," Mr. Tuggle lacked a reasonable expectation of privacy in avoiding isolated recording of his movements. Pet.App.16a-17a.

The Seventh Circuit then turned to "the more challenging question" of the constitutionality of "the prolonged and uninterrupted use of those cameras." Pet.App.17a. The court of appeals surveyed decisions of other courts addressing this question. The court noted that "[t]he answer [to the question presented]—and even how to reach it—is the subject of disagreement among our sister circuits and counterparts in state courts." Pet.App.4a-5a; *see also* Pet.App.25a ("Federal circuit, federal district, and state courts have splintered on how to treat police use of cameras on public property . . . to record what happens outside one's home."). As the court explained, the "divergent" outcomes in different courts and "array of opinions" "reflect the complexity and uncertainty of the prolonged use of this technology and others like it." Pet.App.5a, 30a.

The court of appeals read this Court's decisions in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and the concurring opinions of five Justices in *United States v. Jones*, 565 U.S. 400 (2012), as expressing "concerns" about prolonged "surveillance leading to 'a precise, comprehensive record of a person's *public* movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.'" Pet.App.32a (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). But the court of appeals concluded that "the Supreme Court has not yet required lower courts" to apply the rationale espoused in *Carpenter* in cases that lack the "unique features of the historical [cell-site location information] at issue there." Pet.App.23a, 35a.

The Seventh Circuit ultimately distinguished pole-camera surveillance from the data at issue in *Jones* and

Carpenter on the ground that the pole cameras "only highlighted Tuggle's *lack* of movement, surveying only the time he spent at home and thus not illuminating what occurred when he *moved* from his home." Pet.App.32a-33a. The pole cameras "only depicted one small part of a much larger whole." Pet.App.33a.

The court of appeals nonetheless expressed "unease about the implications" of its decision. Pet.App.37a. The court rejected as absurd the government's suggestion that it could have conducted the same surveillance by stationing agents atop utility poles, warning that "courts should not rely" on such a fiction "to limit the Fourth Amendment's protections." Pet.App.36a-37a; *see* U.S. C.A. Br. 22-23. And the court found "[t]he eighteen-month duration of the government's pole camera surveillance . . . concerning, even if permissible." Pet.App.37a. Such lengthy surveillance, according to the court, "challenges the Fourth Amendment's stated purpose of preserving people's right to be 'secure in their persons, houses, papers, and effects.'" *Id.*

REASONS FOR GRANTING THE PETITION

This petition presents an acknowledged split among federal courts of appeals and state courts of last resort on a question of colossal importance. This case is an optimal vehicle for resolving the question presented. And the time to resolve the question presented is now: until this Court intervenes, the constitutionality of an increasingly common police practice will turn on where one lives. The Court should grant the petition.

I. Federal and State Courts Are Divided over Whether Long-Term Pole-Camera Surveillance of a Home Constitutes a Search

The Seventh Circuit repeatedly underscored the split of authority. *See* Pet.App.4a-5a, 25a, 30a. The decision

below only deepens the conflict. To date, the First, Sixth, and (now) Seventh Circuits have concluded that long-term, warrantless pole-camera surveillance of a home comports with the Fourth Amendment.[1] The Fifth Circuit and state supreme courts have reached the opposite conclusion.

1. In *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), the Sixth Circuit upheld the constitutionality of pole-camera surveillance of a house lasting ten weeks. There, a pole camera captured a resident carrying guns. *Id.* at 285-86. Because he had a prior felony conviction, the government indicted him for illegal possession of a firearm. *Id.* at 286. The Sixth Circuit rejected the defendant's Fourth Amendment challenge to the surveillance, reasoning that he "had no reasonable expectation of privacy in video footage recorded by a camera . . . that captured the same views enjoyed by passersby on public roads." *Id.* at 287-88.

