No. 21-541

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

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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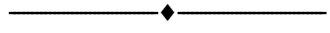
INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ)[1] is a nonprofit, public-interest law firm committed to securing the foundations of a free society by defending constitutional rights. A central pillar of IJ's mission is the protection of private property rights, both because the ability to control one's property is an essential component of individual liberty and because property rights are bound up with all other civil rights. *See United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights.").

To that end, IJ challenges warrantless government surveillance of people and their property. *See*, *e.g.*, *LMP Servs., Inc.* v. *City of Chicago*, 2019 IL 123123 (Ill.), cert. denied, 140 S. Ct. 468 (Nov. 4, 2019); *Rainwaters* v. *Tenn. Wildlife Res. Agency*, Benton County Circuit Court, No. 20-CV-6 (challenging wildlife officers' warrantless patrols and photo/video-taking on private farmland). IJ also regularly files amicus briefs in Fourth Amendment cases before this Court. *See*, *e.g.*, *Caniglia* v. *Strom*, 141 S. Ct. 1596 (2021); *Lange* v. *California*, 141 S. Ct. 2011 (2021); *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018); *Riley* v. *California*, 573 U.S. 373 (2014).



[1] Amicus affirms that both parties received timely notice and have consented to the filing of this brief, no attorney for either party authored this brief in whole or in part, and no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

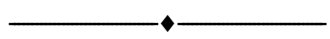
SUMMARY OF ARGUMENT

When ordinary Americans use the word "search," they mean that a person is purposefully looking for something. Maybe that something is a destination, or a lost key, or a job. Or, if the searcher is a police officer—like the officers who surveilled Travis Tuggle's home in this case—maybe they are looking for evidence of a crime. This intuitive definition of "search" has not meaningfully changed since the Founding.

Of course, it is now much easier to search for things. Unlike at the Founding, today's Americans have Google Maps, apps to locate lost keys, and job databases to look for employment. And, if they are police officers—like the officers in this case—they have access to technology like pole cameras that they can use to investigate people. But the fact that it is now *easier* to search for things does not mean that the people who employ these methods are not *searching*.

At least since *Katz* v. *United States*, 389 U.S. 347 (1967), however, this Court has not given the word "search" its ordinary meaning. *See Carpenter* v. *United States*, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) (noting that *Katz*'s "reasonable expectation of privacy" test does "not [employ] a normal definition of the word 'search' "). The result has been a half-century (and counting) of confusion on the Fourth Amendment's threshold inquiry. *See id.* at 2265 (Gorsuch, J., dissenting) ("In fact, we still don't even know what [*Katz*'s] 'reasonable expectation of privacy' test *is*.").

Amicus proceeds in two parts. Section I explains that the Seventh Circuit's holding—that surveilling Tuggle's home for 18 months with secret video cameras was not a "search"—shows that *Katz* is broken. In short, *Katz* is circular, produces counter-intuitive results, and does not sufficiently protect "the right of the people to be secure in" their persons and property. Section II urges the Court to take this case and replace *Katz* with a test that honors the ordinary meaning—both at the Founding and now—of the word "search."



ARGUMENT

I. This case confirms that *Katz* is broken.

From 2013 to 2016, Illinois police investigated Travis Tuggle for his role in a meth-distribution conspiracy. As part of the investigation, the officers mounted three video cameras on utility poles surrounding Tuggle's home and recorded 24/7 surveillance of his comings and goings and other activities. The officers could tune in live and zoom or pan to get better shots. Or they could run back the tape and watch any minute of any day at their pleasure.

This went on for 18 months without Tuggle's consent or a warrant. *United States* v. *Tuggle*, 4 F.4th 505, 511–12 (7th Cir. 2021).

Most Americans, if surveilled for 18 months by a neighbor with secret cameras pointed at their homes, would not think twice about what was going on: They

would reasonably conclude the neighbor was searching for information about their activities, habits, and routines. Yet the Seventh Circuit held that no "search" occurred when police did the same thing to Tuggle. *Id.* at 529.

In the Seventh Circuit's view, *Katz* left it no choice. Under *Katz*, the key question was whether Tuggle had a privacy expectation in the exterior of his home that "society is willing to accept as reasonable." *Tuggle*, 4 F.4th at 514 (cite omitted). And under *Katz*, people (supposedly) lack any privacy expectation in what they "knowingly expose[] to the public." 389 U.S. at 351.

