No. 21-541

In The
Supreme Court of the United States

TRAVIS TUGGLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization that promotes and protects the First Amendment right to free speech, assembly, press, and petition. IFS has substantial experience litigating challenges to political speech restrictions, and it represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to regulation of core political activity.

Amicus has an interest in this case because the government's unhindered ability to surveil a person's home threatens to chill First Amendment rights.

SUMMARY OF ARGUMENT

Modern pole camera surveillance is increasingly more efficient and invasive than traditional forms of law enforcement surveillance. While human surveillance is limited by time and cost, "a pole camera does not need to eat or sleep, nor does it have family or professional concerns to pull its gaze away from its target." *Commonwealth v. Mora*, 485 Mass. 360, 374 (2020). "Far more so than watching in real time, creating a recording enables the extraction of a host of

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Both parties received notice of this filing and have provided written consent to the filing of this brief.

interconnected inferences about an individual's associations, proclivities, and more." *Id.* at 375.

While this case concerns the monitoring of a single home, the government offers no consistent limiting principle for how pole cameras may be used in home surveillance. In a world where residences could be indefinitely observed, the government gains the ability to assemble an extraordinarily precise picture of citizens' memberships, meetings, and associations.

Consequently, the government's warrantless, continuous surveillance of a residence threatens Americans' First Amendment right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala.*, 357 U.S. 449, 466 (1958) ("*NAACP*"). After all, associational liberty needs "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("*Button*"), and must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference," *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

The warrantless collection of round-the-clock home surveillance risks short-circuiting these precedents and undermining the right to private association. This information offers the government the ability to reverse-engineer not merely groups' membership lists, but to also identify people with sympathy for or a passing interest in an organization's aims. Left unchecked, this power will discourage Americans from engaging in public gatherings and private meetings of

all types that could be identified by travel to and from a person's home, chilling both social and political association and the collective speech it fosters.

In recent terms, this Court has not permitted the government to obtain a person's location or contacts on demand. With the increasing sophistication and capability of government surveillance tools, this Court should maintain its recent emphasis on protecting privacy, not only in the interest of protecting the Fourth Amendment, but also to protect First Amendment freedoms.

ARGUMENT

I. Long-term sophisticated video surveillance of a home allows the government to ascertain an individual's most private associations.

The sanctity of the home is engrained in American law and culture. Indeed, "[t]he maxim that a 'man's house is his castle' is one of the oldest and most deeply rooted principles in Anglo-American jurisprudence." Jonathan L. Hafetz, *"A Man's Home is his Castle?": Reflections on the Home, the Family, and Privacy during the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. OF WOMEN & L. 175, 175 (2002). The Fourth Amendment specifically set out to protect the right of people to be secure in their home against unreasonable searches and seizures. *See* U.S. CONST. amend. IV. But omnipresent government surveillance

of one's home and its curtilage does more than endanger Fourth Amendment rights. The invasion of privacy similarly poses significant First Amendment concerns that necessitate the protections of a warrant requirement.

As Justice Sotomayor recognized in the context of warrantless GPS tracking, data regarding one's location "generates 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." *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). Likewise, accessibility to prolonged "video surveillance of one's house could reveal considerable knowledge of one's comings and goings for professional and religious reasons, not to mention possible receptions of others for these and possibly political purposes." *United States v. Houston*, 813 F.3d 282, 296 (6th Cir. 2016) (Rose, J., concurring). *See also People v. Tafoya*, 494 P.3d 613, 623 (Colo. 2021) (Continuously recording curtilage activities is "at least as intrusive as tracking a person's location—a dot on a map—if not more so" (quoting *People v. Tafoya*, 490 P.3d 532, 540 (Colo. App. 2019))).

Modern pole cameras already possess the capability to gather "a mosaic of intimate details of [a] person's private life and associations." *State v. Jones*, 903 N.W.2d 101, 110 (S.D. 2017). Such devices can "remotely zoom, pan, and tilt," as well as be "equipped with lighting technology to facilitate nighttime coverage." Pet. 4–5. Footage may be watched in real time,

reviewed at a later date, and "stored indefinitely and used at will by the State to prosecute a criminal case or investigate an occupant or a visitor." *Jones*, 903 N.W.2d at 112. There is every reason to believe that as technology continues improving, the capabilities of pole cameras and other surveillance devices will only increase. If a stand for associational rights is not taken now, homeowners and their guests will be left "at the mercy of advancing technology." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Carte blanche governmental access to indefinite surveillance raises significant First Amendment concerns. Without a clear doctrine, there is no limit to the number of houses that could fall under the scrutinizing eye of the government. Such access is dangerous: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. The government's ability to cheaply install sophisticated surveillance equipment that can endlessly monitor a home unquestionably functions to chill associational relationships, a result that both violates the First Amendment and poses a substantial threat to a vibrant civil society.

II. In addition to the Fourth Amendment concerns raised in the Petition, the government's unbridled ability to collect continuous, enhanced video surveillance on any house poses a grave risk to Americans' First Amendment freedoms.

