No. 22-481

In The
Supreme Court of the United States

DAPHNE MOORE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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

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QUESTION PRESENTED

Whether long-term police use of a surveillance camera targeted at a person's home and curtilage is a Fourth Amendment search.

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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.*, *Long Lake Twp. v. Maxon*, No. 349230, 2022 WL 4281509 (Mich. Ct. App. Sept. 15, 2022), *appeal filed*, No. 164948 (Mich. Oct. 27, 2022) (challenging warrantless drone surveillance); *LMP Servs., Inc. v. City of Chicago*, 160 N.E.3d 822 (Ill.), *cert. denied*, 140 S. Ct. 468 (2019) (challenging warrantless GPS tracking); *Rainwaters v. Tenn. Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794 (Tenn. Cir. Ct. Mar. 22, 2022) (challenging warrantless patrols of farmland). IJ also regularly files amicus briefs in Fourth Amendment cases before this Court. *See, e.g.*, *Tuggle v. United States*, 142 S. Ct. 1107 (2022); *Caniglia v. Strom*, 141 S. Ct. 1596 (2021); *Lange v. California*, 141 S. Ct. 2011 (2021); *Collins v. Virginia*, 138 S. Ct.

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[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 other than Amicus made a monetary contribution specifically for the preparation or submission of this brief.

1663 (2018); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014).

SUMMARY OF ARGUMENT

When ATF agents pointed a camera at Moore's home for eight months, they were *searching* for evidence. Most Americans would not think twice about that. Nor did Chief Judge Barron, who observed that the "camera was specifically placed so as to 'reveal location information' pertaining to specific individuals for law enforcement's investigative purposes." *United States v. Moore-Bush*, 36 F.4th 320, 353 (1st Cir. 2022) (en banc) (Barron, C.J., concurring) (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018)).

The fact that the agents pointed the camera at Moore's home to look for evidence should have ended the First Circuit's "search" analysis. But under *Katz v. United States*, 389 U.S. 347 (1967), courts are forced to look at other details, like what technology the government used and how Americans view it, that have no bearing on whether the government is *searching*. This exercise "[i]n assessing when a search is not a search," *Kyllo v. United States*, 533 U.S. 27, 32 (2001), has produced needless confusion that will only grow with the rise of the surveillance state and changing social expectations about technology.

There is a simple solution: Return to Americans' common understanding of what it means to "search." Since the Founding, "search" has meant "a purposeful, investigative act (and nothing more)." *Morgan v. Fairfield County*, 903 F.3d 553, 568 (6th Cir. 2018)

(Thapar, J., concurring and dissenting). By refocusing on the government's investigative purpose, this Court can resolve lower courts' confusion on the threshold question and pave the way for more substantive analyses of whether searches are "reasonable."

Amicus proceeds in three parts. Section I names a basic truth: The government here used a pole camera to search for evidence. Section II explains the problem: *Katz* forces courts to focus on details that have nothing to do with whether the government is *searching*. Section III offers the solution: This Court should replace *Katz* with an intuitive test that focuses on the government's investigative purpose.

ARGUMENT

I. The Government Used a Pole Camera to Search for Evidence.

Start with what the ATF agents actually did. They pointed a pole camera at Moore's home and used it to spy on her for eight months. The camera recorded her comings and goings, her activities, and her routines, every minute of every day. At a common sense level, most Americans would say the agents were *searching* for something. And they would be right: The agents were looking for information they could use to prosecute Moore's daughter. Chief Judge Barron agreed, noting the "camera was specifically placed so as to 'reveal location information' pertaining to specific individuals for law enforcement's investigative purposes." *United States v. Moore-Bush*, 36 F.4th 320, 353 (1st Cir. 2022) (en banc) (Barron, C.J., concurring)

(quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018)).

That should have ended the First Circuit's analysis of the "search" question. But the dueling concurrences instead spent over a hundred pages discussing whether the camera violated a reasonable expectation of privacy. They considered the camera's height, cost, and zooming, panning, and playback abilities. *Id.* at 322–23, 348, 372. They parsed the amount of privacy a reasonable person could expect in Moore's shoes. They considered factors like fencing, the distance between nearby homes, the nosiness of neighbors, and how many doorbell cameras exist in society. *Id.* at 330 n.10, 331 n.11, 336–37, 369, 372. Yet, despite all that analysis, the court split evenly on whether a "search" occurred.