The court brushed aside the length of the surveillance as constitutionally irrelevant. The Sixth Circuit reasoned that the government could have placed "an agent disguised as a construction worker to sit atop the pole . . . for ten weeks." *Id.* at 289. The court had to concede that this surveillance method might not be "practical," but it con-

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[1] In its decision below, the Seventh Circuit also identified the Fourth and Tenth Circuits as resolving this question in favor of the government. Pet.App.27a. The Fourth Circuit case, however, involved surveillance of open fields, not a home. *See United States v. Vankesteren*, 553 F.3d 286, 287 (4th Cir. 2009). And although the Tenth Circuit authorized warrantless pole-camera recording of a residence, it did not address the implications of long-term surveillance. *See United States v. Jackson*, 213 F.3d 1269, 1282 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033 (2000); *see also United States v. Cantu*, 684 F. App'x 703 (10th Cir. 2017) (same).

cluded that "the actual practicality" of traditional surveillance methods is irrelevant to the constitutionality of video surveillance. *Id.* The Sixth Circuit recently reaffirmed *Houston* in *United States v. Trice*, 966 F.3d 506, 516-20 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1395 (2021), and *United States v. May-Shaw*, 955 F.3d 563, 567-69 (6th Cir. 2020), *cert. denied*, ---S. Ct.---, 2021 WL 2405226 (2021).

The First Circuit also has upheld long-term pole-camera surveillance of a home. In *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009), the court rejected a Fourth Amendment challenge to eight months of pole-camera surveillance for similar reasons as the Sixth Circuit. *Id.* at 116-17. A First Circuit panel later reaffirmed *Bucci* following this Court's decision in *Carpenter*. *See United States v. Moore-Bush*, 963 F.3d 29 (1st Cir. 2020); *but see id.* at 47-58 (Barron, J., concurring) (stating that *Carpenter* suggests that the First Circuit misapplied this Court's precedents in *Bucci* and calling for en banc review). The First Circuit recently granted en banc review in the latter case to consider whether to overrule *Bucci*. *United States v. Moore-Bush*, 982 F.3d 50 (1st Cir. 2020) (mem.).

2. a. The Fifth Circuit reached the opposite conclusion in *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987). There, government agents used a pole camera to surveil the defendant's property, including a fenced-in backyard, for almost two months. *Id.* at 250. As a result of information obtained from the surveillance, the police stopped the defendant's car and found marijuana. *Id.* He was subsequently convicted of possession of marijuana with intent to distribute. *Id.* at 249.

On appeal, the Fifth Circuit found that the videotaping—"a potentially indiscriminate and most intrusive method of surveillance," *id.* at 250—constituted a search.

And in no uncertain terms: "This type of surveillance provokes an immediate negative visceral reaction" because it "raises the spectre of the Orwellian state." *Id.* at 251. In so holding, the court dismissed the government's arguments that a citizen has "no reasonable expectation of privacy in activities conducted in his backyard visible to a casual observer" or a power company lineman atop the pole. *Id.* at 250. The Fifth Circuit found that reasoning applicable only to "one-time," "minimally-intrusive" observation, such as aerial observation or a glance over the fence—not long-term surveillance of the home. *Id.* at 251.

The Fifth Circuit thus held that the surveillance constituted a search. *Id.* But it also held that the government had adequately protected the defendant's Fourth Amendment rights by obtaining advance permission from the district court to conduct the surveillance. *Id.* at 251-52.

b. Several state supreme courts agree with the Fifth Circuit. The South Dakota Supreme Court found a search under the federal Fourth Amendment on facts similar to this case. *See State v. Jones*, 903 N.W.2d 101 (S.D. 2017). In *Jones*, a pole camera "continuously recorded activity outside of [the defendant's] residence" for about two months. *Id.* at 104. "The camera sent a live feed to a server" as well as a mobile phone, and video was stored so that detectives could review "previously-recorded footage." *Id.*

The South Dakota Supreme Court acknowledged, and rejected, the contrary decisions of the First and Sixth Circuits discussed above. *Id.* at 111-12. The court also rejected the government's argument that the defendant lacked an expectation of privacy because his movements outside the home were observable by the public. *Id.* at 110. Citing this Court's decision in *Jones*, the court held that the defendant had an expectation of privacy in the "aggregate" of his movements outside the home. *Id.* at

111 (citation omitted). The court noted that the surveillance permitted police to observe the "intimate details of a person's private life and associations," including "who enters and exits the home," "the activities of the occupant's children and friends," and "items brought into the home revealing where the occupant shops." *Id.* at 110. And it observed that "traditional law enforcement surveillance techniques" would be unable to "accumulate th[is] vast array of information." *Id.* A pole camera, by contrast, "does not grow weary, or blink, or have family, friends, or other duties to draw its attention." *Id.* at 112.

