No. _____

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

PETITION FOR WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Daphne Moore was a defendant in the district court and an appellee in the First Circuit. Nia Moore-Bush (now, by marriage, Nia Dinzey) was also a defendant-appellee below, but resolved her case through a plea after remand from the First Circuit. Dinelson Dinzey, Joshua Foster, Tracy Parsons, Jamieson Gallas, Oscar Rosario, Luis Niko Santos, and Amanda Atkins were defendants in the district court, but did not join the motion to suppress, and were not parties to the appeal in the First Circuit.

Respondent United States of America was the plaintiff-appellant below.

RELATED PROCEEDINGS

United States District Court for the District of Massachusetts:

United States v. Moore-Bush, No. 3:18-30001-WGY (June 3, 2019, amended June 4, 2019) (granting motions to suppress);

United States v. Moore-Bush, No. 3:18-30001-WGY (June 5, 2019) (denying government's motion for reconsideration).

United States Court of Appeals for the First Circuit:

United States v. Moore-Bush, Nos. 19-1582, 19-1583, 19-1625, 19-1626 (June 16, 2020) (panel opinion reversing grant of motion to suppress);

United States v. Moore-Bush, Nos. 19-1582, 19-1583, 19-1625, 19-1626 (Dec. 9, 2020) (order granting petition for rehearing en banc and vacating panel opinion);

United States v. Moore-Bush, Nos. 19-1582, 19-1583, 19-1625, 19-1626 (May 27, 2022, unsealed amended opinion filed June 9, 2022) (en banc) (per curiam) (reversing grant of motion to suppress);

United States v. Moore, Nos. 19-1583, 19-1626 (June 23, 2022) (en banc) (order denying petition for rehearing).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daphne Moore respectfully petitions for a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the en banc First Circuit, App. 1a–112a, is reported at *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022).[1] The now-vacated First Circuit panel opinion, App. 137a–195a, is reported at 963 F.3d 29. The district court opinion granting Petitioner's motion to suppress, App. 113a–134a, is reported at 381 F. Supp. 3d 139. The district court opinion denying the government's motion for reconsideration of the order granting suppression, App. 135a–136a, is unreported.

JURISDICTION

The en banc First Circuit entered judgment on May 27, 2022, App. 202a, and denied rehearing on June 23, 2022, App. 200a. On September 14, 2022, this Court extended the time within which to file a petition for a writ of certiorari to November 20, 2022.

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[1] On May 27, 2022, the First Circuit filed its en banc per curiam opinion and two concurring opinions under seal. App. 207a. On June 9, 2022, the court released an amended public version of its opinion and the concurrences. App. 205. The Appendix contains the version of the court's opinion and concurrences publicly docketed by the First Circuit on June 9, 2022. App. 1a. The information still under seal is narrow, and is not necessary for resolution of this petition. However, Petitioner can file the sealed opinion in a separate sealed appendix upon request of this Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

INTRODUCTION

In this case, law enforcement agents, acting without a warrant, surreptitiously installed a surveillance camera on a utility pole near Petitioner's home and used it to record the activities at and around her home and curtilage over an uninterrupted eight-month period. After the district court held that such long-term video surveillance of a home and its curtilage is a Fourth Amendment search requiring a warrant, the First Circuit took the case en banc in order to definitively resolve the issue. The court failed, however, deadlocking 3-3 on that question.

Three judges, in a comprehensive 96-page concurring opinion by Chief Judge David Barron, concluded that long-term "pole camera" surveillance of a home and curtilage is a search, because it reveals numerous "privacies of life" that law enforcement could not have observed and recorded over a long period prior to the availability of small, cheap, and powerful digital cameras. App. 3a–86a (Barron, C.J., concurring). Judge Barron reasoned that as a result, people have a reasonable expectation of privacy with respect to a complete record of all the comings and

goings from their home over a long period, and an invasion of that expectation is a search.

Three other judges disagreed. They concluded that because passersby could see the outside of Petitioner's home and curtilage, Petitioner had no reasonable expectation of privacy even against eight months of nonstop surreptitious video surveillance by the police. App. 86a–112a (Lynch, J., concurring).

The deep disagreement within the First Circuit reflects and reinforces an entrenched split among courts of appeals and state supreme courts. Three circuits have held that long-term pole-camera surveillance of a home is not a Fourth Amendment search. Meanwhile, the Fifth Circuit and the supreme courts of Colorado and South Dakota have held that such surveillance violates reasonable expectations of privacy and is a search under the Fourth Amendment. The even divide within the en banc First Circuit only underscores the necessity for this Court to resolve the question, and the dueling concurrences below comprehensively develop the arguments on both sides.

This Court's intervention is particularly needed given the importance of the question presented—what one commentator has called "perhaps the most urgent and consequential issue in current Fourth Amendment law."[2] The lower courts have struggled with how to apply this Court's decision in *Carpenter v.*

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[2] Matthew Tokson, *Telephone Pole Cameras Under Fourth Amendment Law*, 84 Ohio St. L. J. __ (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4237138.

United States, 138 S. Ct. 2206 (2018), to the particular law enforcement practice at issue here. As the cost of such surveillance falls and its use by law enforcement expands, the need to resolve whether the Fourth Amendment poses any constraint has become all the more urgent. As Chief Judge Barron explained below, adopting the government's rule would enable a "brave new world" in which "the government [could] access[] a database containing continuous video footage of every home in a neighborhood, or for that matter, in the United States as a whole." App. 5a, 43a. This Court should grant the writ of certiorari to resolve the split among lower courts and to make clear that the Fourth Amendment still "secure[s] the privacies of life against arbitrary power." *Carpenter*, 138 S. Ct. at 2214 (cleaned up).

STATEMENT OF THE CASE

1. In January 2017, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") began investigating Nia Moore-Bush[3] and her husband for unlicensed sale of firearms, and soon began to suspect that they were also selling illegal drugs. App. 6a–7a.

About a month into the investigation, Moore-Bush moved in with her mother, Petitioner Daphne Moore. Petitioner lived in a single-family home in a "quiet, residential neighborhood" in Springfield, Massachusetts. App. 7a, 119a.

The ATF wanted to surveil the house to confirm agents' suspicions about Moore-Bush—they did not, at that point, suspect Petitioner—but, as an ATF agent

[3] Ms. Moore-Bush changed her name to Nia Dinzey after marriage. To avoid confusion, this petition follows the opinions below in referring to her as "Moore-Bush."

explained, the house was "located on a quiet residential street where physical surveillance [was] difficult to conduct without detection." Def. Daphne Moore's Mot. to Suppress at 2, ECF No. 326 (quoting affidavit in support of application for wiretap order). So, on May 17, 2017, ATF agents surreptitiously installed a digital video camera near the top of a utility pole across the street from the house. App. 7a. Agents "hid the Pole Camera out of sight" of the residents of the house. App. 125a. They did not seek or obtain a warrant to install the camera.

