

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 *AMICI CURIAE* OF THE
AMERICAN ISLAMIC CONFERENCE AND THE
MUSLIM PUBLIC AFFAIRS COUNCIL
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

Amici curiae represent the interests of adherents to the religion of Islam by promoting understanding, peaceful coexistence, and respect for civil liberties and the rule of law.

Founded in the wake of the September 11, 2001 terrorist attacks, the American Islamic Congress seeks to combat intolerance and facilitate understanding both among Muslims and through interfaith initiatives. With the motto “Passionate about Moderation,” the American Islamic Congress promotes coexistence, human rights, and religious liberty through programming and advocacy in the courts. The American Islamic Congress opposes all acts of intolerance, especially when directed at religious minorities.

The Muslim Public Affairs Council is a nonprofit public affairs organization that has worked since its founding in 1988 to enhance American pluralism, improve understanding, and speak out on policies that affect American Muslims. Through engaging our government, media, and communities, the council leads the way in bolstering more nuanced portrayals of Muslims in American society and partnering with diverse communities to encourage civic responsibility.

Amici submit this brief to highlight the broad implications of the Seventh Circuit’s decision for vulnerable religious groups—and Muslims in particular—who have all too often been the target of suspicionless

¹ No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief. The parties were notified at least ten days before the due date of this brief of the intention to file.

government surveillance tactics. If left on the books, the decision below would allow the government to evade judicial scrutiny when subjecting religious minorities to around-the-clock surveillance in their homes and houses of worship. For *amici*, the decision below thus threatens not just their right to be free from unlawful searches and seizures, but their right to freely practice their religion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In holding that law enforcement can surveil a home around the clock and for 18 months straight without getting a warrant, the decision below sends Fourth Amendment law down a dangerous path. As the Seventh Circuit correctly noted, society is fast approaching the time when “Americans will traverse their communities under the perpetual gaze of cameras.” *United States v. Tuggle*, 4 F.4th 505, 509 (7th Cir. 2021). The Seventh Circuit’s holding is thus not just a concern for those engaged in criminal wrongdoing, but for all Americans. And, as *amici* shall explain, it is of particular concern for religious minorities.

When it comes to overweening government surveillance, people of faith have long had a target on their backs. From Quakers in colonial times to Rev. King and Mennonite students in the 1960s, the government has brazenly violated the privacy and civil liberties of religious outsiders time and time again. And sadly, history keeps repeating itself. In the wake of the 9/11 attacks, law enforcement officials have gone to almost any length to surveil and spy on Muslims in their mosques, homes, student groups, and places of business.

For Muslims, Sikhs, Jews, and other minority faiths, the Fourth Amendment is thus an essential

bulwark of religious freedom. In the first place, it protects their ability to pray, worship, meditate, and study in their homes without government intrusion. And it also protects the sanctity and privacy of their mosques, synagogues, churches, and other houses of worship. Wherever believers worship, they reasonably expect to be shielded by a Fourth Amendment “wall of separation” between church and state.

By sanctioning prolonged, 24/7 surveillance of homes without probable cause or a warrant, the decision below threatens the rights of religious adherents to be secure in their homes and houses of worship. Without any suspicion of wrongdoing, the government can now double down on its past abusive tactics and watch the homes of Muslims and other people of faith for months or years on end. And because the Fourth Amendment already “stands at its zenith in the home,” Pet. 3, the Seventh Circuit’s decision would almost certainly permit the same dragnet methods on businesses, houses of worship, or any other place viewable from a public street. As in times past, religious minorities would not be free to gather or worship without being watched and subjected to increased scrutiny.

To protect the Fourth Amendment rights of all citizens, including those like *amici* have been the target of abusive surveillance tactics, the Court should grant the petition and hold that the prolonged, nonstop surveillance in this case required a warrant.

ARGUMENT

I. The Fourth Amendment protects religious adherents in their homes and houses of worship.

While the decision below addressed police surveillance of the home of a person suspected of criminal activity, the decision's implications sweep much further. The Fourth Amendment secures the right of all people to be free from unlawful searches and seizures. U.S. Const. amend. IV. In our increasingly “smart-home-dotted” and “[c]amera-studded” world, *Tuggle*, 4 F.4th at 509, ever-expanding police surveillance is a concern for all citizens, but it is of particular concern for those, like Muslims and other minority religious groups, who are historically vulnerable to government targeting and abuse. For those individuals, their religious freedom is protected not only by the First Amendment, but by the Fourth Amendment as well.

