No. 22-3276

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

BRUCE L. HAY,
Defendant–Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF KANSAS, AMERICAN CIVIL LIBERTIES UNION OF COLORADO, BRENNAN CENTER FOR JUSTICE, CENTER FOR DEMOCRACY & TECHNOLOGY, AND ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF DEFENDANT–APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are non-profit entities that do not have parent corporations. No publicly held corporation owns ten percent or more of any stake or stock in amici curiae.

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INTERESTS OF AMICI[1]

The **American Civil Liberties Union ("ACLU")**, the **ACLU of Kansas**, and the **ACLU of Colorado** are membership organizations dedicated to the principles of liberty and equality embodied in the state and federal constitutions and laws. The rights they defend through direct representation and amicus briefs include the right to be free from the government's exploitation of technology to conduct unreasonable searches and seizures. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (direct counsel in case challenging warrantless long-term location tracking); *People v. Tafoya*, 494 P.3d 613 (Colo. 2021) (amicus in case challenging warrantless long-term use of pole cameras).

The **Brennan Center for Justice** at NYU School of Law[2] is a nonpartisan public policy and law institute focused on fundamental issues of democracy and justice. The Center's Liberty and National Security Program seeks to advance effective national security policies that respect the rule of law and constitutional values and is particularly concerned with domestic intelligence gathering policies and the concomitant effects on First and Fourth Amendment freedoms. The Center

[1] No person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. *See* Fed. R. App. P. 29(a)(4)(E). Amici submit this brief with the consent of both parties. *See* Fed. R. App. P. 29(a)(2).

[2] This brief does not purport to convey the position, if any, of the New York University School of Law.

has filed numerous amicus briefs on behalf of itself and others in cases involving electronic surveillance and privacy issues. *See, e.g.*, *Tuggle v. United States*, 142 S. Ct. 1107 (2022); *Carpenter*, 138 S. Ct. 2206; *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016).

The **Center for Democracy & Technology ("CDT")** is a non-profit public interest organization that seeks to ensure that the human rights we enjoy in the physical world are realized in the digital world. Integral to this work is CDT's representation of the public's interest in protecting individuals from abuses of new technologies that threaten the constitutional and democratic values of privacy and free expression. For over twenty-five years, CDT has advocated in support of laws and policies that protect individuals from unconstitutional government surveillance.

The **Electronic Privacy Information Center ("EPIC")** is a public interest research center in Washington, D.C., that focuses on emerging privacy, civil liberties, and civil rights issues. EPIC routinely participates as amicus curiae in cases concerning constitutional rights and emerging technologies.

SUMMARY OF ARGUMENT

This case arises from the government's use of a sophisticated pole camera aimed at a home to surveil everyone who came and went for nearly ten weeks. During that period, police officers could watch the camera's feed in real time (or later, at their leisure) from the station, and could remotely pan, tilt, and zoom close enough to read license plates or detect what someone was carrying into or out of the house. From this, law enforcement could learn a great deal of sensitive information about their target's activities and associations. Yet the government did all of this without a warrant.

The district court erred in concluding that the government's use of a pole camera to observe a home for ten weeks did not amount to a Fourth Amendment search. Long-term technological surveillance that allows the government to monitor and record who and what is entering a home invades a reasonable expectation of privacy. Simply put, people do not expect that their home and its curtilage—sacred spaces under the Fourth Amendment—will be under constant, unblinking surveillance. Over time, pole cameras trained on a home and its curtilage can reveal deeply sensitive information about a person, including the identities of the person's guests and visitors; whether someone other than their spouse visited at night (and how frequently); whether they regularly leave their home with a protest sign or a prayer shawl; and, depending on the camera's zoom

capabilities, potentially whether they are holding documents such as medical bills or ballots. And, as compared to traditional police capabilities, the ability to set up an unattended camera and "travel back in time" to review thousands of hours of historical footage "[w]ith just the click of a button" fundamentally alters the nature of the privacy invasion and upsets the longstanding balance between privacy and police authority. *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018). Increasingly common automated video analytic technologies could further supercharge the sensitive information that can be effortlessly pulled and stockpiled from video footage. And other sources of law also confirm that people do not reasonably expect that others will attach a camera to a utility pole and continuously surveil their home for weeks at a time.