The First Circuit's struggle shows the intractable problems with the "reasonable expectation of privacy" test. It is circular, unintuitive, and overly malleable. Worse, its entire approach is contrary to the ordinary meaning of the word "search"—"a purposeful, investigative act." *Morgan v. Fairfield County*, 903 F.3d 553, 568 (6th Cir. 2018) (Thapar, J., concurring and dissenting). Had the First Circuit employed the ordinary meaning "search," it would have reached the same conclusion as most Americans: Pointing a pole camera at Moore's home to gather evidence was a search.

II. Courts Are Confused About Pole Cameras Because *Katz* Elevates Irrelevant Details Over the Government's Investigative Purpose.

Though the definition of "search" has not changed since the Founding, this Court's approach has. Until *Katz*, the Court held that a physical trespass was required for a search to occur. *See Katz v. United States*, 389 U.S. 347, 352 (1967) (citing *Olmstead v. United States*, 277 U.S. 438 (1928)). But over time, technological advances made it possible for the government to spy on people without physically entering their property. At its best, *Katz*'s "reasonable expectation of privacy" test was an attempt to ensure the government could not evade Fourth Amendment scrutiny by using technology to do what it could previously only do in person. *See Kyllo v. United States*, 533 U.S. 27, 34–35 (2001).

Yet *Katz* has shown that it is not up to the task of protecting core Fourth Amendment rights in the digital age. *Katz* requires courts to abandon the intuitive definition of "search," which focuses on whether the government has directed a purposeful investigative act toward a person or her property, and instead focuses the inquiry on what technology the government used and how society views it. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

While these details may bear on whether a search is "reasonable," *infra* 15–16, they are irrelevant to the threshold question: What is a "search?" Regardless, the lower courts are required to gather and parse these details at the start of the analysis. Borrowing

from this Court, they ask all sorts of questions about the technology, including:

- How high or far away is the technology?[2]
- How long is the technology spying?[3]
- How common or expensive is it?[4]
- Is the data real-time or historical?[5]

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[2] *Compare California v. Ciraolo*, 476 U.S. 207, 215 (1986) (no search because plane 1,000 feet in the air was in public navigable airspace), *and Florida v. Riley*, 488 U.S. 445, 451 (1989) (no search because helicopter below public navigable airspace was still lawful), *with United States v. Houston*, 813 F.3d 282, 288–89 (6th Cir. 2016) (considering whether view from top of a pole is the same as view from bottom).

[3] *Compare United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring) ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. Other cases may present more difficult questions."), *and Carpenter*, 138 S. Ct. at 2266–67 (Gorsuch, J., dissenting) (questioning the line-drawing *Katz* demands regarding duration), *with United States v. Tuggle*, 4 F.4th 505, 526 (7th Cir. 2021) ("How much pole camera surveillance is too much? Most might agree that eighteen months (roughly 554 days) is questionable, but what about 250 days? 100 days? 20 days? 1 day?"), *cert. denied,* 142 S. Ct. 1107 (2022).

[4] *Compare Carpenter*, 138 S. Ct. at 2220 (limiting holding to unconventional surveillance tools), *and Kyllo*, 533 U.S. at 40 (no search because thermal-imaging devices are not in "general public use"), *with Moore-Bush*, 36 F.4th at 372 (Lynch, J., concurring) ("A basic model of [a] doorbell security camera can be purchased for just $51.99.")

[5] *Compare Carpenter*, 138 S. Ct. at 2218, 2220 (limiting holding to historical cell-site location information), *and Riley v. California*, 573 U.S. 373, 395–96 (2014) (explaining that cell phone data is different in part because of its historical aspects), *with Tuggle*, 4 F.4th at 525 ("By the logic of *Riley* and *Carpenter* . . . the pole

- Is there anything blocking the technology from seeing the property?[6]
- How comprehensive is the surveillance?[7]
- Does the technology see more than the average nosy neighbor?[8]

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camera surveillance here did not run afoul of the Fourth Amendment because the government could not 'travel back in time to retrace [Tuggle's] whereabouts.'")