ATF agents operated the camera remotely. They could view a live stream of the footage via a password-protected website, and could remotely pan, tilt, and zoom the camera to a "significant level of magnification." App. 7a & n.3. The magnification was sufficient to "accurately capture facial expressions, details on clothing, small objects in a person's hands (such as keys or a cigarette), and the license plate numbers of cars parked in the residence's private driveway." *Id.* The camera operated day and night; although nighttime footage was "lower in quality," there was still enough resolution, for example, "accurately to depict license plate numbers." App. 9a. The footage was recorded, "digitally stored[,] and could be retrieved and re-watched at any time." App. 8a–9a.

The camera "could discern the presence of a person looking out the front windows of the house and see inside the front of the garage when its door was up." App. 8a. In addition,

> the camera had within its view roughly half of the front structure of the . . . residence, including its side entrance and a gardening plot

> near that entrance, the whole of the home's private driveway, the front of the home's garage, much of the home's front lawn, and the vast majority of the walkway leading from the home's private driveway up to the home's front door.

App. 8a.

The camera remained in place, constantly recording Petitioner's home, for approximately eight months. App. 9a. The camera recorded "what is effectively a live-action log of all visitors to their home during the eight-month period in which the pole camera operated." App. 17a–18a n.8. The recorded footage "captured numerous comings, goings, and occurrences in the front curtilage of the residence," including "persons going to and from the residence, parking, smoking cigarettes, or taking out the trash." App. 9a. It provided the police with a comprehensive record of every time anyone, including Petitioner herself, entered or exited the home over eight months.

2. On January 11, 2018, a federal grand jury in the District of Massachusetts indicted Moore-Bush and four co-defendants on drug distribution charges. Petitioner was not named in that indictment. Moore-Bush was arrested the following day, and the pole camera was removed soon after. App. 9a.

On December 20, 2018, more than eleven months after Moore-Bush's indictment, a grand jury issued a superseding indictment that, for the first time, leveled charges against Petitioner. Petitioner was charged with distribution and possession with intent to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. § 841(a)(1), as well as

conspiracy, money laundering, and false statement offenses. App. 10a & n.6.

Petitioner and Moore-Bush filed motions to suppress evidence obtained from the pole-camera surveillance and its fruits, arguing that the "prolonged, covert use of a hidden pole camera to spy on and record the activities associated with a private home" violates reasonable expectations of privacy and constitutes a search under the Fourth Amendment. ECF No. 326 at 9–10. The government opposed, relying on *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009), which held that pole-camera surveillance of a home is not a search. The government argued that this Court's subsequent decisions in *United States v. Jones*, 565 U.S. 400 (2012), and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), did not disturb *Bucci*'s precedential force. ECF No. 367.

The district court granted Petitioner's and Moore-Bush's motions to suppress. The court "infer[red] from their choice of neighborhood that they subjectively expected that their and their houseguests' comings and goings over the course of eight months would not be surreptitiously surveilled." App. 118a. And it concluded that "the Pole Cameras collected information that permitted the Government to peer into Moore-Bush['s] and Moore's private lives and constitutionally protected associations in an objectively unreasonable manner." *Id.* The court reasoned that *Bucci* was "no longer bind[ing] . . . in light of subsequent Supreme Court precedent undermining it," namely *Carpenter*. App. 121a. The court read *Carpenter* "to cabin—if not repudiate—th[e] principle" relied on in *Bucci* that, as a categorical matter, "[a]n individual does not have an expectation

of privacy in items or places he exposes to the public," and to establish that long-term technology-aided surveillance of the home can reveal numerous "intimate personal details" that society reasonably regards as private. App. 122a, 131a (alteration in original).

The district court also held that because the government had not argued that the good-faith exception to the exclusionary rule applied, it had "waived that argument." App. 116a n.2. The court ordered suppression of "evidence obtained directly from the Pole Camera," but took no action on any fruits of that surveillance on the ground that the defendants had not identified tainted derivative evidence. The court also suggested that the independent-source doctrine might preclude suppression of such evidence in any event. App. 134a & n.9.

The government moved for reconsideration, arguing that the court had erred on the Fourth Amendment question and in its conclusion that the government had waived the good-faith exception. ECF No. 423. The district court denied the motion for reconsideration. App. 135a–136a.

3. On appeal, a panel of the First Circuit reversed. App. 137a–195a. Judge Lynch, joined by then-Chief Judge Howard, held that the panel was bound by *United States v. Bucci*, which similarly involved eight months of warrantless pole-camera surveillance of a home. App. 138a–139a (citing *Bucci*, 582 F.3d 108). *Bucci* deemed "dispositive" the "legal principle" that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." 582 F.3d at 116–17.

Judge Barron concurred in the judgment but wrote separately to suggest that the court take the case en banc to reconsider *Bucci* in light of subsequent precedent from this Court. App. 188a.

4. Petitioner and Moore-Bush filed petitions for rehearing en banc, which the First Circuit granted. App. 198a.

More than a year after oral argument, the en banc court issued a unanimous judgment but sharply divided opinions. The opinion of the court was a two-sentence per curiam statement:

> The district court order granting Daphne Moore and Nia Moore-Bush's motions to suppress is unanimously reversed by the en banc court. We remand with instructions to deny the motions to suppress.

App. 3a. That terse statement, which had the effect of leaving *Bucci* in place because of the Court's deadlock on the merits of the Fourth Amendment issue, was followed by lengthy dueling concurrences in which the court split 3-3 on whether long-term pole-camera surveillance of a home is a Fourth Amendment search.

a. In a 96-page concurring opinion, now-Chief Judge Barron, joined by Judges Thompson and Kayatta, concluded that long-term pole-camera surveillance of a home violates reasonable expectations of privacy and is a search. App. 3a–86a (Barron, C.J., concurring) ("Barron concurrence").

The Barron concurrence interpreted *Carpenter* to hold that "one reasonably leaves one's home without expecting a perfect form of surveillance to be conducted over a long period of time." App. 30a. Although a human stakeout of 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." App. 28a, 31a (cleaned up) (quoting *Carpenter*, 138 S. Ct. at 2215).

Moreover, Chief Judge Barron reasoned, long-term, unblinking surveillance of the home raises special concerns, because it is uniquely able to reveal "information about a person's life, including, potentially, 'familial, political, professional, religious, and sexual associations.'" App. 35a (quoting *Carpenter*, 138 S. Ct. at 2217). Accordingly, by conducting months of pole-camera surveillance of her home, the government violated Petitioner's reasonable expectation of privacy: the "instantly searchable, perfectly accurate, and thus irrefutable digital compendium of the whole of what visibly occurred over" an eight-month period was "'deeply revealing' of the 'privacies of life'" that occur at one's home and curtilage. App. 45a, 54a–55a.

Judges Barron, Thompson, and Kayatta nonetheless concurred in the reversal of the district court's suppression order based solely on their conclusion that the good-faith exception to the exclusionary rule applied and that the government had not waived that argument. App. 82a–83a & n.33.

b. Judge Lynch, joined by Judges Howard and Gelpí, concluded that the government's conduct in this case was not a Fourth Amendment search. Judge Lynch reasoned that because the exterior of

Petitioner's home was exposed to public view, she could have no reasonable expectation of privacy against even long-term pole-camera surveillance by police. App. 103a–104a, 112a (Lynch, J., concurring) ("Lynch concurrence")).