The district court concluded that because the area outside Mr. Hay's home was visible to passersby, he lacked a reasonable expectation of privacy in anything occurring there that was captured by the pole camera over ten weeks. But that conclusion side-stepped the Supreme Court's opinion in *Carpenter*. While *Carpenter* involved the tracking of location information, its reasoning was not so limited. As the Supreme Court explained, "[w]hen an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, [this Court] ha[s] held that official intrusion into that private sphere generally qualifies as a search." *Id.* at 2213 (quotation marks and

citation omitted). What's more, "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Id.* at 2217 (citing *Katz v. United States*, 389 U.S. 347, 351–52 (1967)).

After *Carpenter*, long-term pole camera surveillance of a home is a Fourth Amendment search—and the failure to recognize this would have chilling consequences. Without a warrant requirement, police could use pole cameras to constantly surveil anyone, anywhere, for any reason (or no reason at all). And the use of this surveillance would disparately impact those who lack the resources to buy property or erect barriers capable of thwarting it. But constitutional protections cannot turn on wealth—and to conclude otherwise would be particularly disturbing in light of the already disproportionate surveillance of low-income and minority communities.[3]

To guard against these outcomes, and to address the additional concerns described below, this Court should reverse the district court's ruling. The Court would hardly tread new ground in doing so. Following the guidance of the U.S. Supreme Court in *Carpenter* and predecessor cases, the depth and duration of the warrantless surveillance at issue here render it unreasonable. This Court should join the Fifth Circuit and the high courts of Colorado, Massachusetts, and South

[3] *See generally* Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, The Century Found. (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance.

Dakota in holding that long-term pole camera surveillance of a home is a search requiring a warrant. *See United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *People v. Tafoya*, 494 P.3d 613 (Colo. 2021); *Commonwealth v. Mora*, 150 N.E.3d 297, 309, 312–13 (Mass. 2020); *State v. Jones*, 903 N.W.2d 101 (S.D. 2017); *see also United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (en banc) (Barron, C.J., concurring) (opinion for three members of equally divided six-member en banc court), *petition for cert. filed*, No. 22-481 (Nov. 18, 2022).

ARGUMENT

I. Conducting warrantless long-term, continuous surveillance of a person's home with a pole camera violates the Fourth Amendment right to be secure in our homes against unreasonable searches.

Where an individual has a reasonable expectation of privacy in an item or location to be searched, a warrantless search is "*per se* unreasonable under the Fourth Amendment." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357). Of course, the home and its curtilage are among the most private of spaces under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *California v. Ciraolo*, 476 U.S. 207, 213 (1986). Even when a home's curtilage can be seen by people passing by on public streets and sidewalks, that fact does not suffice to eliminate application of the Fourth Amendment. As the U.S. Supreme Court has long made clear, even "by venturing into the public sphere," a "person does not surrender all Fourth Amendment protection." *Carpenter*, 138 S. Ct. at 2217; *see also Katz*, 389 U.S. at 351.

In *Carpenter*, the Court recognized a reasonable expectation of privacy in a cell phone user's movements over seven days—even those occurring in public—as memorialized in a service provider's business records. 138 S. Ct. at 2217, 2223. That decision simply cannot be shrunk down to a principle that protects people from government intrusion when they are out in public with their cell phones, yet leaves them exposed to government intrusion for months on end as soon as they

return to the front of their homes. Just as government collection of a person's long-term cell phone location information impinges on reasonable expectations of privacy because of the privacies of life it reveals, *id.* at 2223, so too does law enforcement's warrantless use of a pole camera to record the details of a person's comings, goings, and activities at their home for an extended period.

A. Long-term around-the-clock pole camera surveillance of a home reveals comprehensive and deeply personal information and impinges on reasonable expectations of privacy.

It is reasonable for people to expect that the government will not use a sophisticated camera trained at their home to surveil their comings and goings for nearly ten weeks.

As an initial matter, long-term video surveillance interferes with the "right to be 'secure' in one's home." *Moore-Bush*, 36 F.4th at 322 (Barron, C.J., concurring); *see id.* at 335. The home and its surroundings stand at the "very core" of individual privacy under the Fourth Amendment. *Jardines*, 569 U.S. at 6. Like all warrantless searches, warrantless searches of the home are "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). That presumption extends to warrantless searches of a home's curtilage, which "harbors the intimate activity associated with the sanctity of a [person]'s home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 300 (1987) (cleaned up) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)); *accord Jardines*, 569 U.S. at 6 (curtilage

is "part of the home itself for Fourth Amendment purposes" (quoting *Oliver*, 466 U.S. at 180)). "[T]here exist no 'semiprivate areas' within the curtilage where governmental agents may roam from edge to edge." *Bovat v. Vermont*, 141 S. Ct. 22, 24 (2020) (Gorsuch, J., respecting the denial of certiorari) (discussing *Jardines*). "If the home is a 'castle,' a home that is subject to continuous, targeted surveillance is a castle under siege. Although its walls may never be breached, its inhabitants certainly could not call themselves secure." *Mora*, 150 N.E.3d at 309.