[6] *Compare Ciraolo*, 476 U.S. at 211–12 ("Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus. Whether respondent therefore manifested a subjective expectation of privacy from *all* observations of his backyard . . . is not entirely clear in these circumstances."), *with Tuggle*, 4 F.4th at 513 ("Nothing in the record suggests that Tuggle erected any fences or otherwise tried to shield his yard or driveway from public view, which might have signaled he feared the wandering eye or camera lens on the street. We therefore do not confront the more challenging situation in which the government intentionally places cameras to see *over* a fence . . . ."), *and Moore-Bush*, 36 F.4th at 331 n.11, 369 (disagreement between two concurring opinions of the need for a fence or obstruction).

[7] *Compare Carpenter*, 138 S. Ct. at 2218 (cell phones present unique privacy concerns because they can "achieve[] near perfect surveillance"), *with Tuggl*e, 4 F.4th at 524 ("Of course, the stationary cameras placed around Tuggle's house captured an important sliver of Tuggle's life, but they did not paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon. If the facts and concurrences of *Jones* and *Carpenter* set the benchmarks, then the surveillance in this case pales in comparison."), *and United States v. Trice*, 966 F.3d 506, 519 (6th Cir. 2020), *cert. denied,* 141 S. Ct. 1395 (2021) (distinguishing *Carpenter* because motion-sensor pole cameras record only brief video segments).

[8] *Compare Carpenter*, 138 S. Ct. at 2219 (contrasting a nosy neighbor's memory and a cell phone's storage), *with Moore-Bush*,

Forcing courts to parse so many details about *how* the government is searching distracts from the fact that matters most: *that* the government is searching. From wiretapping, to thermal sensors, to GPS tracking, to cellphone data, the government has always used the latest technology to look for evidence. The fact that these technologies change over time, or that Americans' views on them evolve from one generation to the next, does not change the fact that the government is using them to *search*.

Until *Katz* is addressed, lower courts will continue to elevate these irrelevant details for every new technology. That's true now for pole cameras: Courts cannot agree on whether pointing cameras at houses to spy on people is a search because they are focused on the red-herring details surveyed above.[9] And, as the Seventh Circuit recently noted, *Katz* ensures courts will remain confused about new technologies for years to come: "Today's pole cameras will be tomorrow's body cameras, 'protracted location tracking using [automated license plate readers],' drones, facial recognition, Internet-of-Things and smart devices, and so much more that we cannot even begin to envision." *Tuggle*, 4 F.4th at 527–28; *see also* Electronic Frontier Foundation, *Atlas of Surveillance*, https://atlasof

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36 F.4th at 330 n.10, 336–37 (disagreement between concurring opinions about how much a nosy neighbor could observe).

[9] *See Tuggle*, 4 F.4th at 516–17, 525 (not a search); *Houston*, 813 F.3d at 287–88 (not a search); *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009) (not a search); *United States v. Jackson*, 213 F.3d 1269, 1280–81 (10th Cir. 2000) (not a search), *judgment vacated on other grounds,* 531 U.S. 1033 (2000); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (yes, search).

surveillance.org/atlas (updated Sept. 28, 2022) (mapping government use of surveillance technologies).

That's why the Seventh Circuit wrote—and Amicus agrees—that the time has come for this Court "to revisit the Fourth Amendment test established in *Katz*." *Tuggle*, 4 F.4th at 528.

III. This Court Should Grant the Petition to Adopt a Test that Focuses on the Government's Investigative Purpose.

Forty years ago, this Court noted that it may consider "whether different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *United States v. Knotts*, 460 U.S. 276, 283–84 (1983). That surveillance is now possible. The Court should grant review to replace *Katz* with an intuitive, technologically neutral test that focuses on the government's investigative purpose.