The Lynch concurrence stated that "[t]he Supreme Court's decision in *Carpenter* does not support the [Barron] concurrence's reasoning," and in fact "forbids it." App. 91a. In Judge Lynch's view, "*Carpenter* did not upend the longstanding fundamental proposition of Fourth Amendment law, that '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *Id.* (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). And it considered the privacy interest in long-term recording of activity at the home and its curtilage to be categorically less than the privacy interest in long-term recording of movement, in part because neighbors "could" observe activity at the home. App. 97a, 102a.

The Lynch concurrence did not address the good-faith exception.

5. After remand from the First Circuit, Moore-Bush reached a plea agreement with the government and was sentenced. ECF Nos. 747, 811. Petitioner and the government filed a joint motion to stay Petitioner's trial date pending this Court's consideration of this appeal, which the district court granted. ECF Nos. 803, 809.

REASONS FOR GRANTING THE WRIT

I. FEDERAL COURTS OF APPEALS AND STATE HIGH COURTS ARE IRRETRIEVABLY DIVIDED OVER WHETHER LONG-TERM POLE-CAMERA SURVEILLANCE OF THE HOME IS A SEARCH.

The sharp divide within the en banc First Circuit perfectly reflects the entrenched split in authority among federal courts of appeals and state high courts. *See* App. 76a–77a (recognizing split in authority); *United States v. Tuggle*, 4 F.4th 505, 511 (7th Cir. 2021) (identifying "disagreement among our sister circuits and counterparts in state courts"); *People v. Tafoya*, 494 P.3d 613, 621 (Colo. 2021) (en banc) ("Those courts are split."). The First Circuit in its earlier decision in *Bucci*, the Sixth and Seventh Circuits, and the three-judge Lynch concurrence below, have concluded that long-term pole-camera surveillance of a home is not a Fourth Amendment search.[4] The Fifth Circuit, the high courts of Colorado and South Dakota, and the three-judge Barron concurrence below, have reached the opposite conclusion, namely, that long-term pole-camera surveillance of a home is a search requiring a warrant.

A. 1. The two-sentence per curiam opinion of the en banc First Circuit below left in place the First Circuit's

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[4] In *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000), the Tenth Circuit held that use of a pole camera was not a search, but did not address *long-term* pole-camera surveillance. And in *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009), the Fourth Circuit permitted warrantless pole-camera surveillance of open fields, without addressing what protections might apply to surveillance of a home.

previous opinion on pole-camera surveillance in *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009). In *Bucci*, which like this case involved a pole camera's eight-month recording of activity in front of the defendant's house, the court found no Fourth Amendment violation. The court concluded simply that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public" and "[t]hat legal principle is dispositive here." *Id.* at 116–17. The court did not consider whether the duration of surveillance or the Fourth Amendment's special concern for the privacy of the home and its curtilage affected the analysis. That continues to be the law in the First Circuit only because the current court was exactly evenly divided on the question.

2. The Sixth Circuit followed suit several years later. In *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), the defendant was convicted of being a felon in possession of a firearm based largely on footage of him handling firearms on his rural Tennessee farm. The government amassed that footage through ten weeks of warrantless pole-camera surveillance of buildings and curtilage on the property. On appeal, a divided panel held that the defendant had "no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads." *Id.* at 287–88.

Although the court recognized that ten weeks of in-person surveillance would have been impractical, including because agents had testified that their "vehicles '[stuck] out like a sore thumb' at the rural property," *id.* at 286 (alteration in original), it

concluded that the pole-camera surveillance did not impinge a reasonable expectation of privacy because "the ATF *theoretically* could have staffed an agent disguised as a construction worker to sit atop the pole . . . for ten weeks." *Id.* at 289 (emphasis added). The panel majority held that the duration of the surveillance did not matter because "it was possible for any member of the public to have observed the defendant's activities during the surveillance period." *Id.* at 290. One judge disagreed, explaining both that long-term video surveillance of a home raises serious privacy concerns, and that the use of technology to enable previously impossible types of invasive surveillance implicates exactly the concerns outlined in the opinions of five members of this Court in *Jones*, 565 U.S. 400. 813 F.3d at 296 (Rose, D.J., concurring on harmless error grounds).

In subsequent cases, the Sixth Circuit has concluded that any argument that long-term pole-camera surveillance implicates the Fourth Amendment is foreclosed by *Houston*, notwithstanding this Court's subsequent opinion in *Carpenter*. *United States v. May-Shaw*, 955 F.3d 563, 567 (6th Cir. 2020); *United States v. Trice*, 966 F.3d 506, 518 (6th Cir. 2020).

3. In *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022), the Seventh Circuit reached the same result. *Tuggle* involved 18 months of continuous surveillance by three pole cameras directed at the defendant's home. While expressing "unease about the implications of [long-term pole-camera] surveillance for future cases," *id.* at 526, the court concluded that the Fourth Amendment was not violated because, while the cameras "captured

an important sliver of Tuggle's life, . . . they did not paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon" in *Carpenter* and *Jones*. *Id.* at 524. Disagreeing with the Sixth Circuit's reasoning in *Houston*, however, the Seventh Circuit stressed that its decision did "not rest on the premise that the government *could have*—in theory—obtained the same surveillance by stationing an agent atop the utility poles outside Tuggle's home" because "[t]o assume that the government would, or even could, allocate thousands of hours of labor and thousands of dollars to station agents atop three telephone poles to constantly monitor Tuggle's home for eighteen months defies the reasonable limits of human nature and finite resources." *Id.* at 526.

B. On the other side of the split stand the Fifth Circuit, the South Dakota and Colorado Supreme Courts, and the three-judge Barron concurrence below.[5]

1. In *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987), the Fifth Circuit held that nearly two months of pole-camera surveillance of the defendant's fenced-in backyard and driveway was a Fourth Amendment search. The government had argued that there was no reasonable expectation of privacy because the property could have been

[5] In addition, the Massachusetts Supreme Judicial Court has unanimously held that long-term pole-camera surveillance of a home is a search under the state constitution. *Commonwealth v. Mora*, 150 N.E.3d 297, 302 (Mass. 2020) ("We conclude that the continuous, long-term pole camera surveillance targeted at the residences of Mora and Suarez well may have been a search within the meaning of the Fourth Amendment, a question we do not reach, but certainly was a search under art. 14.").

observed by passersby or a "power company lineman on top of the pole." *Id.* at 250. The court disagreed. Distinguishing fleeting observation of publicly visible portions of a person's property, the court explained that using "a video camera that allowed [police] to record *all* activity in [the] backyard" was a categorically greater intrusion than a passing observation. *Id.* at 251 (emphasis added). The court also emphasized that "the area monitored by the camera fell within the curtilage of [the defendant's] home, an area protected by traditional fourth amendment analysis." *Id.* The "indiscriminate video surveillance" at issue, the court warned, "raises the spectre of the Orwellian state." *Id.*