Because of the intimate activity that occurs in and around a home, long-term, continuous pole camera surveillance of a residence reveals comprehensive and highly sensitive information, in much the same way as long-term surveillance of a person's cell phone's location. In *Carpenter*, echoing several of the Justices' concurrences in *United States v. Jones*, 565 U.S. 400 (2012), the Court explained that individuals have a "reasonable expectation of privacy in the whole of their physical movements" revealed by cell site location information ("CSLI") because of "the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection." *Carpenter*, 138 S. Ct. at 2217, 2223. As the Court explained, the aggregation of CSLI opens an "intimate window into a person's life, revealing . . . 'familial, political, professional, religious, and sexual associations.'" *Id.* at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). As the en banc Fourth Circuit explained

when striking down a long-term aerial surveillance program over Baltimore, "*Carpenter* solidified the line between short-term tracking of public movements—akin to what law enforcement could do prior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 341 (4th Cir. 2021) (en banc) (cleaned up).

Similarly, pole cameras constantly trained at a residence can reveal a great deal of sensitive and private information. Indeed, their capacity to reveal private information is what makes them useful to law enforcement in investigations. The district court dismissed the privacy concerns posed by long-term pole camera surveillance as not "the same" ones addressed in *Carpenter* and *Jones*, in part because pole cameras "reveal[] just a small part of [a] larger whole, even if an important one." *United States v. Hay*, 601 F. Supp. 3d 943, 953 (D. Kan. 2022). But over time, the information recorded by pole cameras compounds into a startingly invasive picture—the same kind of "comprehensive dossier" of a person's activities that concerned the *Carpenter* Court. 138 S. Ct. at 2220.

Watching a resident leave home every Sunday morning with a hymnal, every Saturday morning with a prayer shawl, or every Friday with a prayer rug suggests both the resident's religious affiliation and their level of observance. Leaving with a protest sign on a regular basis indicates political orientation and

activity, while carrying an oversized X-ray film envelope may reveal medical hardships. A pattern where the departure of one resident of the house is followed by a visitor arriving with flowers could disclose a romantic liaison, and the revelation that the visitor regularly spends the night could help confirm it. Taken altogether, this information captures manifold "privacies of life." *Id.* at 2217 (citation omitted); *Moore-Bush*, 36 F. 4th at 334–36 (Barron, C.J., concurring).

Indeed, "the sum total of all visible activities that take place [at the home] . . . can be even *more* revealing than the sum total of one's movements while out and about, given the nature of what transpires in front of the home." *Moore-Bush*, 36 F.4th at 336 (Barron, C.J., concurring) (emphasis added). As the Colorado Supreme Court recently observed, "pole camera surveillance . . . shares many of the troubling attributes of GPS tracking that concerned Justice Sotomayor in *Jones*. . . . '[T]his type of surveillance is at least as intrusive as tracking a person's location—a dot on a map—if not more so.'" *Tafoya*, 494 P.3d at 622–23 (citation omitted).[4] Such warrantless invasion violates the Fourth Amendment, whose drafters were concerned with the preservation of "security to forge the private

[4] In *Tafoya*, the Colorado Supreme Court held that the warrantless use of a pole camera to surveil a person's home for more than three months violated the Fourth Amendment. 494 P.3d at 614; *see also People v. Sanchez*, 494 P.3d 611 (Colo. 2021). If this Court were to affirm the district court in this case, Colorado residents would be living under two different rules.

connections and freely exchange the ideas that form the bedrock of a civil society." *Mora*, 150 N.E.3d at 309.