Indeed, the Founders adopted the Fourth Amendment partly in response to governmental intrusions into religion. General warrants issued by the Crown notoriously targeted religious dissenters. *See* Christian Edmonds, *The Religious Underpinnings of the Fourth Amendment*, 25 Tex. Rev. L. & Pol. 473 (2021). One of the leading concerns that led many to flee England in the 17th century was the violent enforcement of orders that mandated general searches of conventicles. *Id.* at 484. As William Penn noted in 1677, “promiscuous searches for assemblies of nonconformists of every stripe became the order of the day.” *Id.* (citing Concessions and Agreements of West New Jersey (Mar. 13, 1677), *in* Sources of Our Liberties 184, 185 (Richard L. Perry & John C. Cooper eds., 1978)).

Although many Englishmen came to America fleeing religious intolerance, some colonies continued the English practice of using searches and seizures to suppress minority faiths. In New England, where Puritans dominated, “Quakers bore the brunt of general searches and seizures for religious control.” *Id.* at 485 (quoting William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602–1791, 199 (2009)). Likewise, Massachusetts law required law enforcement officials to search all homes and places where Quakers were suspected of having prohibited meetings. *Id.* (quoting Cuddihy, *supra*, at 199). It was with these abuses in mind that James Madison introduced the Fourth Amendment at the Constitutional Convention, as a “security against general warrants.” *Id.* (citing Letter from James Madison to George Eve (Jan. 2, 1789), *in* 5 *The Writings of James Madison, 1787–1790*, at 319 n.1 (Gaillard Hunt ed., 1904)). In short, by adopting the Fourth Amendment, the Founders were reacting to abusive searches and seizures that manifested most glaringly against religious minorities.

The Fourth Amendment continues to be a vital protection for the faithful today. The Amendment secures the “right of the people” to be free from unlawful searches and seizures—but it is especially critical for Muslims and other religious adherents who have been historically targeted for surveillance and religious profiling. *See infra*, part II.

Most fundamentally, the Fourth Amendment protects religious adherents in their homes. Like anyone else, believers have the right “to retreat into [their] own home[s] and there be free from unreasonable governmental intrusion.” *Florida v. Jardines*, 569 U.S. 1, 6

(2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (alteration not in original). That core protection is more important than ever today, as believers turn to their own homes to worship and practice their faith. For instance, when mosques were shuttered due to COVID-19, many Muslims held Friday congregational prayer services in their homes. See Hannan Adely, *Can't Go to Mosque During Ramadan During COVID? Families Make 'Mini-Mosques' at Home*, USA Today (May 20, 2020), <https://perma.cc/R59N-3CJQ>; Ustaz Fadhlullah Daud, *How to Pray in Congregation at Home*, Muslim.sg (Apr. 22, 2020), <https://perma.cc/223Y-53QN>. And Muslims have for centuries held family prayers and personal prayers at home. *Practices in Islam: Worship in the Mosque and at Home*, BBC Bitesize, <https://perma.cc/RCB5-NNQZ> (last visited Nov. 9, 2021); see Mahmoud M. Ayoub, *Islam Faith and History* 57 (2004) (Muslims perform obligatory prayers “together in a mosque behind a prayer leader . . . or at home in solitude”).

Other faiths have done likewise. During the pandemic, Jewish prayer quorums of 10 or more were improvised—from being held outside or on balconies to having drive-in Shabbat services. Levi Cooper, *Jewish Prayer Quorums in the Shadow of Corona: Congregating for Prayer When Congregating is Prohibited*, National University of Singapore Asia Research Institute (Aug. 17, 2021), <https://perma.cc/MA7A-WXNW>. Christian congregations livestreamed sermons, held virtual hang-outs to connect their community, and met in small groups when permitted. Katie Swisher, *How You Can Stay Connected to Your Congregation and Community During COVID-19*, United Methodist Churches of Indiana (Mar. 17, 2020), <https://perma.cc/K3Y2-CN85>; *Regathering the Church: Coming Out of COVID:*

Strategy Options, Southern Baptists of Texas Convention, <https://perma.cc/W8RU-THX4> (last visited Nov. 8, 2021).

Beyond the home, the Fourth Amendment also protects religious adherents as they attend their mosques, churches, and other houses of worship. Indeed, the Fourth Amendment’s express protection for “houses” may well extend to *houses* of worship. See Eric Rassbach, *Are Houses of Worship “House[s]” Under the Third Amendment?*, 82 *Tenn. L. Rev.* 611, 620–623 (2015) (citing evidence that the Founders understood the word “house” to include houses of worship). And in any case, the Fourth Amendment certainly protects worshippers in their “persons,” “papers,” and “effects” wherever they go—including their places of worship. U.S. Const. amend. IV. Although “the Fourth Amendment protects people, not places,” that which a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz v. United States*, 389 U.S. 347, 351 (1967).