This Court has repeated the point many times since. *See*, *e.g.*, *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986) (Fourth Amendment does not "require law enforcement to shield their eyes when passing by a home on public thoroughfares"); *California* v. *Greenwood*, 486 U.S. 35, 41 (1988) (Fourth Amendment does not require police "to avert their eyes from evidence of criminal activity that could have been observed by any member of the public").

Petitioner offers compelling reasons why, even under *Katz*, the decision below was wrong. *See* Pet. 19–23. But whatever the Court thinks of those reasons, the fact that *Katz* put the Seventh Circuit in such a bind shows that *Katz* is no longer a viable answer to the problems it hoped to solve. At its best, *Katz* was an attempt to ensure that, as governments gained the ability to intrude on persons and property through nonphysical means, *see* 389 U.S. at 352–53, courts could

still "preserv[e] . . . that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001).

The decision below confirms that *Katz* is not up to the task, for three reasons:

First, *Katz* has long "been criticized as circular, and hence subjective and unpredictable." *Id*. And for good reason: *Katz* asks whether "society" considers a privacy expectation reasonable. But social privacy norms change over time. Indeed, as the Court implicitly recognized in *Kyllo*, privacy expectations can "dissipate[ ] as soon as [a new] technology is 'in general public use.'" 533 U.S. at 47 (Stevens, J., dissenting) (quoting *id.* at 34). A test that "waxes" and "wane[s]" as new generations react to new technology, *Tuggle*, 4 F.4th at 510, is ill-equipped to preserve any amount of privacy, much less the privacy that existed at the Founding.

Consider location tracking. This Court has recognized that the Fourth Amendment was meant to curb "a too permeating police surveillance." *Carpenter*, 138 S. Ct. at 2213–14 (cleaned up). In *Carpenter*, with that idea in mind, the Court recognized that people have a reasonable privacy expectation against long-term tracking of their movements—even in public. *Id.* at 2217. The Court relied (in part) on the fact that, historically, the government "simply could not" track a person in this way. *Id.* at 2217 (quoting *United States* v. *Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring)).

But if, as *Kyllo* held, privacy expectations erode as surveillance technologies reach common use, it is only a matter of time until the expectation recognized in *Carpenter* fades away.

This is, effectively, what happened to Tuggle. Police used cameras to constantly track his comings and goings and other activities for 18 months. This would seem to implicate the historical concern about overly pervasive surveillance, and the privacy expectation against long-term public tracking, recognized in *Carpenter*. Yet the Seventh Circuit, "under a straightforward application of *Kyllo*," held that Tuggle lacked any privacy expectation given "the commonplace role cameras have in our society." *Tuggle*, 4 F.4th at 516.

It's hardly surprising that the Seventh Circuit, saddled with *Katz*'s circular framework, felt "unease about the implications of [its decision] for future cases." *Id.* at 526. If *Katz* remains the test, no current or historical privacy expectations will ever be safe from society's shifting views about new technologies.

Second, the decision below adds to *Katz*'s long list of counter-intuitive results. *See Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting) (noting "*Katz* has yielded often unpredictable—and sometimes unbelievable" caselaw); *id.* at 2244 (Thomas, J., dissenting) (similar). The Seventh Circuit was deeply "concern[ed]" at the idea that Tuggle lacks a legitimate privacy expectation against 18 months of secret pole-camera surveillance. *Tuggle*, 4 F.4th at 526. And other courts have registered the same concern. *See*

Pet. 10–13 (collecting cases); *see also United States* v. *Anderson-Bagshaw*, 509 Fed. Appx. 396, 405 (6th Cir. 2012) (noting, where camera was used to surveil unobstructed backyard, that "[f]ew people . . . would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents").

Under *Katz*, though, the counter-intuitive result below is par for the course. Applying *Katz*, for example, the Court has held that the following investigative acts are not searches:

- Examining a person's private bank records to look for evidence of tax evasion. *United States* v. *Miller*, 425 U.S. 435, 437–38, 442–43 (1976).
- Placing an electronic beeper in a container loaded in a person's car and following the beeper's signals to locate a cabin. *United States* v. *Knotts*, 460 U.S. 276, 278–79, 281–83 (1983).
- Sifting through a person's curbside trash to look for drugs. *California* v. *Greenwood*, 486 U.S. 35, 37–38, 40–41 (1988).
- Hovering a helicopter 400 feet above a greenhouse in a residential backyard and peering through an opening to look for drugs. *Florida* v. *Riley*, 488 U.S. 445, 447–48, 449–50 (1989) (plurality).
- Hopping multiple fences, walking a half-mile into somebody's property, crossing interior

> barbed-wire fences, and shining a flashlight into a barn to look for a drug lab—three times. *United States* v. *Dunn*, 480 U.S. 294, 297–98, 303–04 (1987).