The district court held that, under *United States v. Jackson*, 213 F. 3d. 1269 (10th Cir.), *vacated on other grounds sub nom. Jackson v. United States*, 531 U.S. 1033 (2000), "Hay lacked a reasonable expectation of privacy in the area viewed by the camera, so the pole camera surveillance was not a search under the Fourth Amendment." *Hay*, 601 F. Supp. 3d. at 947. *Jackson*, too, involved the use of pole cameras to surveil residences. But its holding was based on the outdated assumption that the pole cameras "were capable of observing only what any passerby would easily have been able to observe,"[5] and the now-untenable notion that "activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection." 213 F.3d at 1281; *accord United States v. Cantu*, 684 F. App'x 703, 704–05 (10th Cir. 2017).

As Mr. Hay correctly argued below, "*Carpenter* upended these principles." *Hay*, 601 F. Supp. 3d at 951 (cleaned up); *see* Def. Br. 50–53. The *Carpenter* Court held that the government violates reasonable expectations of privacy when it captures information sufficient to reveal the whole of one's movements over time—even though people expose those movements to a third-party cell phone provider or the public. 138 S. Ct. at 2217. The Court recognized that "the

[5] *See infra* Part I.B (discussing capabilities of modern pole cameras).

inescapable and automatic nature" of the collection of CSLI "does not make it any less deserving of Fourth Amendment protection." *Id.* at 2223. Exposing the outside of one's home to public view is at least as "inescapable" as using a cell phone, because "in no meaningful sense" does living in a place amount to a decision to "assume the risk" of having that home under constant government surveillance. *Id.* at 2220 (cleaned up). Thus, the fact that the pole camera here "could only capture the front of [Mr. Hay's] residence, an area plainly visible to the public," *Hay*, 601 F. Supp. 3d at 947, simply cannot extinguish Mr. Hay's reasonable expectation of privacy in it.[6]

Although the district court thought otherwise, *id.* at 951, this principle is fully consistent with both *Katz* and *Ciraolo*. In *Katz*, the Supreme Court

[6] The district court determined that *Carpenter* did not upend *Jackson*, in part because the *Carpenter* ruling was "a narrow one." *Hay*, 601 F. Supp. 3d at 951 (quoting *Carpenter*, 138 S. Ct. at 2220). But while the *Carpenter* Court's holding could only address the facts before it, nothing in the decision forecloses application of *Carpenter*'s reasoning to other similarly invasive surveillance, including long-term use of pole cameras.

Likewise, the Court's remark that it was not "call[ing] into question conventional surveillance techniques and tools, such as security cameras," *Carpenter*, 138 S. Ct. at 2210, is wholly irrelevant in this case. When walking through a public space, an individual could reasonably expect to be under temporary surveillance by security cameras; however, people do not expect intrusive, round-the-clock monitoring of their own front yards. Pole cameras are readily distinguishable from security cameras, which are installed by property owners (generally accompanied by a sign about their presence) in an attempt to provide *security* and prevent crime under their watch for *all* individuals in a given area. Conventional security cameras are not at issue here.

recognized that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected," 389 U.S. at 351—a passage the *Carpenter* Court quoted in making clear that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere," 138 S. Ct. at 2217. *See also Moore-Bush*, 36 F.4th at 332 (Barron, C.J., concurring) (discussing the significance of these two passages).[7] And in *Ciraolo*, the Court held that a warrant was not required when police observed details about a home "discernable to the naked eye" while briefly "passing by" during a one-time flyover in "public[ly] navigable airspace." 476 U.S. at 213–14. When the dissent voiced concerns that the Court had ignored "Justice Harlan's observations [in *Katz*] about future electronic developments," the Court explained that those warnings "were plainly not aimed at *simple* visual observations from a public place." *Id.* at 214 (emphasis added); *see Cuevas-Sanchez*, 821 F.2d at 251 (distinguishing *Ciraolo* to hold that thirty-day pole camera surveillance of a backyard is a Fourth Amendment search); *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 405 (6th Cir. 2012) (in dicta, "confess[ing] some misgivings about a rule that would

[7] In *Jackson*, without citing or addressing the above-quoted language, this Court cited *Katz* for the too broad proposition that "activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection, and thus, is not constitutionally protected from observation." 213 F.3d at 1281 (citing *Katz*, 389 U.S. at 351). That was never the meaning of *Katz*, as both *Jones* and *Carpenter* make clear.

allow the government to conduct long-term video surveillance of a person's backyard without a warrant," in part because "*Ciraolo* involved a brief flyover, not an extended period of constant and covert surveillance"). Indeed, even when courts have upheld aerial surveillance under the reasoning of *Ciraolo*, they have done so while emphasizing the limited nature of that decision.[8]

B. Prolonged pole camera surveillance of a home significantly encroaches upon traditional spheres of privacy otherwise unknowable via physical surveillance methods.