The opinion also highlighted the stakes of the question presented. If the at-issue surveillance were permissible, the court observed, "law enforcement would be free to place a video camera at any public location and film the activity outside any residence, for any reason, for any length of time," without judicial scrutiny. *Id.* at 113. According to the court, that result "raises the specter of an Orwellian state and unlocks the gate to a true surveillance society." *Id.*

The en banc Colorado Supreme Court added its (unanimous) voice just last month. *See People v. Tafoya*, --- P.3d ---, 2021 WL 4144014 (Colo. Sept. 13, 2021). Government agents installed a pole camera that continuously recorded the defendant's front yard, fenced-in backyard, and driveway "for more than three months." *Id.* at *1. "[P]olice could control [the camera] while viewing the footage live" and "indefinitely stored the footage for later review." *Id.* The court found "the extended duration and continuity of the surveillance . . . to be constitutionally significant," distinguishing cases such as *California v. Ciraolo*, 476 U.S. 207 (1986), as involving "surveillance of limited duration." 2021 WL 4144014, at *6, *9.

The Colorado Supreme Court concluded that the surveillance in *Tafoya* constituted a search under the federal

Fourth Amendment. It acknowledged that "many courts" have considered the question and reached divergent conclusions. *Id.* at *8. Surveying this Court's case law, the Court concluded: "Together, *Jones* and *Carpenter* suggest that when government conduct involves continuous, long-term surveillance, it implicates a reasonable expectation of privacy. Put simply, the duration, continuity, and nature of surveillance matter when considering all the facts and circumstances in a particular case." *Id.* It found that the defendant had a subjective expectation of privacy in his curtilage, in part because he had erected a fence. *Id.* at *9. And it concluded that the expectation of privacy was one that society is prepared to recognize as reasonable. Long-term pole-camera surveillance, the court explained, "shares many of the troubling attributes of GPS tracking that concerned Justice Sotomayor in *Jones*." *Id.* at *10. The court ultimately concluded that "this type of surveillance is 'at least as intrusive as tracking a person's location—a dot on a map—if not more so.'" *Id.* (citation omitted).

Colorado argued that the defendant could not expect privacy because it was possible to see through gaps or over his backyard fence. *Id.* at *10. The Colorado Supreme Court rejected that argument, reasoning that the "public exposure" of the curtilage was not dispositive on the facts of that case—"most significantly," because of the continuous, long-term nature of the surveillance. *Id.* "Put simply," the court concluded, "this surveillance 'involved a degree of intrusion that a reasonable person would not have anticipated.'" *Id.* at *11 (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment)).[2]

[2] The Massachusetts Supreme Court reached the same conclusion under state constitutional law in *Commonwealth v. Mora*, 150 N.E.3d 297 (Mass. 2020). Relying in part on *Carpenter* and the concurring

c. The Seventh Circuit below distinguished the Fifth Circuit's decision in *Cuevas-Sanchez* on the ground that the Fifth Circuit case involved a "ten-foot-tall fence," and thus the camera in that case captured "images unviewable to passersby," unlike this case. Pet.App.28a. That distinction misunderstands the facts of *Cuevas-Sanchez*; parts of the backyard were visible from the street and persons of average height could see over a lower, five-foot fence into the backyard. 821 F.2d at 250. The Seventh Circuit's distinction also overstates the relevance of the fence to the Fifth Circuit's reasoning. While the Fifth Circuit invoked the fence as part of its rationale for finding a subjective expectation of privacy at the first step of *Katz*'s reasonable-expectation-of-privacy analysis, it also invoked the backyard's status as curtilage, "an area protected by traditional fourth amendment analysis." *Id.* at 251. Nothing suggests that the Fifth Circuit viewed the presence of a ten-foot-tall fence shielding the backyard from one vantage point but not other vantage points as dispositive to that analysis. And, in holding that the defendant's expectation of privacy was a reasonable one at the second step of the analysis, the Fifth Circuit did not rely on the fence at all. *Id.*

In any event, the South Dakota Supreme Court's decision in *Jones* does not involve a fence, meaning that the courts are divided with respect to how to resolve the question presented in cases that do not involve a fence. Moreover, even if a fence creates a subjective expectation of

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opinions in *Jones*, the court held that the five-month surveillance constituted a search under the state constitution because "[e]xtended surveillance 'reveals types of information not revealed by short-term surveillance.'" *Id.* at 307 (citation omitted). The court emphasized the heightened protection that both the Fourth Amendment and the state constitution accord to the home, observing that "[i]f the home is a 'castle,' a home that is subject to continuous, targeted surveillance is a castle under siege." *Id.* at 309.