If anything, the Fourth Amendment applies with greater force to houses of worship, where the faithful gather to exercise core constitutional rights. Although many houses of worship welcome all comers, those who gather rightly expect their houses of worship to be a sanctuary from government intrusion—in effect shielded by the wall of separation between church and state. Given the combined First and Fourth Amendment concerns at stake, whenever the government intrudes on sacred spaces, “the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’” *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

II. Religious adherents, and Muslims in particular, have long been the target of abusive government surveillance.

In spite of the protection the Fourth Amendment affords to religious exercise, the government has a sordid history of intruding on the privacy of people of faith, and religious minorities in particular.

In the 1960s, the government targeted the Reverend Martin Luther King, Jr. and the Southern Christian Leadership Conference. *See* Sylvester A. Johnson & Steven Weitzman, *The FBI and Religion* 170 (2017). Seeking to quash grassroots activism and alleged communist ties in King's circle, J. Edgar Hoover tasked FBI agents with investigating King. *Id.* at 171. Agents listened in on King's phone calls and wiretapped his home and hotel rooms as he traveled. *Id.* at 172–73. By 1967, the FBI had wiretapped all 10 phone lines at the Southern Christian Leadership Conference's headquarters in Atlanta and recruited a paid informant from the conference's staff. *Id.* at 182.

Around the same time, the government also targeted Mennonite students for their "radical" pacifist activism during the Vietnam War. Keith Sprunger & Mary Sprunger, *Big Brother is Watching: FBI Surveillance of Antiwar Activities at Mennonite Colleges in the 1960s*, 92 *Mennonite Q. Rev.* 5 (2018). Under Hoover's direction, FBI agents surveilled the Mennonite university, Bethel College, through a network of undercover sources and informants. *Id.* at 20–23.

More recently, DHS surveilled Reverend Kaji Dousa for her religious work at the southern border ministering to migrants. *Christian Pastor Targeted by DHS for Ministering to Migrants Sues to End Illegal Government Surveillance*, *Protect Democracy* (July 8,

2019), <https://perma.cc/KNL5-GTFW>. Leaked agency documents show DHS placed Reverend Dousa on a secret watchlist and subjected her to routine surveillance. *Id.*; Mari Payton et al., *Documents Reveal Border Agents Targeted U.S. Pastor Over Caravan Marriage Ceremonies*, NBC San Diego (Jan. 7, 2020), <https://perma.cc/4FGZ-WXGF>. In New York, ICE officials monitored Reverend Dousa’s rallies and prayer vigils, leading some vulnerable migrants not to attend her church services. Compl. at 3–4, *Dousa v. Dep’t of Homeland Sec.*, No. 19CV1255-LAB(KSC), 2019 WL 2994633 (S.D.Cal. Feb. 8, 2019).

Abusive government surveillance has been particularly acute and widespread against Muslims. The NYPD, for example, monitored Muslims from 2001 to 2014 through its Muslim Surveillance and Mapping Program. *Factsheet: The NYPD Muslim Surveillance and Mapping Program*, Bridge, a Georgetown University Initiative (May 11, 2020), <https://perma.cc/X7RG-LP3L>. Considered “hot spots,” mosques were a focus of the program. *Id.* The NYPD infiltrated at least 250 mosques in the New York City area alone. *Id.* The NYPD’s targeted surveillance of Muslims even crossed into New Jersey, where NYPD operatives surveilled at least 20 mosques, as well as numerous restaurants, shops, schools, and Muslim student groups. *Id.*

The NYPD’s efforts also included hiring “crawlers”—informants who infiltrated mosques, took notes on statements by imams and congregants, and passed along lists of attendees to the police. The Muslim American Civil Liberties Coalition et al., *Mapping Muslims: NYPD Spying and its Impact on American Muslims*, CLEAR Project, CUNY School of Law, 11, <https://perma.cc/XG7U-YHEU> (last visited Nov. 9, 2021). A Muslim Sunday School teacher and an imam

noticed the continuous presence of undercover police cars outside their mosques and religious spaces. *Id.* at 12. The ever-present surveillance sowed fear and distrust within the Muslim community. *See generally id.* For many, fulfilling the religious duty of attending services to worship and pray meant exposing oneself to government surveillance. *Id.*

Like the FBI's monitoring of Mennonite college students, the NYPD also surveilled college-age Muslim students who organized to speak out against government overreach. *See id.* at 39. The NYPD identified dozens of Muslim student associations at colleges, labeling seven of the groups as "MSAs of concern." Bridge, *supra*. Unsurprisingly, many students chose not to associate with the groups. The Muslim American Civil Liberties Coalition et al., *supra*, at 31. The NYPD's Intelligence Division even sent undercover operatives into some Muslim student groups, going so far as to dispatch one to join a student whitewater rafting trip to report back on their behaviors and how often they prayed. *Id.* at 40.