When the government uses or exploits emerging technologies, the Supreme Court's Fourth Amendment analysis "has sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter*, 138 S. Ct. at 2214 (cleaned up) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). In *Carpenter*, for example, the Court explained that "[p]rior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.'" *Id.* at 2217 (quoting *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment)). "For that reason, 'society's expectation has

[8] *See Florida v. Riley*, 488 U.S. 445, 448–49 (1989) (explaining that *Ciraolo* "control[led]" where a law enforcement officer made observations from a helicopter "[w]ith his naked eye"); *United States v. Broadhurst*, 805 F.2d 849, 854, 856 (9th Cir. 1986) (explaining that *Ciraolo* was limited to "unenhanced visual observations" and that its result "can hardly be said to approve of intrusive technological surveillance where the police could see no more than a casual observer").

been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue'" a person's movements "for a very long period." *Id.* (quoting *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment)).

The long-term use of pole cameras radically transforms the capabilities of law enforcement to peer into individuals' private lives, threatening to disrupt the traditional "relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (citation omitted). With pole cameras like those used in this case, police can leave behind the classic "stakeout" of yore, which was highly labor- and resource-intensive. Like the cell phone tracking at issue in *Carpenter*, pole camera surveillance "is remarkably easy, cheap, and efficient compared to traditional investigative tools," enabling a heretofore incredibly costly and resource-intensive kind of monitoring "at practically no expense." 138 S. Ct. at 2218.[9] Although an officer parked outside

[9] Based on one oft-cited analysis estimating the cost of various surveillance techniques, *see* Kevin Bankston & Ashkan Soltani, *Tiny Constables & the Cost of Surveillance: Making Cents Out of* United States v. Jones, 123 Yale L.J. Online 335, 342–43 (2014), amici estimate that it would cost more than $80,000 for police to monitor a home in person consistently for ten weeks. By contrast, a standard pole camera costs a small fraction of that amount. *See, e.g.*, Matthew Tokson, *Telephone Pole Cameras Under Fourth Amendment Law*, 84 Ohio St. L. J. 977, 984 (2022) (identifying pole cameras sold for between $200 and $5,000, and explaining that once a law enforcement agency owns a pole camera, ongoing operational costs are extremely low).

a home might observe some activities over a limited period of time, "prior to the digital age" it would have been prohibitively "difficult to conduct a stakeout that could effectively and perfectly capture all that visibly occurs in front of a person's home over the course of months—and in a manner that makes all of the information collected readily retrievable at a moment's notice." *Moore-Bush*, 36 F.4th at 333–34 (Barron, C.J., concurring) (cleaned up) (quoting *Carpenter*, 138 S. Ct. at 2215). The remote-viewing capabilities of the technology allow police to evade detection, while unlimited recording allows the police to "travel back in time," *Carpenter*, 138 S. Ct. at 2218, and scrutinize an individual's day-to-day activities at their home over the course of months, or even years.

As the Supreme Court emphasized in *Kyllo v. United States*, courts must also "take account of more sophisticated systems that are already in use or in development." 533 U.S. 27, 36 (2001). While law enforcement can manipulate current cameras to pan, zoom, and tilt, the capabilities of pole cameras are only getting more robust. Newer cameras can identify precise and granular details—as minute as letters on a package.[10] Pole cameras may also integrate capabilities currently being used or considered for use by law enforcement in other camera systems, including sophisticated analytical software that allows for license plate

[10] *See* Jay Stanley, *The Dawn of Robot Surveillance: AI, Video Analytics, and Privacy*, ACLU (June 2019), https://www.aclu.org/sites/default/files/field_document/061119-robot_surveillance.pdf.

identification, facial recognition, filtering, object identification, and more.[11] These analytical tools can be applied to video footage after the fact—even enhancing recordings obtained via older pole camera technology. For example, backend analytics software like BriefCam can aggregate surveillance camera footage, "rapidly" comb through it to "pinpoint" people and objects, make that footage searchable by keyword, and provide law enforcement the ability to "review six to ten surveillance sites in less time than one classic surveillance operation."[12] The software can also summarize footage by "showing every pedestrian or vehicle that appeared at [a] location across many hours all together within minutes" or can filter footage by "allow[ing] operators to show only red cars . . . or only women, with all the other traffic disappearing."[13]