privacy against *short-term* surveillance of curtilage, "[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." *Mora*, 150 N.E.3d at 366-67 (citing *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment)). For that reason, the absence of a fence—which many individuals cannot afford to erect or cannot erect due to neighborhood or local restrictions—does not diminish citizens' reasonable expectations of privacy in avoiding long-term surveillance of their homes. The Fourth Amendment's protection of the home should not depend on "an individual's ability to afford to install fortifications and a moat around his castle." *Id.*

* * *

The acknowledged division of authority regarding whether long-term, surreptitious video surveillance of a home constitutes a search is indisputable. The Seventh Circuit and the South Dakota and Colorado Supreme Courts have acknowledged the split. This Court should intervene now to resolve this split on an issue of monumental importance.

II. The Question Presented Is Exceptionally Important and Squarely Presented

This case is an ideal vehicle for considering the question presented—a question that has enormous consequences for every American. The Seventh Circuit acknowledged the significance of this issue and, as legal commentators have recognized, "basically begged" for this Court's review.[3] Other commentators rightly depict the Seventh Circuit's decision as deepening a divide among courts, labeling the question presented as "ripe for

[3] Short Circuit Podcast, *Episode 183: Expectations of Surveillance*, Inst. for Justice, at 3:10 (July 21, 2021), https://ij.org/sc_podcast/183/.

Supreme Court review."[4] The Court should accept the growing chorus of invitations to consider this issue.

1. The Seventh Circuit all but called for this Court to provide guidance on the question presented. The Seventh Circuit explained that it was "bound by Supreme Court precedent" and lacked "other statutory or jurisprudential means to cabin the government's surveillance techniques," observing that the issues presented by the appeal were "above [its] pay grade." Pet.App.5a, 37a (citation and quotation marks omitted). The court further expressed "reservations" and described its "unease about the implications" of its decision. Pet.App.17a, 37a.

The implications of the question presented have only grown in importance in recent years. As technology has advanced, so too has the government's capacity to invade personal privacy. The Court's prior decision authorizing aerial photography of a home, *Ciraolo*, 476 U.S. 207, occurred when photographs were still captured on physical film rolls. The then-existing physical limitations inherent in photographic and video surveillance protected individuals' expectation that their homes could not be secretly surveilled 24/7 for months on end. Technology has eviscerated those practical protections. The government can

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[4] Matthew Tokson, *Telephone Pole Cameras and Long-Term Government Surveillance*, Dorf on Law (July 19, 2021), https://tinyurl.com/caezymwm ("The [Seventh Circuit] seems to be saying, in so many words, 'someone else should fix this.'"); *see also* Grayson Clary, *Courts in a Deepening Muddle Over Location Surveillance*, Reporters Committee for Freedom of the Press (Aug. 9, 2021), https://tinyurl.com/bmfuwsrn ("[U]nless Congress or the Supreme Court speaks clearly to the issue, the courts will continue to divide in their willingness to extend *Carpenter* beyond its facts."); Matthew Tokson, *The Next Wave of Fourth Amendment Challenges After* Carpenter, 59 Washburn L. Rev. 1, 17 n.132 (2020) (describing the split in authority before the decision below).

now spy in real time on an individual's every movement in and out of his home for many months and store a record of those movements on a tiny thumb drive. And that is to say nothing of the sophisticated video analytics, such as facial recognition technology and artificial intelligence, that the government will apply to such video surveillance if left unchecked.

Even as technology advances, the sanctity of a person's home remains unchanged. "[W]hen it comes to the Fourth Amendment, the home"—including its curtilage—"is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Long-term pole-camera surveillance treads on the protections individuals enjoy at the threshold and in the curtilage of their private sanctuaries. Homes are where individuals form their most private associations. In sanctioning warrantless long-term pole-camera surveillance, the decision below permits the government to peer into every citizen's "familial, political, professional, religious, and sexual associations" for no reason at all. *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). This degree of surveillance evokes images of the Orwellian state the Seventh Circuit decried.