So long as *Katz* controls, the list of counter-intuitive results will only continue to grow.

Third, *Katz* undermines "the Fourth Amendment's stated purpose of preserving people's right to 'be secure,'" *Tuggle*, 4 F.4th at 526, by immunizing broad swaths of intrusive government conduct from Fourth Amendment scrutiny.

The Founders invoked the concept of "security" for a reason. *See* Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 Hastings L.J. 713, 734 (2014). At the Founding, "secure" meant "protected from . . . danger"; "free from fear." *Id.* at 738 & n.152 (quoting Samuel Johnson, 2 *A Dictionary of the English Language* 1777 (W. Strahan ed., 1755)). Or, as Blackstone put it: "security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, [and] his body," as well as freedom from "menaces" to his safety. 1 William Blackstone, *Commentaries on the Laws of England* 125 (1765).

The Founders' "frequent repetition of the adage that a man's house is his castle," *Payton* v. *New York*, 445 U.S. 573, 597 (1980) (cleaned up), illustrates the concept. Castles provide "security in property." *Carpenter*, 138 S. Ct. at 2239–40 (Thomas, J., dissenting). They both guard against physical harm and provide

their occupants with peace of mind that they are safe. *See* Milligan, *supra* 748.

That is why Lord Coke called a man's house his "castle and fortress, [just] as well for his defence against injury and violence, *as for his repose*." *Id.* at 747 (cleaned up) (emphasis added). And it is why John Adams, on the eve of the Revolution, saw the home as providing "as compleat a security, safety and *Peace and Tranquility*" as a castle. *Id.* at 748 (cleaned up) (emphasis added).

But who could feel "secure" in his home under the unblinking eyes of three government cameras for months on end? Who could feel "free from fear" and "menaces," *id.* at 734, 738 & n.152 (cleaned up), with the government's gaze ceaselessly trained on his every coming and going—especially when that gaze can run on "in the absence of any oversight from a coordinate branch" of government? *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). To ask the question is to answer it.

Yet in the First, Sixth, and now Seventh Circuits, *see* Pet. 8–10, the government can spy on any American with mounted video cameras for months—even years—without a warrant or probable cause. The Seventh Circuit was right about one thing: The time has come for this Court "to revisit . . . *Katz*." *Tuggle*, 4 F.4th at 528.

II. The Court should grant review and adopt a test that honors the ordinary meaning of the word "search."

This Court should grant review to revisit *Katz*. And in doing so, it should adopt a test that reflects the ordinary meaning of "search" as "a purposeful, investigative act" directed toward a person or his property. *Morgan* v. *Fairfield County*, 903 F.3d 553, 568 (2018) (Thapar, J., concurring).

The concept of an ordinary meaning test (OMT) is not new. It first appeared in *Kyllo*, where Justice Scalia wrote in passing: "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." 533 U.S. at 32 n.1 (quoting Noah Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)).

The OMT arose again in 2018, when Justice Thomas and Sixth Circuit Judge Thapar expanded upon the idea. Both observed that, at the Founding, "search" was not a term of art. It did not appear in legal dictionaries from the era and there was no significant debate over its meaning. *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting); *Morgan*, 903 F.3d at 568 (Thapar, J., dissenting).

Because "search" was not a term of art, both jurists looked to the term's "ordinary meaning" at the Founding. *Carpenter*, 138 S. Ct. at 2238; *Morgan*, 903 F.3d at

568. Both cited the Webster definition from *Kyllo*. And they cited several more Founding-era dictionaries supporting the same core point: that a "search" is a purposeful, investigative act. *See Carpenter*, 138 S. Ct. at 2238 (citing, for example, Nathan Bailey, *An Etymological English Dictionary* (22d ed. 1770) ("a seeking after, a looking for, & c."), and 2 John Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795) ("An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit")); *Morgan*, 903 F.3d at 568 & n.1 (similar).

Most recently, the Iowa Supreme Court, drawing on Justice Thomas's *Carpenter* dissent in construing Iowa's (identical) state search-and-seizure provision, abandoned *Katz* as incompatible with the "fair and ordinary meaning" of the term "search." *State* v. *Wright*, 961 N.W.2d 396, 413 (Iowa 2021) (citing *Carpenter*, 138 S. Ct. at 2238).