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[11] Clare Garvie et al., Geo. L. Ctr. on Privacy & Tech., *The Perpetual Line-up* (Oct. 18, 2016), https://www.perpetuallineup.org/; The Constitution Project's Task Force on Facial Recognition Surveillance & Jake Laperruque, *Facing the Future of Surveillance*, The Project on Government Oversight (Mar. 4, 2019), https://www.pogo.org/report/2019/03/facing-the-future-of-surveillance; i2c Technologies, *Deployable Video Surveillance Units*, https://i2ctech.com/product/vpmax-customizable-pole-camera-system (last visited May 9, 2023) (describing the VPMax Complete Customizable Pole Camera Unit as including "a variety of camera configurations" including "PTZ camera, 2 fixed cameras, liscense [sic] plate recognition cameras, or thermal cameras").

[12] *See* BriefCam, *Video Analytics Solutions for Post-Event Investigations*, https://www.briefcam.com/solutions/police-investigations (last visited May 9, 2023).

[13] Stanley, *supra* note 10, at 29 (citing BriefCam, *The BriefCam Comprehensive Video Analytics Platform*, https://www.briefcam.com/solutions/platform-overview

Technology like this allows the massive amounts of digital footage collected by today's pole cameras to be searched quickly and easily, even after an indefinite passage of time. All of this only increases the need for this Court to recognize strong protections now.

C. The reasonable expectation of privacy against long-term pole camera surveillance of the home is bolstered by other sources of law.

Additional sources of law confirm that long-term, continuous pole camera surveillance of the home is a search. "Although no single rubric definitively resolves which expectations of privacy are entitled to protection," *Carpenter*, 138 S. Ct. at 2213–14, other sources of law can help in evaluating those intrusions that society views as unreasonable. *See*, *e.g.*, *Jardines*, 569 U.S. at 13 (Kagan, J., concurring) ("The law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions." (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)); *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) (evaluating alternate sources of law in lieu of reasonable-expectation-of-privacy test); *State v. Wright*, 961 N.W.2d 396, 419 (Iowa 2021) (finding "an expectation [of privacy] based on positive law" under the state constitutional analog to the Fourth Amendment).

(last visited May 9, 2023); BriefCam, *Technology that Allows You to Review Video Fast*, https://www.briefcam.com/technology/video-synopsis (last visited May 9, 2023)).

In *Ciraolo*, for example, the Court noted that the plane was operating in "public navigable airspace," as defined by federal statute. 476 U.S. at 213 (citing 49 U.S.C. app. § 1304). Since "[a]ny member of the public" could legally fly in that airspace, and in doing so might observe the curtilage of the home from above, there was no reasonable expectation against law enforcement doing the same. *Id.* at 213–14.

Here, caselaw points in the opposite direction. As Chief Judge Barron of the First Circuit has explained, "courts have long found such video recording of neighbors to be patently unreasonable—so much so that such activity can be tortious." *Moore-Bush*, 36 F.4th at 337 n.16 (Barron, C.J., concurring). Courts have repeatedly held persistent, continuous video recording of a person's curtilage to constitute intrusion on seclusion or similar torts. *See id.* (collecting cases).[14]

In addition, members of the public are generally barred from attaching extraneous materials to utility poles, further reinforcing people's reasonable

[14] *See also Jackman v. Cebrink-Swartz*, 334 So. 3d 653, 654 (Fla. Dist. Ct. App. 2021) (intrusion upon seclusion); *Baugh v. Fleming*, No. 03-08-00321-CV, 2009 WL 5149928, at *1 (Tex. Ct. App. Dec. 31, 2009) (same); *Williams v. Manning*, No. 05C-11-209-JOH, 2009 WL 960670, at *17–18 (Del. Super. Ct. Mar. 13, 2009) (punitive damages for privacy and nuisance claims); *Goosen v. Walker*, 714 So. 2d 1149, 1150 (Fla. Dist. Ct. App. 1998) (stalking).

expectation that they will not be subject to round-the-clock monitoring from a camera surreptitiously mounted on a nearby pole.[15]

As these sources of law reflect, no one expects that their neighbor, or the state, will mount a video camera on a utility pole and train it on their home for months at a time, recording their every encounter and activity there and maintaining a perfect record that can be accessed at any time. This Court should reverse the district court's decision in order to protect Tenth Circuit residents from the state warrantlessly monitoring their homes and charting out detailed pictures of the occupants' private lives.