Despite sanctioning the government's actions, the Seventh Circuit warned of the practical consequences of its decision. "[I]n the not-so-distant future," Americans "will traverse their communities under the perpetual gaze of cameras."[5] Pet.App.1a-2a. They will walk out their

[5] That future, in large measure, is already here. *See* Samuel D. Hodge, Jr., *Big Brother is Watching: Law Enforcement's Use of Digital Technology in the Twenty-First Century*, 89 U. Cin. L. Rev. 30, 30-32 (2020) (describing the vast array of video surveillance techniques available to law enforcement, including facial recognition technology); Tom Vander Ark, *Cameras Everywhere: The Ethics of Eyes in the Sky*, Forbes (May 8, 2019), https://tinyurl.com/y8ux8v9m (describing a pervasive, worldwide surveillance movement).

front doors and be greeted by "cameras installed on nearby doorbells, vehicles, and municipal traffic lights." Pet.App.1a. "By the end of the day, millions of unblinking eyes will have discerned Americans' occupations and daily routines, the people and groups with whom they associate, the businesses they frequent, their recreational activities, and much more." Pet.App.2a.

Whatever the Fourth Amendment implications of such surveillance in the public space, at a minimum, the Fourth Amendment must protect against warrantless, long-term, targeted surveillance of individuals' homes. Under the decision below, the government, without an ounce of suspicion, could place pole cameras in front of any and every house indefinitely. Public officials could use their law enforcement authority to spy on political rivals or the organizers of public protest movements. Police could install cameras outside the homes of ex-felons in the hope of catching them with firearms. Jilted police officers could spy on ex-girlfriends. In this era of technological change, the Fourth Amendment stands as the bulwark against Big Brother's prying eyes. The significance of the decision below—and the need for this Court's intervention—cannot be overstated.

3. This case is an excellent vehicle for resolving the question presented. No further factual development is needed. There are no jurisdictional or procedural barriers to this Court's review. And the question presented was outcome-determinative. The government's indictment was built on evidence obtained from the pole cameras, as the Seventh Circuit expressly noted. Pet.App.7a.

This case is also free of the types of fact-intensive questions that could muddy what is otherwise a clean Fourth Amendment issue. The case presents the pure legal question whether the Fourth Amendment protects against long-term warrantless video surveillance of a

home and its curtilage whether or not the homeowner has a fence. By contrast, cases involving fences may involve fact-specific inquiries regarding the public's ability to see over or through the fence. *See, e.g., Tafoya*, --- P.3d ---, 2021 WL 4144014, at *10 (gaps in defendant's fence a "legitimate fact[]" to consider as part of the court's overall analysis); *Cuevas-Sanchez*, 821 F.2d at 250 (government arguing that height differences across a fence affected the defendant's reasonable expectation of privacy). Further, this case allows the Court to avoid the line-drawing exercise inherent in deciding how much surveillance is too much. Whatever the line, eighteen months certainly crosses it.

Finally, the fact pattern presented here is reoccurring. Pole cameras are a common investigative technique used by today's law enforcement officers. *See* Matthew Tokson, *The Next Wave of Fourth Amendment Challenges After* Carpenter, 59 Washburn L. Rev. 1, 17-19 (2020). And "with the evolution of far more invasive technologies," litigation on this issue and similar issues will "repeat itself again and again"—and the public and law enforcement will remain confused regarding their rights—until this Court resolves the conflict among the courts. Pet.App.39a.

III. The Seventh Circuit's Decision Is Wrong

The Seventh Circuit's decision misunderstands fundamental Fourth Amendment principles.

1. As relevant here, a search occurs under the Fourth Amendment when government agents intrude into a citizen's expectation of privacy "that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This Court has offered two "basic guideposts" to help courts decide "which expectations of privacy are entitled to protection."

Carpenter, 138 S. Ct. at 2213-14. First, the Fourth "Amendment seeks to secure 'the privacies of life' against 'arbitrary power.'" *Id.* at 2214 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Second, "a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" *Id.* (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

Additionally, this Court repeatedly has emphasized the sanctity of the home—the *only* physical location the Fourth Amendment singles out for special solicitude. "We have . . . lived our whole national history with an understanding of the 'ancient adage that a man's house is his castle.'" *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)). Fourth Amendment protection applies with equal force to the curtilage, where "the intimate activity associated with the 'sanctity of a man's home and the privacies of life' [occur]." *Oliver v. United States*, 466 U.S. 170, 180 (1984) (citation omitted).

In holding that no search occurred here, the Seventh Circuit invoked the general principle that "[w]hat a person exposes to the public is not private, even in his home or office." Pet.App.46a (citing *Katz*, 389 U.S. at 351). But in cases involving long-term surveillance, this Court has emphasized the limits of this principle.