2. The South Dakota Supreme Court reached the same conclusion in *State v. Jones*, 903 N.W.2d 101 (S.D. 2017). There, a police pole camera "continuously recorded activity outside of [the defendant's] residence" for nearly two months to gather evidence of marijuana sales. *Id.* at 104. As here, the camera had a remotely operated zoom function. And the footage could be viewed live or played back in real time or fast enough to allow police to "review a day's worth of activity in approximately 10 to 11 minutes." *Id.*

Expressly disagreeing with the First and Sixth Circuits in *Bucci* and *Houston*, *id.* at 107–08, 111–12, the South Dakota Supreme Court concluded that long-term pole-camera surveillance of a home is a Fourth Amendment search. The court rejected the government's argument that because the defendant's property was visible from the street, police should be able to surveil it with a pole camera for a prolonged period. The court distinguished *California v. Ciraolo*, 476 U.S. 207 (1986), which involved short-term

observation of areas exposed to public view. Citing the concurring opinions from this Court in *United States v. Jones*, the court explained that, unlike in *Ciraolo*, the pole camera at issue allowed the government to "capture[] something not actually exposed to public view—the aggregate of all of [the defendant's] coming and going from the home, all of his visitors," and more. *Id.* at 111 (alterations in original) (citation omitted). Because long-term pole-camera surveillance is "markedly different" than the kinds of short-term visual observation that this Court has permitted without a warrant, the Fourth Amendment's warrant requirement applies. *Id.*

The court warned that ruling otherwise would allow law enforcement "to place a video camera at any public location and film the activity outside any residence, for any reason, for any length of time, all while monitoring the residence from a remote location by computer or phone." *Id.* at 113. Echoing the Fifth Circuit in *Cuevas-Sanchez*, the court noted that such surveillance "raises the specter of an Orwellian state and unlocks the gate to a true surveillance society." *Id.* at 112.

3. Most recently, in *People v. Tafoya*, 494 P.3d 613 (Colo. 2021) (en banc), the Colorado Supreme Court unanimously held that more than three months of warrantless pole-camera surveillance of the defendant's home and curtilage violated the Fourth Amendment. As here, the pole camera could be remotely operated to "pan left and right, tilt up and down, and zoom in and out." *Id.* at 622. Police could view the feed live, and "indefinitely stored the footage for later review." *Id.* at 614.

This Court's decisions in *Carpenter* and *Jones*, the Colorado Supreme Court reasoned, had "clarified that public exposure is not dispositive" on the question whether technology-aided police surveillance is a search, and had suggested that when the government uses technology to conduct "continuous, long-term surveillance, it implicates a reasonable expectation of privacy." *Id.* at 619, 620. Much like prolonged location tracking, long-term monitoring of activities around one's home "'reflects a wealth of detail' about [the resident] and his associations." *Id.* at 622 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). And the "cheap and surreptitious" nature of such surveillance contravenes traditional expectations of privacy because it gives police a power they never could have previously exercised; "if a police officer had manned the utility pole for three continuous months, obviously [the defendant] would have noticed." *Id.* at 623.

The court rejected the government's argument that because the defendant's curtilage was "visible through gaps in [his] fence" and from a neighboring apartment building, he had forfeited any expectation of privacy in the sum total of his activities on his property. The court identified as "most significant[]" the fact that "the surveillance occurred continuously over a long period of time; the pole camera not only could see into the backyard, but it also recorded the activities of [the defendant's] backyard all day, every day for over three months." *Id.* For that reason, "this surveillance 'involved a degree of intrusion that a reasonable person would not have anticipated.'" *Id.* (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment)).

C. Finally, while the en banc court below ultimately reached a unanimous judgment, the dueling concurrences comprehensively lay out the arguments for and against finding long-term pole-camera surveillance a search. There is nothing more to be said on either side, and only this Court can resolve the irreconcilable split among the courts and within the First Circuit itself.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION ABOUT FOURTH AMENDMENT RIGHTS IN THE FACE OF ADVANCING POLICE SURVEILLANCE TECHNOLOGIES.

The entrenched and even division reflected above underscores the difficulty and importance of the issue of long-term pole-camera surveillance of the home and its curtilage. Resolving it is an important next step in this Court's ongoing effort to reconcile enduring Fourth Amendment principles with police use of modern technologies to monitor activity that people have long reasonably expected to be private.

This Court has repeatedly "rejected . . . mechanical interpretation" of older Fourth Amendment rules to cases involving "the power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (discussing *Katz*). Instead, it has recognized an "obligat[ion]—as '[s]ubtler and more far-reaching means of invading privacy have become available to the [g]overnment'—to ensure that the 'progress of science' does not erode Fourth Amendment protections.'" *Carpenter*, 138 S. Ct. at 2223 (second alteration in original) (quoting *Olmstead v. United States*, 277 U.S. 438, 473–474 (1928)

(Brandeis, J., dissenting)). That obligation is clearly present here.

In *Riley v. California*, the Court declined to extend the search-incident-to-arrest exception to warrantless searches of cell phones. 573 U.S. 373, 386 (2014). In *Carpenter*, it declined to extend the third-party doctrine to permit warrantless searches of cell phone location information. 138 S. Ct. at 2217. And in *Kyllo* and *Jones*, it declined to extend the public-exposure doctrine to thermal imaging of a home, *Kyllo*, 533 U.S. at 34–36, and GPS tracking of a car on public streets, *Jones*, 565 U.S. at 415–18 (Sotomayor, J., concurring); *id.* at 429–31 (Alito, J., concurring in judgment).

This case presents another critical question about the limits of the public-exposure doctrine where technology reveals myriad "privacies of life" in ways that are "remarkably easy, cheap, and efficient compared to traditional investigative tools." *Carpenter*, 138 S. Ct. at 2217–19.

This Court's intervention is necessary in light of the significant threat to Americans' Fourth Amendment rights posed by the police practice in question.

In his concurrence below, Chief Judge Barron cautioned that withholding Fourth Amendment protection would give the government unfettered power to amass "continuous video footage of every home in a neighborhood, or for that matter, in the United States as a whole." App. 43a. That warning echoed the Supreme Judicial Court of Massachusetts' concern that "[w]ithout the need to obtain a warrant, investigators could use pole cameras to target any home, at any time, for any reason," and that "[i]n such

a society, the traditional security of the home would be of little worth, and the associational and expressive freedoms it protects would be in peril." *Mora*, 150 N.E.3d at 310; *see also Cuevas-Sanchez*, 821 F.2d at 251 (invoking Orwell); *Jones*, 903 N.W.2d at 112 (same).