In short, a growing number of prominent jurists have embraced the OMT. This Court should grant certiorari so that it can consider whether to do the same, for at least three reasons:

First, the OMT, unlike *Katz*'s esoteric and counterintuitive test, aligns with how normal Americans use—and have always used—the word "search." Now, as in 1789, "search" means "to look into or over carefully or thoroughly in an effort to find something." *Morgan*, 903 F.3d at 568 (Thapar, J., concurring) (quoting *Webster's Third New International Dictionary of the*

English Language (2002)). The term is easy to understand in everyday life: people search for destinations, keys, jobs, and countless other things. And it's just as easy to understand when police are involved: police search for suspects, weapons, cars—or, in Tuggle's case, evidence of a meth-distribution conspiracy. No court needs to guess about what "society" thinks is reasonable to say that all of these activities are searches.

Second, adopting the OMT would preserve the baseline protections under both the *Katz* and *Jones* tests. Every case where the Court has ever found a search under *Katz* involved a purposeful, investigative act. And the same is true under *Jones*, which recognizes a search when the government intrudes on property "for the purpose of obtaining information." *Jones*, 565 U.S. at 404. The OMT, therefore, would not require overturning any of this Court's cases holding that a "search" occurred.

Moreover, adopting a test that would require *more* government conduct to satisfy the Fourth Amendment would only safeguard Americans' right to be secure. The government now has access to "remarkably easy, cheap, and efficient" tools for opening "intimate window[s] into a person's life." *Carpenter*, 138 S. Ct. at 2217–18. It is precisely when such windows are opening that the Court should "strive" for a broad construction of the Fourth Amendment that "ensure[s] that the liberties the Framers sought to protect are not undermined by the changing activities of government officials." *Oliver* v. *United States*, 466 U.S. 170, 187 (1984) (Marshall, J., dissenting). That is what the OMT offers.

Third, under the OMT, less cases would turn on the Fourth Amendment's threshold inquiry and more would turn on the question that matters for people like Tuggle and for Americans more broadly: Was the government's conduct constitutionally "reasonable"?

As it stands, many cutting-edge surveillance cases that reach this Court do so only on the threshold question of whether the Fourth Amendment even applies. *See*, *e.g.*, *Carpenter*, 138 S. Ct. at 2211 (whether accessing historical cell-site-location information was a search); *Jones*, 565 U.S. at 430 (whether placing a GPS tracker on a car was a search); *Kyllo*, 533 U.S. at 34 (whether using a thermal-imaging device on a home was a search). As a result, the Court often fails to offer guidance for lower courts on how to *actually decide* whether the government's use of new surveillance technologies violates the Fourth Amendment. *See Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting) (noting that the Court's holding that accessing historical cell-cite-location information was a search "supplies little . . . direction" for future cases involving that technology).

Simplifying the "search" inquiry, as the OMT would, would offer this Court more opportunities to provide that guidance.

Of course, the outcome in some cases would be the same. For example, a search would remain a search under the OMT even after a person consents to it. (After all, if a person allows police into her home to look for

drugs, what else is she consenting *to* if not a "search"?) Consent would just make the search reasonable.

But other cases might require more nuanced analysis. Look at Tuggle's case: The Seventh Circuit had trouble identifying a search due to this Court's holdings that no search occurs when police *just so happen* to see things in public view. *See*, *e.g.*, *Ciraolo*, 476 U.S. at 213. But here, police *purposefully investigated* Tuggle by using cameras to record him for 18 months. Under the OMT, that is a search. And it is a search that, on remand, would surely invite new arguments from the parties about whether a warrant was required and, if so, whether the exclusionary rule applies.

* * *

All told, the OMT offers a compelling alternative to *Katz* that warrants this Court's consideration. The test honors the ordinary meaning of "search," both at the Founding and now. It would produce intuitive results and give courts a way to preserve "the right of the people to be secure" even as police gain access to evermore intrusive surveillance techniques. And, importantly here, it would provide a clear path forward in Tuggle's case: The Court could grant certiorari, replace *Katz* with the OMT, and remand so that lower courts, given new "jurisprudential means to cabin the government's surveillance techniques," *Tuggle*, 4 F.4th at 511, can figure out whether those techniques were reasonably applied in Tuggle's case.

CONCLUSION

Katz is broken. The Court should grant the petition so that it can revisit *Katz* and replace it with the ordinary meaning test.

Respectfully submitted,

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