A. This Court's Recent Decisions Pave the Way for a Purpose-Based Test.

Start with *Katz*'s chorus of critics. Legal scholars have long criticized *Katz* as circular, unintuitive, and overly malleable. *See, e.g.*, Jeffrey Bellin, *Fourth Amendment Textualism*, 118 Mich. L. Rev. 233, 251–53 (2019); William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1888 (2016); Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 188.

Hearing the criticism, this Court and several justices have signaled that it may be time for a new test. *See, e.g.*, *Kyllo*, 533 U.S. at 34 ("[*Katz*] has often been criticized as circular, and hence subjective and unpredictable."); *Jones*, 565 U.S. at 427 (Alito, J., concurring) ("[*Katz*] involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks." (cites omitted)); *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting) (noting "*Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence"); *id.* at 2244 (Thomas, J., dissenting) (similar).

The Court has already made moves in that direction, though without addressing the elephant in the room. Multiple recent decisions have either (1) purported to apply *Katz* while rejecting a "mechanical interpretation," or (2) avoided *Katz* altogether by taking a trespass-based approach. In both types of cases, the Court has dodged *Katz* when it would have produced the absurd result that a purposeful, investigative government act was not a "search."

Take *Kyllo*, where the Court held that applying *Katz* as written "would leave the homeowner at the mercy of advancing technology." 533 U.S. at 35. To avoid this outcome, the Court rejected a "mechanical interpretation" that distinguishes "off-the-wall" and "through-the-wall surveillance." *Id.* Though this was a "distinction of constitutional magnitude" under *Katz*'s public-exposure doctrine, *Id.* at 41 (Stevens, J., dissenting), the result would have belied the government's investigative purpose.

In *Carpenter*, the Court similarly rejected a "mechanical interpretation" of *Katz*'s third-party doctrine to historical cell-site location information. 138 S. Ct. at 2214 (quoting *Kyllo*, 533 U.S. at 35). The Court noted that its narrow holding did not "address other business records that might *incidentally* reveal location information." *Id.* at 2220 (emphasis added). That is, the Court suggested there may be a difference between information gathered *incidentally* and information gathered *purposefully*. Chief Judge Barron highlighted this focus on the government's investigative purpose in his opinion below:

> [*Carpenter*] suggests that even if the pole camera in question here could . . . be viewed as a "security camera" or "business record," the camera, as here used, is not of that kind. This camera was specifically placed so as to 'reveal location information' pertaining to specific individuals for law enforcement's investigative purposes . . . . There is nothing "incidental" about the "location information" regarding the home . . . .

Moore-Bush, 36 F.4th at 353 (Barron, C.J., concurring) (quoting *Carpenter*, 138 S. Ct. at 2220).

When the Court has applied the "trespass" test, its focus on the government's investigative purpose has been even clearer. In *Jones*, the Court held that a trespass "is neither necessary nor sufficient to establish a constitutional violation." 565 U.S. at 408 n.5 (cleaned up). Rather, the government action, whether a trespass, invasion of privacy, or other purposeful act,

must involve "an attempt to find something or obtain information." *Id.*

The Court held the same in *Florida v. Jardines*, a case involving the warrantless use of a drug-sniffing dog on someone's porch. 569 U.S. 1, 3–4 (2013). There, the Court noted that whether the government conducts a search "depends upon the purpose for which they entered." *Id.* at 10. Because the officers' "behavior objectively reveal[ed] a purpose" to "gather information," the agents had conducted a search. *Id.* at 7, 10. Notably, it did not matter whether the officers used a drug dog or some other method to search, because "[i]t is not the dog that is the problem, but the behavior that here involved use of the dog."[10] *Id.* at 9 n.3. Applying that logic here: It is not the pole camera, but the ATF agents' investigative purpose in using the camera, that makes their spying a search.

In sum, this Court has increasingly departed from *Katz* by focusing on the government's investigative purpose. The Court should continue that trend here—and do it explicitly.