The right of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing," *NAACP*, 357 U.S. at 466, is a "basic constitutional protection[]," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), that "lies at the foundation of a free society," *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). Consequently, this Court has long protected the right not only to associate, but to do so privately, free from government surveillance or interference.

a. Freedom of association is protected by the First Amendment.

This Court explicitly laid out this most "basic protection" for associational privacy in the 1950's and 1960's, when segregationist Southern governments sought to obtain membership lists of civil rights organizations through corporate registration laws (*NAACP*, 357 U.S. 449), legislative investigations (*Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963)), and the taxing power (*City of Little Rock*, 361 U.S. 516).

These precedents established that associational liberty cannot be abridged for naught, and that government action potentially infringing on free association

will be "subject to the closest scrutiny." *NAACP*, 357 U.S. at 461. Governments must tread carefully when condoning or conducting activities that touch upon that protected freedom, even in contexts less dire than those faced by the NAACP. *See Buckley*, 424 U.S. at 64 (overly expansive disclosure demands "can seriously infringe on privacy of association and belief guaranteed by the First Amendment"); *see also Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) ("disclosure requirements can chill association even if there is no disclosure to the general public" (quoting *Shelton*, 364 U.S. at 486) (internal quotation marks omitted)).

Whenever a "State attempts to make inquiries about a person's belief or associations, its power is limited by the First Amendment." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Such "sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Id*. Even when the government claims that its activities are backed by interests of the highest order, associational liberty may nevertheless trump those interests. *See Am. Civ. Liberties Union v. Clapper*, 785 F.3d 787, 802 (2d Cir. 2015) (relying on *NAACP v. Alabama* to permit, in national security context, a First Amendment claim against government metadata collection because of the Plaintiff's "members' interests in keeping their associations and contacts private").

This Court has repeatedly stated that "First Amendment freedoms need breathing space to survive." *Button*, 371 U.S. at 433; *Fed. Election Comm'n v.*

Wis. Right to Life, Inc., 551 U.S. 449, 468–69 (2007) (Roberts, C.J., controlling op.) (quoting same). Accordingly, freedom of association is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *City of Little Rock*, 361 U.S. at 524. For example, this Court has limited the power of "a congressional committee [to] investigat[e] lobbying and of an Act [to] regulat[e] lobbying," to protect against potential intimidation. *NAACP*, 357 U.S. at 461 (citing *United States v. Rumley*, 345 U.S. 41, 46–47 (1953) and *United States v. Harriss*, 347 U.S. 612, 625–26 (1954)). "The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs" belongs to "all legitimate organizations," *Gibson*, 372 U.S. at 555–56, and "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious[,] or cultural matters," *NAACP*, 357 U.S. at 462.

NAACP and *Buckley* protect not merely controversial political dissent, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), but also more prosaic groups. For instance, the Eleventh Circuit held that a city violated the First Amendment when it "require[d] corporate applicants for adult business licenses to disclose the names of 'principal stockholders'" privately to a regulatory agency when the agency was unable to demonstrate a sufficient need for that information. *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1366 (11th Cir. 1999).

b. The government's ability to review citizens' every coming and going from a home is likely to chill constitutionally protected associational rights.

If a state government tried to obtain the membership list of the Council of American-Islamic Relations, the American Conservative Union, the American Civil Liberties Union, Planned Parenthood, the National Rifle Association, Black Lives Matter, or some other issue group, whether through foreign corporation statutes, the taxing power, or other means, it would be rebuffed by courts following established precedent. *See Bonta*, 141 S. Ct. at 2384 ("When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into [First Amendment] protected areas . . . discourage citizens from exercising rights protected by the Constitution.' " (quoting *Baird*, 401 U.S. at 6)); *NAACP*, 357 U.S. at 462 ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

Permitting governments to continuously monitor any person's home with impunity provides an opportunity to bypass these cornerstone precedents and reverse-engineer not only the membership list of a targeted group, but also identify those with sympathy for or a passing interest in the organization. Repeated departures from one's home at a certain time, or visits to a particular home at some times, may signal religious observance, political expression, familial gatherings, or

community involvement. Comings and goings may also signal contact with members of the press.

In the instant matter, the government surreptitiously recorded Mr. Tuggle's home for eighteen months, and such data was stored on an FBI server where agents could review the footage at any time. Whenever Mr. Tuggle interacted with someone at his home or traveled to and from his residence, the government knew in real-time without any awareness by Mr. Tuggle. Without a check on this Orwellian surveillance, any home in the country could be subjected to the same constant monitoring that Mr. Tuggle's home experienced.

As this Court previously acknowledged: "Awareness that the government may be watching chills associational and expressive freedoms." *Jones*, 565 U.S. at 416. If the government is allowed to unilaterally spy on any home without limitation, declining to engage in public gatherings and private meetings may well become a rational choice for a broad range of opinion holdings, including those who may presently exist within the mainstream of political thought. Today's majority opinion, after all, can rapidly become tomorrow's minority view. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 480–85 (2010) (Thomas, J., concurring and dissenting op.) (recounting Proposition 8-related retaliation in California).