Similarly, while the Seventh Circuit recently held that the kind of pole-camera surveillance at issue here did not implicate the Fourth Amendment, it did so reluctantly, expressing "concern[]" and "unease about the implications" of its conclusion. *Tuggle*, 4 F.4th at 526. Even courts that disagree about how to resolve the issue agree that "the status quo in which the government may" make a permanent, searchable video record of people's activities outside their homes for months without any basis for suspicion "challenges the Fourth Amendment's stated purpose of preserving people's right to 'be secure in their persons, houses, papers, and effects.'" *Id.*

Moreover, while lower courts are hopelessly divided over how to apply this Court's precedents to this invasive practice, the "relative ease," App. 84a, with which police can deploy pole cameras, their increasing capabilities,[6] and their decreasing costs,[7] mean that their use to surveil people's homes is

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[6] App. 74a (discussing "the advent of smaller and cheaper cameras with expansive memories and the emergence of facial recognition technology").

[7] *See* Tokson, *supra* note 2 (manuscript at 6–7, 22–23) (identifying pole cameras sold for between $200 and $5,000, and explaining that once a law enforcement agency has a pole camera, ongoing operational costs are extremely low).

becoming increasingly common. *See* App. 93a n.36 (citing recent cases where pole cameras were used).

And while it is clear that police use of pole cameras is proliferating, the full scope of the problem is impossible to ascertain. The only cases where the public or the target are likely to learn of the surveillance are those where criminal charges are brought and the government seeks to use evidence derived from the surveillance. People who are surveilled but never charged, or against whom the government chooses not to use evidence derived from the surveillance, will have neither notice nor recourse.

While the implications of widespread suspicionless pole-camera surveillance are alarming, the impact on police of a rule requiring compliance with the Fourth Amendment would be modest. Police in South Dakota have been required to obtain pole camera warrants since 2017, in Massachusetts since 2020, and in Colorado since last year. *Jones*, 903 N.W.2d 101; *Mora*, 150 N.E.3d 297; *Tafoya*, 494 P.3d 613. Federal authorities already obtain pole camera warrants in some jurisdictions. *E.g.*, Search & Seizure Warrant, *In re Search of Real Prop. at 221 Burns St., Alcoa, Tenn., 33701, Through the Use of and Recording by a Video Camera Installed on a Pub. Tel. Pole*, No. 3:16-MJ-1050 (E.D. Tenn. May 25, 2016); *In re Seizure Warrant Pole Camera re Shelley Johnso*n, No. 5:19-mj-68-MJF (N.D. Fla. Sept. 10, 2019). There is no reason to believe that abiding by Fourth Amendment requirements in these jurisdictions has undermined law enforcement objectives. Particularly where prolonged surveillance is planned, there will rarely be any exigencies requiring immediate surveillance, and where there

are genuine exigencies, the exigent circumstances exception would apply, just as with all other searches.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED.

This case is an excellent vehicle for the Court to decide the question presented. This appeal presents a pure legal issue on an undisputed factual record. The legal issue was raised and preserved. And the facts—eight months of pole-camera surveillance of a home located in a residential neighborhood—allow this Court to cleanly answer the question presented.

This Court recently denied a writ of certiorari in *Tuggle*, No. 21-541, 142 S. Ct. 1107 (cert. denied Feb 22, 2022). But the evenly divided dueling opinions of the en banc court here sharply illustrate the intractable division in the lower courts, and comprehensively address and analyze the competing arguments. In particular, Chief Judge Barron's concurring opinion addressed both the traditional reasonable-expectation-of-privacy analysis in light of this Court's decision in *Carpenter*, as well as the role of positive law in shaping the Fourth Amendment interests, making this a particularly good vehicle for comprehensive merits consideration. *See* App. 33a, 37a n.16; *cf. Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting) (declining to reach firm conclusion about role of positive law in defining Fourth Amendment search when that argument had not been developed in the lower courts).

Further, there are no procedural hurdles, and the constitutionality of long-term, continuous pole-camera surveillance of the home is squarely before this Court.

Any question about the applicability of the good-faith exception to the exclusionary rule—which the district court deemed waived and which only three members of the en banc First Circuit even addressed—can and should be resolved on remand after this Court resolves the Fourth Amendment issue. That is often the sequence in Fourth Amendment cases. When this Court finds a Fourth Amendment violation that the court below did not, the applicability of the good-faith exception (and harmless error, inevitable discovery, and similar doctrines) will often remain to be resolved. But that is no impediment to this Court resolving the Fourth Amendment issue.

Indeed, that is exactly what happened in *Carpenter*. The Court granted certiorari to review the Fourth Amendment question whether obtaining cell site location records was a search, reversed the lower court on that question, and remanded for further proceedings. On remand, the court of appeals concluded that the good-faith exception applied. *United States v. Carpenter*, 926 F.3d 313, 314 (6th Cir. 2019). The availability of a good-faith exception and harmless error will often be unresolved where the focus of proceedings below was on the merits of the Fourth Amendment question, yet that is no barrier to review.[8]

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[8] *See, e.g.*, *United States v. Rodriguez*, 799 F.3d 1222, 1224 (8th Cir. 2015) (on remand after this Court held that extending traffic stop beyond the time necessary to handle the matter for which the stop was made violates the Fourth Amendment, applying the good-faith exception); *United States v. Byrd*, 388 F. Supp. 3d 406, 416 (M.D. Pa. 2019) (on remand after this Court held that a person driving a rental car retains a reasonable expectation of privacy in the car even if they are not listed on the rental agreement as an authorized driver, holding that the

IV. THE DECISION BELOW IS WRONG.

As noted above, the en banc First Circuit's judgment depended on the decision of three members of the Court, set forth in Judge Lynch's concurrence, that the eight-month pole-camera surveillance of Petitioner's home and curtilage was not a search. That decision was incorrect.

"When 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." *Carpenter*, 138 S. Ct. at 2213 (quotation marks omitted). The Lynch concurrence, App. 94a, and *Bucci*, which remains the law of the First Circuit, viewed as "dispositive" the "legal principle" that "an individual does not have an expectation of privacy in items or places he exposes to the public." 582 F.3 at 117. But if that were categorically true, this Court could not have decided *Carpenter* as it did. As this Court has made clear, "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Carpenter*, 138 S. Ct. at 2217. "[W]hat [a person] seeks to preserve as private, even in an area

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search was supported by probable cause and, even if it were not, the good-faith exception applied); *Collins v. Commonwealth*, 824 S.E.2d 485, 496 (Va. 2019) (on remand after this Court held that the automobile exception does not apply to the warrantless search of a car on a home's curtilage, applying the good-faith exception); *People v. Riley*, No. D059840, 2015 WL 721254, at *1 (Cal. Ct. App. Feb. 19, 2015) (on remand after this Court held that warrantless search of a cell phone incident to arrest violates the Fourth Amendment, noting that applicability of the good-faith exception was at issue, but resolving case on harmless-error grounds).

accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351. Here, the location and duration of the surveillance make all the difference. And positive law confirms that the government conduct was a search.

A. Long-Term Pole-Camera Surveillance Interferes with the Fourth Amendment Right to be Secure In Our Homes Against Unreasonable Searches.

The home stands at the "very core" of the Fourth Amendment's protections. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). The same protection extends to the 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"). "[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*).