II. Authorizing warrantless, prolonged pole camera surveillance of a home would disparately impact those with the fewest resources to protect themselves from surveillance.

Although affirming the district court's order would threaten everyone's privacy, it would especially harm poor people who cannot replace constitutional privacy protections with expensive properties and enhanced technology. The Supreme Court has long emphasized that "the most frail cottage in the kingdom is

[15] *See*, *e.g.*, *Verizon New England, Inc. v. Fibertech Networks, LLC*, Nos. Civ. A. 02-831, 02-843, 2002 WL 32156845, at *3 (Mass. Super. Ct. Aug. 19, 2002) (Where a party "has made attachments to . . . poles without right to do so," they are "committing a continuing trespass."); 18 Pa. Cons. Stat. § 6905(a) ("A person is guilty of a summary offense if he drives a nail or tack or attaches any metal or hard substance to or into any [utility] pole . . . ."); Kan. Stat. § 21-5820; Me. Stat. tit. 35-A, § 2310; Okla. Stat. tit. 21, § 1838; Wyo. Stat. Ann. § 37-12-120; Rev. Code Wash. § 70.54.090.

absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Karo*, 468 U.S. 705, 731 (1984) (Stevens, J., concurring) (quoting *United States v. Ross*, 456 U.S. 798, 822 (1982)). Enforcing the warrant requirement for prolonged pole camera surveillance will ensure this promise does not ring hollow across the increasing economic disparity gap.

If the existence of a reasonable expectation of privacy against prolonged pole camera surveillance of the home turned on how easy it would be for a passerby to view the residence, only those who erected towering walls around their homes would be able to shield themselves from pervasive video surveillance. But the Fourth Amendment does not require people to take extraordinary measures to protect themselves from invasive modern surveillance techniques. Thus, in *Kyllo*, the Court rejected the dissent's suggestion that people should be required to add extra insulation to their homes to avoid thermal-imaging surveillance. *Compare* 533 U.S. at 29–40, *with id.* at 45 (Stevens, J., dissenting). And in *Carpenter*, the Court made clear that people need not "disconnect[] the[ir] phone from the network . . . to avoid leaving behind a trail of location data." 138 S. Ct. at 2220. The same is true here: people need not barricade their home from the outside world to protect against long-term, warrantless surveillance by pole cameras.

Moreover, many people would be unable to avail themselves of Fourth Amendment protection, whether because they lack the resources to erect a barrier

to block public view or because, in many jurisdictions, government zoning regulations would forbid it. *See, e.g.*, *Mora*, 150 N.E.3d at 306 ("Moreover, requiring defendants to erect physical barriers around their residences before invoking the protections of the Fourth Amendment . . . would make those protections too dependent on the defendants' resources."); *Horton v. United States*, 541 A.2d 604, 608 (D.C. 1988) ("[C]onfiguration of the streets and houses in many parts of the city may make it impossible, or at least highly impracticable, to screen one's home and yard from view."). Standard utility poles for residential power delivery are approximately 40 feet tall.[16] Many jurisdictions—including the town where the defendant in this case resided (Osawatomie, Kansas)—bar homeowners from erecting fences tall enough to shield their property from even passersby on foot, not to mention pole-mounted cameras.[17] And even where high walls are legal,

[16] *See* David Brooks, *There Are 500,000 Utility Poles in New Hampshire, Yet We Hardly Notice Them*, Concord Monitor (Dec. 24, 2016), https://www.concordmonitor.com/electricity-utility-poles-4469151 [https://perma.cc/XT7U-8MYT].

[17] *See, e.g.*, Osawatomie, Kan., Zoning Regs. Art. 5 § 10(B) (4 feet); Salina, Kan. Zoning Regs. § 42-83(f)(1) (3 or 4 feet); Olathe, Kan., Unified Dev. Ordinance § 18.50.050(C) (4 feet); Lawrence, Kan. Dev. Code § 16-604.1 (3 or 4 feet); Colo. Springs, Colo., Mun. Code § 7.3.907(A)(20)(b) (42 inches); Arvada, Colo., Mun. Code § 6.5.8(A) (30 inches); Mineral Cnty., Colo., Zoning Regs. § 2.9(A)(3)(c) (40 inches); Pitkin Cnty., Colo., Mun. Code § 5-20-100(e) (42 inches); Pueblo, Colo., Mun. Code § 17-4-4(f)(5)(c) (4 feet); Salt Lake City, Utah, City Code § 21A.40.120(E)(1)(A) (4 to 6 feet); Ogden, Utah, Code § 15-13-7(C)(1) (4 feet); City of Albuquerque, N.M., Integrated Dev. Ordinance § 14-16-5-7(D) (3 feet);

they would protect only those with the resources to purchase them, and would exclude renters, who lack license to build on the property they occupy. Accepting the government's rule would "make a crazy quilt of the Fourth Amendment." *Smith v. Maryland*, 442 U.S. 735, 745 (1979).