Such outcomes are precisely what this Court has sought to prevent. Chilling effects from this invasive form of government oversight will do grave damage

to the First Amendment, which was designed to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited. . . ." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Mills v. Ala.*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

c. Panopticon government surveillance would infringe on freedom of the press and free exercise of religion.

Panopticon government surveillance would not only infringe on associational freedom but also chill press and free exercise rights. "[T]he right to associate anonymously often operates as a vehicle to protect other First Amendment rights, such as the freedom of the press." *Bonta*, 141 S. Ct. at 2390; *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361–67 (1995) (Thomas, J., concurring) (noting that "Founding-era Americans" understood freedom of the press to include the right of printers and publishers to protect the anonymity of authors).

Even in the digital age, reporters often still meet with sources in person to maintain a private space to talk and protect the source's identity. *See Meeting in Person Most Common Way to Protect Sources*, Pew Research Center (Feb. 4, 2015), https://perma.cc/84RN-FRZ9 (noting that 59% of reporters surveyed had met

in person to protect a source). If the government were permitted to monitor any house for any length of time on a whim, there could be no confidence that a source or reporter was not being watched as he or she went to and from a residence. When a person's livelihood or life is on the line, confidentiality is of the utmost importance. *See With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, Human Rights Watch (July 28, 2014), https://perma.cc/LJ9E88YS (noting the precautions journalists take to conceal their location when meeting with sources). Without the protection that confidentiality provides, a chilling effect engulfs the newsgathering process and inhibits the informed society that freedom of the press was meant to foster.

Unbridled government monitoring can also stoke fear of persecution that will inhibit the free exercise of religion. Sensitivity to the danger of persecution is inherent to the First Amendment's free exercise protections, given the "recent history" of persecution when it was ratified. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 232–33 (1963) (internal quotation marks omitted). While the objects of persecution have changed over time, the danger has not.

Notably, many law enforcement agencies sharply increased surveillance of Muslim communities after 9/11 which "interfere[d] with their religious practice" and "chill[ed] free speech." *See* Saher Khan & Vignesh Ramachandran, *Post-9/11 surveillance has left a generation of Muslim Americans in a shadow of distrust and fear*, PBS, Sept. 16, 2021, https://to.pbs.org/2ZZqaM2.

The time of day when individuals leave their homes, what they're wearing when they leave, and having visitors over at certain times can all indicate different religious preferences or practices. Constant surveillance would inhibit the free exercise of religion, allowing government and society to either silence or intimidate into silence those believers who have fallen afoul of shifting public opinion.

III. Requiring the government to obtain a warrant before installing, viewing, or acting upon continuous home surveillance will safeguard freedom of association.

This Court has limited the government's ability to determine a person's location or contacts on demand. *Bonta*, 141 S. Ct. at 2382 (noting "the vital relationship between freedom to associate and privacy in one's associations" (quoting *NAACP*, 357 U.S. at 461)); *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (acquisition of historical cell-site location information was a search under the Fourth Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (installing GPS device on car constitutes a search under the Fourth Amendment); *Riley v. Calif.*, 573 U.S. 373 (2014) (Fourth Amendment requires that police obtain a warrant before searching data, including geolocational data, stored on a smartphone); *United States v. Karo*, 468 U.S. 705, 714 (1984) (warrantless "monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment"). Had these cases been decided differently, more than the Fourth

Amendment would have been affected. These rules would have directly impacted the ability of all Americans to associate with whomever they choose, free of government interference or surveillance, in their efforts to "advance[] . . . political, economic, religious[,] or cultural matters. . . ." *NAACP*, 357 U.S. at 466. In this case, as in those, procedural protections are vital.

NAACP v. Alabama is instructive. Because it knew the government was after its members and a judicial forum was available, the NAACP was able to challenge the State of Alabama's subpoena of its membership list. *See Buckley*, 424 U.S. at 25 ("[G]overnment 'action which may have the effect of curtailing the freedom to associate'" must be "subject to the closest scrutiny." (quoting *NAACP*, 357 U.S. at 460–61)). Had the State been able to simply obtain that information by installing surveillance cameras to monitor the houses of NAACP members and their visitors every hour of the day, this important judicial check would have been unavailable, and the "likelihood of a substantial restraint" upon NAACP members' "right to freedom of association" would have been far higher. *NAACP*, 357 U.S. at 461. But now individual and group privacy is lost long before individuals and groups know and can do anything about it. The basic protections this court created for associational privacy in the *NAACP* cases will continue to exist only by requiring judicial review before the government may act.

CONCLUSION

The rights protected by the First Amendment function as an interlocking mechanism that protects our polity as a whole. Here, requiring the government to obtain a warrant before beginning constant surveillance of a residence will do more than vindicate the Fourth Amendment rights already explained by the Petitioner. That limitation will also guard against the "significant encroachments on First Amendment rights of the sort that compelled disclosure" of private information "imposes." *Buckley*, 424 U.S. at 64.

Respectfully submitted,

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