By August 2011, the extent of the program was revealed through detailed investigative reports. The reports revealed that the NYPD had been spying on mosques as well as Muslim student groups, businesses, and community organizations for years, undermining claims that officers were only following leads for national security threats and terrorism. *See Adam Goldman & Matt Apuzzo, Inside the Spy Unit that NYPD Says Doesn't Exist*, NBC New York, Associated Press (Aug. 31, 2011), <https://perma.cc/KJM3-9XYP>.

Two major lawsuits were filed against the City of New York for the NYPD's actions under the Muslim Surveillance Program. The first, *see Hassan v. City of New York*, 804 F. 3d 277 (3rd Cir. 2015), led to a

settlement in which the NYPD agreed to reform its practices by no longer engaging in suspicionless surveillance on the basis of religion or ethnicity. *Hassan v. City of New York: Case Overview*, Muslim Advocates, <https://perma.cc/57YC-GWPL> (last visited Nov. 9, 2021). The second, *Raza v. City of New York*, 998 F. Supp. 2d 70 (2013), established additional investigative reforms to protect Muslims and others from unjustified surveillance, confirming the years of targeted discrimination Muslims faced after 9/11. *Raza v. City of New York—Legal Challenge to NYPD Muslim Surveillance Program*, ACLU (Aug. 3, 2017), <https://perma.cc/L39T-BZY5>.

In another case now pending before the Court, FBI agents sent a paid informant to several California mosques to pose as a convert to Islam. *See Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2720 (2021). The FBI informant succeeded in gathering personal information, including details on the religious and political beliefs of hundreds of Muslims. *Fazaga v. FBI*, ACLU Southern California, <https://perma.cc/Z3KC-T8XJ> (last visited Nov. 9, 2021). And the informant did not stop there. Using a hidden camera, he secretly recorded religious prayer groups and private locations including mosques, homes, and businesses. *Fazaga*, 965 F.3d at 1027. All this while the FBI held out to the public that it had no “surveillance program to monitor the constitutionally protected activities of houses of worship” or to “target or monitor legal activity of Muslim groups anywhere in the nation.” Johnson & Weitzman, *supra*, 249.

III. The decision below threatens the liberty and privacy of religious individuals.

The Seventh Circuit’s ruling sets a troubling precedent. It would greenlight long-term warrantless surveillance not only of homes, but of countless other locations. After all, if the Fourth Amendment doesn’t require a warrant for prolonged, around-the-clock street surveillance of homes, which are at the “very core” of the Fourth Amendment’s protection, *Jardines*, 569 U.S. 1 at 6 (quoting *Silverman*, 365 U.S. at 511), the government presumably wouldn’t need a warrant to conduct the same type of surveillance at virtually any other location—houses of worship included. For Muslims, and other religious minorities, the Seventh Circuit’s decision raises a host of concerns.

First, by sanctioning the prolonged surveillance of homes—and, by extension, houses of worship and countless other places—the decision below would allow the government to identify and track nearly every aspect of a person’s life “from the mundane to the intimate.” *Riley v. California*, 573 U.S. 373, 395 (2014). Such a comprehensive record of a person’s comings and goings would disclose “a wealth of detail,” allowing the government “to ascertain, more or less at will,” people’s “religious beliefs” and “associations.” *United States v. Jones*, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring); *see also People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009) (highlighting how GPS surveillance would disclose “indisputably private” trips, like going to “the mosque, synagogue or church”). Under the Seventh Circuit’s ruling, the government could compile a list of Americans’ religious associations, flouting deeply rooted American values.

Second, the decision below would allow the government to engage in religious profiling, targeting Muslims

and other religious minorities for investigative scrutiny without any basis to suspect criminal wrongdoing—much as the NYPD and the FBI did in 9/11’s aftermath.

Third, if law enforcement were allowed to surveil homes and houses of worship around the clock, many believers would be discouraged from gathering to pray or worship—much like the students who disassociated from Muslim student groups that were under NYPD surveillance. This Court recognized a similar “deterrent effect” in *NAACP v. Alabama*, in which it considered Alabama’s attempt to obtain the NAACP’s membership list. 357 U.S. 449, 466 (1958). The Court held the list was off limits, explaining that forcing the NAACP to disclose its members would impair the members’ Fourteenth Amendment rights “to pursue their lawful private interests privately and to associate freely with others.” *Id.*; see also *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (noting that donor “disclosure requirements can chill association ‘[e]ven if there [is] no disclosure to the general public’” (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960))). So too here: allowing the government to surveil homes and houses of worship around the clock would undermine believers’ First Amendment rights to worship, assemble, and associate within religious communities.

Ultimately, what is most concerning for religious minorities is how the ruling below would give the government license to target disfavored religious groups for prolonged and intrusive surveillance without having to justify its decision before a neutral magistrate. If that ruling is allowed to stand, history will only continue to repeat itself.

CONCLUSION

The Court should grant the petition and reverse the decision below.

Respectfully submitted,

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