The gulf between those who have expendable resources and those who do not is only growing. According to data from the U.S. Census Bureau, "the gap between the richest and the poorest U.S. households is now the largest it's been in the past 50 years."[18] And there are troubling racial disparities. Black Americans earn 73.8% of what White Americans earn, and own homes at half the rate.[19] And in Kansas, poverty rates for Black Americans are more than double the rates for White Americans.[20] For those without expendable resources, even building a simple fence is likely out of reach.[21] Thus, permitting warrantless, long-term pole

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Okla. City, Okla. Code § 59-12200.3(B)(1)(d) (4 feet); Casper, Wyo., Code § 17.12.120(D) (4 feet); Lyman, Wyo., Code § 12-4K-20(A) (40 inches).

[18] Bill Chappell, *U.S. Income Inequality Worsens, Widening to a New Gap*, NPR (Sept. 26, 2019), https://www.npr.org/2019/09/26/764654623/u-s-income-inequality-worsens-widening-to-a-new-gap [https://perma.cc/6XHD-4FR6].

[19] Kathy Morris, *Racial Disparity in America: The 10 Worst States for Black Americans*, Zippia (May 30, 2020), https://www.zippia.com/advice/racial-disparity-worst-states.

[20] *Kansas Poverty Rate by Race*, Welfare Info, https://www.welfareinfo.org/poverty-rate/kansas/by-race (last visited May 9, 2023).

[21] The average cost to install a fence in Kansas according to the home services website HomeDepot.com is $5,300–$7,949. Home Depot, *Cost to Install Fencing*,

camera surveillance of those who are unable to construct a fence or other barrier will troublingly "apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016) (recognizing racial disparities in housing types across race and income in rejecting a strict distinction between apartments and single-family houses in the context of warrantless dog sniffs at front doors).

The foundations of our Fourth Amendment jurisprudence indicate that these economic disparities should not translate into disparate protections for the home. William Pitt's oft-quoted 18th-century address urged the House of Commons:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Payton v. New York, 445 U.S. 573, 601 n.54 (1980); *see also Randolph*, 547 U.S. at 115 (same). Pitt's framework formed the basis for our constitutional protections against unreasonable searches of the home. *See, e.g.*, *Payton*, 445 U.S at 601 n.54 ("There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the colonies."). As the Supreme Court recognized in *Randolph*, "we have . . . lived our whole national history with an

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https://www.homedepot.com/services/c/cost-install-fence/8fa995a0c (last visited May 9, 2023).

understanding of th[is] ancient adage." 547 U.S. at 115 (cleaned up). Nearly 250 years after Pitt's address, the Court rejected the argument that the automobile exception allows warrantless entry into a carport unless it is fully enclosed because that "would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of" similar constitutional protections. *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018).

Upholding the warrantless surveillance here would upend this tradition. Wealthy people could purchase homes in gated communities, or on plots set back from the street, or in neighborhoods with underground utility lines where it is more difficult for police to affix a camera. In other words, they could buy a protected space once the Constitution abandoned them. Those without resources, however, will not be so lucky. Even if they could afford to fence in their property, people living in apartments or who rent their homes are commonly restricted from doing so. *See, e.g.*, *United States v. Acosta*, 965 F.2d 1248, 1256 (3d Cir. 1992) ("[T]enants generally have neither the authority nor the investment incentive to take steps to protect a yard from view by doing such things as erecting a solid fence or planting trees and shrubbery."). Without the ability to afford such homes, those with fewer resources will be more and more subject to the warrantless surveillance of their most private moments at their homes. "Yet poor people are

entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc). Under our Constitution, privacy should not be available to some but cost-prohibitive for others.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,414 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2023, the foregoing amici curiae brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system and served on all counsel of record via CM/ECF.

Dated: May 10, 2023

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