Prior cases involving long-term use of a pole camera trained on a person's home and curtilage demonstrate just how much "intimate activity" takes place in the area immediately surrounding one's home. In one case involving 24 days of continuous surveillance, the pole camera "captured [the defendant's] husband naked and her son relieving himself against a tree." *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 401 (6th Cir. 2012). And in every case, prolonged pole-camera surveillance

allows police to learn "who is in the home, and with whom the residents of the home meet, when, and for how long." *Mora*, 150 N.E.3d at 309.

No one reasonably expects the police to train a pole camera on their home for months at a time, recording their every interaction there. Long-term video surveillance interferes with the "right to be 'secure' in one's home." App. 6a (Barron, C.J., concurring). Round-the-clock recording of one's activity at the threshold of the home eviscerates the right "to dwell in reasonable security and freedom from surveillance." *Chapman v. United States*, 365 U.S. 610, 615 (1961). And the ability to access with perfect recall all information from eight months exacerbated the invasion.

This is precisely the kind of "stealthy encroachment[]" against which this Court has long guarded. *Boyd v. United States*, 116 U.S. 616, 635 (1886). "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. Yet under the Lynch concurrence and *Bucci*, police departments can install permanent pole cameras outside *everyone's* home and permanently monitor our comings and goings, our associations, and our daily privacies, without any basis for suspicion.

B. Long-Term Pole-Camera Surveillance of the Home Violates Reasonable Expectations of Privacy.

When confronted with the power of technology "to encroach upon areas normally guarded from

inquisitive eyes," this Court has consistently "sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter*, 138 S. Ct. at 2213–14 (cleaned up) (quoting *Kyllo*, 533 U.S. at 34). In *Jones*, for example, Justice Alito explained that, before the advent of modern technologies, people's expectations of privacy were shaped by the reality that "[t]raditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken." *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment). As both *Jones* and this case equally illustrate, technology can remove practical impediments to long-term surveillance, dramatically increasing the threat to privacy.

Jones involved long-term GPS tracking of a person's car on public roads, and the government maintained that because it only revealed public travels, the defendant had no reasonable expectation of privacy. Rejecting that view, Justice Alito explained that while "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable," "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U.S. at 430. That is because "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.*

For similar reasons, the Court in *Carpenter* held that the acquisition of long-term cell site location information violated reasonable expectations of

privacy. 138 S. Ct. at 2217. The Court again 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.* (quoting *Jones*, 565 U.S. at 429 (Alito, J., concurring in the judgment)). Because long-term location information "provides an intimate window into a person's life, revealing . . . his 'familial, political, professional, religious, and sexual associations,'" its acquisition violates reasonable expectations of privacy and constitutes a search. *Id.* (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

So too here, pole-camera surveillance is "remarkably easy, cheap, and efficient compared to traditional investigative tools." *Id.* at 2218. Before such technology, police could have staked out a home for a limited period, but society would not have expected them to watch a home, without pause, for months on end, and with perfect recall—nor could they possibly have done so without being detected. Prolonged and continuous surveillance of the home would have required a perfectly concealed officer (or a "very tiny constable") "with incredible fortitude and patience" and a power of flawless recall of everything they observed. *See Jones*, 565 U.S. at 420 n.3 (Alito, J., concurring in the judgment). It is an understatement to say that the "continuous, twenty-four hour nature of the surveillance is an enhancement of what reasonably might be expected from the police," *Mora*, 150 N.E.3d at 312 (cleaned up). Both the prolonged surveillance, and the accessing of data from that surveillance, constitute invasions on reasonable expectations of privacy, and therefore are a search under the Fourth Amendment.

Like the collection of long-term location information, prolonged pole-camera surveillance of a home opens an "intimate window into a person's life, revealing . . . his 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, 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." App. 36a (Barron, C.J., concurring).

Over time, a pole camera trained on a person's home records the patterns and timing of residents' movements to and from home, what they carry with them when they leave and arrive, and the people who visit them and for how long they stay. It is precisely because such details reveal a great deal of information that police seek to observe and record it in the first place.

Watching a resident leave home on Sunday morning with a hymnal, Saturday morning with a prayer shawl, or mid-day Friday with a prayer rug reveals details of religious observance. Leaving with a protest sign suggests political activity, while carrying an oversized X-ray film envelope indicates medical travails. A visitor arriving at the house on a weekend evening with flowers could reveal a romantic liaison, while that visitor spending the night might disclose an affair. *See* App. 130a. Prolonged pole-camera surveillance of the home and curtilage "reveals how a person looks and behaves, with whom the residents of the home meet, and how they interact with others." *Mora*, 150 N.E.3d at 311; *accord Tafoya*, 494 P.3d at

622–23. Here, the camera recorded every "activity that occurred at all times of the day for a period of eight months" and made that information available for law enforcement agents to access again and again at their whim. App. 36a (Barron, C.J., concurring).

Both Judge Lynch below and *Bucci* erroneously relied on this Court's decision in *Ciraolo* to conclude that a person does not have a reasonable expectation of privacy so long as their home is "expose[d] to the public." App. 94a (citing *Bucci*, 582 F.3 at 117). But *Ciraolo* addressed markedly different facts. There, the Court held that a warrant was not required when police observed details about a home "discernible to the naked eye" while "passing by" during a one-time flyover in "public[ly] navigable airspace," because a "casual, accidental observ[er]" could have made identical observations. 476 U.S. at 212–14. It found inapposite "Justice Harlan's observations [in *Katz*] about future electronic developments" because those concerns "were plainly not aimed at simple visual observations from a public place." *Id.* at 214.

Applying *Ciraolo* here would "stretch *Ciraolo*'s holding far beyond its natural reach." *Cuevas-Sanchez*, 821 F.2d at 250. As Chief Judge Barron put it, "[n]o casual observer who is merely passing by can observe (let alone instantly recall and present for others to observe) the aggregate of the months of moments between relatives, spouses, partners, and friends that uniquely occur in front of one's home." App. 35a. As courts recognized well before *Carpenter*, "[i]t does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible." *Cuevas-Sanchez*, 821 F.2d at 251; *see also, e.g.*,

Anderson-Bagshaw, 509 F. App'x at 405 ("confess[ing] some misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant" because, in part, "*Ciraolo* involved a brief flyover, not an extended period of constant and covert surveillance").

C. The Reasonable Expectation of Privacy Against Long-Term Pole-Camera Surveillance of the Home is Bolstered by Positive Law.

Positive law confirms 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, positive law offers one source for 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." (alteration in original) (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)); *cf. Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) (evaluating positive 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).

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, positive law points in the opposite direction. As Chief Judge Barron explained, "courts have long found such video recording of neighbors to be patently unreasonable—so much so that such activity can be tortious." App. 37a n.16. Courts have repeatedly held persistent, continuous video recording of a person's curtilage to constitute intrusion on seclusion or similar torts.[9]

In addition, members of the public are generally barred from attaching extraneous materials to utility poles, further reinforcing people's reasonable expectation that they will not be subject to round-the-clock monitoring from a camera surreptitiously mounted on a nearby pole.[10]

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[9] For example, see cases cited at App. 37a n.16. *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).