In *United States v. Jones*, 565 U.S. 400 (2012), for example, this Court held that warrantless GPS monitoring of a car traveling on public streets violates the Fourth Amendment. The majority decided the case on a trespass rationale, but five Justices found a Fourth Amendment violation under *Katz*. Justice Alito (writing for four Justices) acknowledged that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Id.* at 430 (Alito, J., concurring in

judgment). But Justice Alito concluded that "longer term GPS monitoring . . . impinges on expectations of privacy," because society expects that law enforcement would not and cannot catalogue a vehicle's every movement "for a very long period." *Id.* Justice Sotomayor agreed. *See id.* at 415 (Sotomayor, J., concurring).

Carpenter, which involved government collection of 127 days of historical cell-site location information, adopted the approach of the concurring Justices in *Jones*. The Court emphasized that individuals do "not surrender all Fourth Amendment protection by venturing into the public sphere." 138 S. Ct. at 2217. Before "the digital age," the Court observed, society expected that law enforcement would not follow an individual's movements for a long period of time. *Id.* Acquisition of long-term cell-site location data—which "provides an intimate window into a person's life"—thus "invaded Carpenter's reasonable expectation of privacy" and constituted a search. *Id.* at 2217, 2219 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). As Judge Barron put it in addressing pole-camera surveillance, *Carpenter* is "but the Supreme Court's latest sign that we must be more attentive . . . to the risk that new technology poses even to those 'privacies of life' that are not wholly shielded from public view." *Moore-Bush*, 963 F.3d at 50-53 (Barron, J., concurring) (citation omitted).

2. This case presents a straightforward application of these precedents. Citizens reasonably expect privacy against long-term, targeted surveillance of their home. To be sure, residents expect that passersby or the proverbial nosy neighbor might view their movements outside their home for discrete, isolated periods of time. But citizens do not reasonably expect that a passerby, neighbor, or government agent would monitor their every move-

ment in and out of their house, around the clock, for eighteen months. Nor do citizens expect that individuals will climb utility poles and secretly attach video cameras. Local law in Mattoon, Illinois, for example, prohibits "willfully . . . climb[ing] on . . . any . . . pole" and attaching any "matter or material to any . . . utility pole." Mattoon Code §§ 98.037, 99.20.

Long-term surveillance of this kind intrudes on individuals' most private associations. Before digital video technology, long-term surveillance of the home was practically impossible and prohibitively expensive. And long-term, 24/7 video monitoring of the home "provides an intimate window into a person's life," *Carpenter*, 138 S. Ct. at 2217, and exposes the "familial, political, professional, religious, and sexual associations" of Americans in the privacy of their homes, *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). As the Fifth Circuit put it, "[t]his type of surveillance provokes an immediate negative visceral reaction." *Cuevas-Sanchez*, 821 F.2d at 251.

3. The Seventh Circuit below offered flawed distinctions from *Jones* and *Carpenter*. First, it observed that pole-camera surveillance allows the government to capture only "one small part of a much larger whole." Pet.App.31a-33a. But the home is the biggest and most private part of an individual's life. The Seventh Circuit similarly characterized the surveillance as capturing only a "*lack* of movement, surveying only the time [Mr. Tuggle] spent at home." Pet.App.32a. But agents used the cameras to surveil Mr. Tuggle's *movements* and visitors in and out of his house and in his curtilage.

The Seventh Circuit also noted that the government "had to decide *ex ante* to collect the video footage by installing the cameras," as opposed to tapping into a historical repository of data as in *Carpenter*. Pet.App.35a. The court did not explain, however, why that distinction

should matter. *Jones* also involved an *ex ante* decision to install a GPS device, but five Justices nonetheless concluded that use of the device infringed the defendant's reasonable expectation of privacy. *See Jones*, 565 U.S. at 415 (Sotomayor, J., concurring); *id.* at 430 (Alito, J., concurring in judgment).

Finally, the Seventh Circuit invoked this Court's statement in *Carpenter* that it "was *not* 'call[ing] into question conventional surveillance techniques and tools, *such as security cameras*.'" Pet.App.35a-36a (alteration in original) (quoting *Carpenter*, 138 S. Ct. at 2220). But, as Judge Barron recently explained, it appears that the Court had in mind security-camera footage in the possession of third parties—not targeted, long-term surveillance of the home. *Moore-Bush*, 963 F.3d at 51 (Barron, J., concurring). The Seventh Circuit's distinctions do not withstand scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

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

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* 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).