B. A Purpose-Based Test Would Honor the Fourth Amendment's Text and History.

There is a simpler, more intuitive path than the one *Katz* paved. As Justice Thomas and Judge Thapar have explained, "search" was not a legal term of art at

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[10] Then-Judge Gorsuch discussed the Court's focus on investigative purpose while on the Tenth Circuit, distinguishing between an officer trespassing to return a lost dog from one trespassing to look for criminal evidence. *See United States v. Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting).

the Founding, nor was there any real debate over its meaning. *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting); *Morgan*, 903 F.3d at 568 (Thapar, J., concurring and dissenting). So, both judges looked to the term's ordinary meaning at the time the Fourth Amendment was adopted. *Id.* Citing several Founding-era dictionaries, they came to the same conclusion: a "search" is a purposeful, investigative act. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2238 (citing Nathan Bailey, *An Universal Etymological English Dictionary* (22d ed. 1770) ("a seeking after, a looking for, & c.")); *Morgan*, 903 F.3d at 568 (quoting Noah Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989) ("To 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.")).

Last year, the Iowa Supreme Court took the same approach and abandoned *Katz* under Iowa's (identical) search-and-seizure provision. *State v. Wright*, 961 N.W.2d 396, 414 (Iowa 2021). In its place, the Court held that a search occurs when the government "attempt[s] to find something or to obtain information." *Id.* at 413–14 (quoting *Jones*, 565 U.S. at 408 n.5).

This Court should do the same. Doing so would resolve the "search" issue in this case with far less ink than the First Circuit spilled. In fact, Justice Scalia said as much in *Kyllo*: There, he noted that if the Court were to apply the ordinary definition of search from "[w]hen the Fourth Amendment was adopted," then "examining the portion of a house that is in plain public view . . . is a 'search.'" *Kyllo*, 533 U.S. at 32 &

n.1 (citing Webster, *supra*). That is what the ATF agents did to Moore's house with their pole camera.

C. Adopting a Test that Focuses on the Government's Purpose Would Allow the Court to Engage in Real Constitutional Scrutiny.

If this Court were to adopt a test that focuses on the government's investigative purpose, fewer cases would turn on the Fourth Amendment's threshold inquiry and more cases would turn on the merits: Was the search 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 applies *at all*. *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 car was a search); *Kyllo*, 533 U.S. at 34 (whether pointing a thermal-imaging device at a home was a search). As a result, the Court often fails to offer guidance on how to *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 a search occurred "supplies little . . . direction" for how to resolve future cases).

Simplifying the "search" inquiry by focusing on the government's investigative purpose would give this Court more opportunities to provide that guidance.

Of course, even if this Court were to adopt such a test, the final outcome in many cases would be the

same. For example, a search would remain a search even after a person consents to it. (After all, if a person allows police into her home to look for drugs and guns, what else is she consenting to if not a "search"?) Consent would just make the search reasonable.

Other cases might require a more nuanced reasonableness analysis based on questions like: Did the search violate the "right to be secure"? *See* Luke Milligan, *The Forgotten Right to Be Secure*, 65 Hastings L.J. 713, 741–46 (2014). Did the search violate "the reason of the common law"? *See* Laura Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1269–76 (2016). Was a warrant required? *See Johnson v. United States*, 333 U.S. 10, 14 (1948) (lack of a warrant requirement "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers").

Answering these "reasonableness" questions may even require courts to consider certain details about the technology—including those surveyed in Section II—that are currently part of the *Katz* "search" analysis. For example, in pole-camera cases, courts may still want to know whether the camera "achieves near perfect surveillance," *Carpenter*, 138 S. Ct. at 2218, when deciding whether the search was "reasonable." However that analysis would work, though, Amicus's point is that adopting a simpler "search" test would give courts more opportunities to flesh out Fourth Amendment "reasonableness" in cases involving new surveillance technologies.

* * *

Under an intuitive test that focuses on the government's investigative purpose, the First Circuit would have reached the same conclusion as most Americans: The agents used a camera to gather evidence as part of a criminal investigation. That was a "search," and this Court should say as much.

This approach honors the Fourth Amendment's text and history, and it would allow the First Circuit and its sister circuits to apply real constitutional scrutiny rather than focus on irrelevant details. The Court should grant certiorari to do what scholars, judges, and the Court's recent decisions suggest: revisit *Katz*.

CONCLUSION

This Court should grant the petition and replace *Katz* with an intuitive test that focuses on the government's investigative purpose.

Respectfully submitted,

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