[10] *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 . . . ."); Me. Stat. tit. 35-A, § 2310; Okla. Stat. tit. 21, § 1838.

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. Judge Lynch's conclusion that we have no such expectation renders everyone in the First Circuit vulnerable to the state permanently monitoring their every coming and going from home, without even the slightest basis for suspicion. That conclusion is incorrect. This Court should grant review and so hold.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: November 18, 2022

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,
Defendant, Appellee.

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Barron, Chief Judge,

Lynch, Howard, Thompson, Kayatta, and Gelpí,

Circuit Judges.

Randall E. Kromm, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellant.

Judith H. Mizner, Assistant Federal Public Defender, for appellee Nia Moore-Bush, a/k/a Nia Dinzey.

Linda J. Thompson, with whom John M. Thompson and Thompson & Thompson, P.C. were on brief, for appellee Daphne Moore.

Matthew R. Segal, with whom Jessie J. Rossman, Nathan Freed Wessler, Brett Max Kaufman, Andrew Crocker, Samir Jain, Gregory T. Nojeim, and Mana Azarmi were on brief, for amici curiae American Civil Liberties Union, American Civil Liberties Union of Massachussetts, Center for Democracy & Technology, and Electronic Frontier Foundation in support of defendant-appellees.

Bruce D. Brown, with whom Katie Townsend, Gabriel Rottman, and Mailyn Fidler were on brief, for amici curiae Reporters Committee for Freedom of the Press and Eight Media Organizations in support of defendant-appellees.

Opinion En Banc

June 9, 2022

AMENDED OPINION*

Per curiam. The district court order granting Daphne Moore and Nia Moore-Bush's motions to suppress is unanimously reversed by the en banc court. We remand with instructions to deny the motions to suppress.

- Concurring Opinions Follow -

BARRON, **Chief Judge, THOMPSON and KAYATTA, Circuit Judges, concurring**. The Fourth Amendment to the U.S. Constitution "seeks to secure 'the privacies of life' against 'arbitrary power,'" Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)), by "plac[ing] obstacles in the way of a too permeating police surveillance," id. (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)). It is with that "Founding-era understanding[] in mind," id., that we must determine in these consolidated appeals whether the Fourth Amendment places any limits on the use by law enforcement of the kind of surveillance -- unimagined in 1789 -- that it engaged in here: the continuous and surreptitious recording, day and night for eight months, of all the activities in the front curtilage of a private residence visible to a remotely-controlled digital video camera affixed to a utility pole across the street from that residence.

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* The full version of this opinion was filed on May 27, 2022, and remains on file, under seal, in the Clerk's Office.

The Fourth Amendment issue concerning the use of such surveillance arises here in connection with the criminal cases that the federal government brought in the United States District Court for the District of Massachusetts against Nia Moore-Bush and her mother, Daphne Moore, on federal drug- and gun-related charges. Each defendant moved in the District Court to suppress on Fourth Amendment grounds all evidence derived from the digital compendium created through the long-term use of the video pole-camera surveillance of the front curtilage of the defendants' residence. The government opposed the motions on the ground that no Fourth Amendment "search" had been conducted. The District Court then granted the defendants' motions to suppress.

As we will explain, we conclude -- unlike our colleagues -- that the government did conduct a Fourth Amendment "search" when it accessed the digital video record that law enforcement had created over the course of the eight months in question, notwithstanding the government's contention that the record itself is merely a compendium of images of what had been exposed to public view. As we also will explain, however, we agree with our colleagues that the District Court's order granting the defendants' motions to suppress must be reversed.

We come to that latter conclusion because the relevant controlling precedent from our circuit that was in place at the time that the government drew upon the pole-camera surveillance was United States v. Bucci, 582 F.3d 108 (1st Cir. 2009). And, there, a panel of this court had held that the use by law enforcement of uncannily similar pole-camera surveillance did not constitute a search within the meaning of the Fourth Amendment and so raised no

Fourth Amendment concerns. Id. at 116-17. Thus, while we conclude -- unlike our colleagues -- that subsequent developments in Fourth Amendment jurisprudence support the overruling of Bucci and the conclusion that the government conducted a search here, we also conclude that, under the "good faith" exception to the Fourth Amendment's warrant requirement, see Davis v. United States, 564 U.S. 229, 238-41 (2011), the government was entitled to rely on Bucci in acting as it did, Bucci, 582 F.3d at 116. Cf. United States v. Campbell, 26 F.4th 860, 873, 887-88 (11th Cir. 2022) (en banc) (applying the good-faith exception even though it had not been raised by the parties in their initial briefings).

The result is that our court is unanimous in holding that the District Court's order granting the motions to suppress must be reversed. Our court's rationale for that holding, however, is most decidedly not.

The three of us who join this separate opinion would reverse the District Court's order granting the defendants' motions to suppress based solely on the "good faith" exception to the Fourth Amendment's warrant requirement. We reject, however, our colleagues' view that the accessing by law enforcement in a criminal case of the record created by the kind of suspicionless, long-term digital video surveillance at issue here does not constitute a Fourth Amendment search.

Mindful of the brave new world that the routine use of such all-encompassing, long-term video surveillance of the front curtilage of a home could bring about, we are convinced that the government does conduct a search within the meaning of the

Fourth Amendment when it accesses the record that it creates through surveillance of that kind and thus that law enforcement, in doing so, must comply with that Amendment's limitations. For, in accord with post-Bucci precedents from the Supreme Court of the United States that recognize the effect that the pace of technological change can have on long assumed expectations of privacy, we are convinced that no other conclusion would be faithful to the balance that the Fourth Amendment strikes between the right to be "secure" in one's home and the need for public order.[1]

I.

A.

The following facts -- including the characteristics of the pole camera and the recording that it produced -- are undisputed on appeal. The federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") began investigating Moore-Bush in January 2017, for the unlicensed sale of firearms.[2]

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[1] Although we conclude that the motions to suppress must be denied pursuant to the good-faith exception to the warrant requirement, we conclude that it would not be appropriate to rely solely on that ground to resolve this case. The question of Bucci's status in this circuit going forward is an important one. Cf. Pearson v. Callahan, 555 U.S. 223, 236 (2009) (allowing "courts of appeals . . . to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first," including whether the constitutionality of the officer's conduct should be analyzed first).

[2] Our colleagues discuss in some detail the circumstances that caused law enforcement to begin to investigate Moore-Bush. Those details are not pertinent to this analysis, however, because the government does not assert that its use of the pole camera to create the compendium at issue was supported by any quantum of suspicion. We thus must assess the constitutionality of the government's use of this surveillance on the understanding that it

ATF began to have concerns during the investigation that Moore-Bush was trafficking in narcotics.

About a month into the ATF investigation, Moore-Bush moved in with her mother, Moore, who lived at 120 Hadley Street in Springfield, Massachusetts. ATF agents claimed that they came to suspect that Moore-Bush -- though not, at that point, her mother -- was using the Hadley Street residence as the site for illegal firearms and narcotics transactions.

The location of the home made it difficult for law enforcement to undertake the physical surveillance of it. So, on or around May 17, 2017, ATF agents, without seeking a warrant, surreptitiously installed a digital video camera near the top of a utility pole across the public street from the residence.

The District Court found -- based on the defendants' undisputed contentions -- that the digital, video pole camera was "hid[den] . . . out of sight of its targets." It further found that law enforcement used the camera to "surreptitiously surveil[]" the Hadley Street residence.

ATF agents were able to view a live-stream of what the camera recorded through a password-protected website. The agents also could, remotely, pan, tilt, and zoom[3] the camera to better focus on individuals or objects of interest.

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had no reasonable basis to suspect wrongdoing by the defendants at the relevant time.

[3] The camera's zoom feature enabled a significant level of magnification. Although the record does not disclose the camera's precise capability on that dimension, the government in filings below "analogized [that] feature to a law enforcement agent using binoculars." Images in the record reflect that, by zooming, the

When not zoomed, the camera had within its view roughly half of the front structure of the 120 Hadley Street residence, including its side entrance and a gardening plot near that entrance, the whole of the home's private driveway, the front of the home's garage, much of the home's front lawn, and the vast majority of the walkway leading from the home's private driveway up to the home's front door (although not the front door itself).[4] The camera also had within its view a portion of the public street that ran parallel to the front of the house and perpendicular to the private driveway.

Because of the positioning of the camera, it was not able to peer into the home's interior. However, images in the record taken from the footage captured by the camera indicate that the camera could discern the presence of a person looking out the front windows of the house and see inside the front of the garage when its door was up.

The camera recorded in color, but it did not record audio. The camera's footage was digitally

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camera was able to accurately capture facial expressions, details on clothing, small objects in a person's hands (such as keys or a cigarette), and the license plate numbers of cars parked in the residence's private driveway.

[4] The government represented to the District Court at the suppression hearing on May 13, 2019, that the pole camera did not have "a full clear view of the entire exterior of the home" as there was "one tree that partially obfuscate[d] the view of the pole camera." The government then explained in a subsequent filing that, at least during the winter, "there was no obstruction -- the leaves had fallen and the view was clear." In this respect, we note that the pole camera was in place surveilling the home from May 2017 until January 2018.

stored and could be retrieved and re-watched at any time.

The camera could and did operate at night, but the resulting footage was lower in quality. For example, when the camera recorded in the dark, it became more difficult -- although not impossible -- for the camera accurately to depict license plate numbers.

The camera recorded the Hadley Street residence for approximately eight months without interruption. It captured numerous comings, goings, and occurrences in the front curtilage of the residence -- from the mundane (such as persons going to and from the residence, parking, smoking cigarettes, or taking out the trash) to the potentially incriminating. The resulting record included all these movements and interactions. The government does not represent that law enforcement officers were continuously watching the livestream of the video while the camera was recording.

B.

A federal grand jury indicted Moore-Bush on January 11, 2018, for conspiracy to distribute and possess with intent to distribute heroin and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 846. Moore-Bush was also subject to a drug forfeiture allegation under 21 U.S.C. § 853. Four other defendants (but not Moore) were named in that indictment.

Moore-Bush was arrested the following day. The pole camera was removed soon after Moore-Bush's arrest, which occurred about eight months after the camera began recording.

Nearly a year after Moore-Bush's arrest, on December 20, 2018, a grand jury returned a superseding indictment that charged Moore-Bush and, for the first time, her mother, Moore. The superseding indictment charged Moore-Bush with, among other crimes, conspiracy to distribute and possess with intent to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count One); distribution and/or possession with intent to distribute various narcotics in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Counts Two through Six); conspiracy to deal firearms without a license in violation of 18 U.S.C. § 371 (Count Twenty); and dealing firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A) (Counts Twenty-One and Twenty-Two).[5] The superseding indictment also charged Moore with, among other crimes, conspiracy to distribute and possess with intent to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count One); and distribution and possession with intent to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. § 841(a)(1) (Count Three).[6]

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[5] Moore-Bush was also charged with conspiracy to launder money in violation of 18 U.S.C. § 1956(h) (Counts Seven and Eight); money laundering in violation of 18 U.S.C. §§ 2, 1956(a)(1) (Counts Eleven and Fourteen through Nineteen); and aiding and abetting the possession of a firearm by a felon, in violation of 18 U.S.C. §§ 2, 922(g)(1) (Count Twenty-Three). She faced a drug forfeiture charge as well.

[6] Moore was also charged with money laundering and money laundering conspiracy in violation of 18 U.S.C. § 1956(a)(1), (h) (Counts Eight and Fourteen through Nineteen); and making false statements to federal agents in violation of 18 U.S.C. § 1001 (Count Twenty-Four). She also faced a drug forfeiture charge.

On April 22, 2019, Moore moved to suppress the record created by the pole camera and all "fruits" of it. Moore-Bush filed a similar suppression motion on May 2, 2019. Each motion argued that law enforcement had engaged in a warrantless search within the meaning of the Fourth Amendment that was unreasonable based on "the prolonged, covert use of a hidden pole camera to . . . record the activities associated with" the Hadley Street residence for a period of eight months.

The government did not contend that this surveillance was supported by either probable cause or reasonable suspicion to believe that a crime had been committed, let alone that it was authorized by a warrant. Rather, the government contended that the defendants' suppression motions must be rejected because, under this circuit's decision in Bucci, which applied Katz v. United States, 389 U.S. 345 (1967), the "images captured by the pole camera [did not] violate[] the [d]efendant[s'] objectively reasonable expectation of privacy in the view of" the curtilage of their home and so no Fourth Amendment search had occurred. The government thus contended that it could use, in the defendants' criminal cases, any digital video footage or still images captured by the pole camera over the eight-month span in which it was in operation, including any images that the camera had captured "from November 2017 through January 2018."

In Bucci, a panel of this court addressed a motion to suppress that concerned evidence produced by a government-installed digital video pole camera that had been pointed for eight months at the front of the defendant's home as part of a criminal investigation. 582 F.3d at 116. Bucci in a brief

paragraph of analysis rejected the defendant's motion to suppress. It held that the surveillance conducted via the pole camera did not interfere with any subjective expectation of privacy on the part of the defendant because the defendant had taken no measures to hide the activities that occurred in his home's curtilage from public view. Id. at 116. Bucci also observed that the surveillance did not interfere with any objectively reasonable expectation of privacy on the part of the defendant, because the images captured by the camera were solely of conduct that had occurred in public view. Id. at 117.

Notwithstanding Bucci, the District Court on June 3, 2019, granted both defendants' motions to suppress the digital record created by the pole camera and any of the record's fruits.[7] The District Court concluded in so ruling that Bucci was no longer binding precedent because it conflicted with a subsequent Supreme Court precedent, Carpenter v. United States, 138 S. Ct. 2206 (2018). See United States v. Moore-Bush, 381 F. Supp. 3d 139, 144-45 (D. Mass. 2019).

Carpenter followed United States v. Jones, 565 U.S. 400 (2012), which was itself decided three years after Bucci. The Supreme Court determined in Jones that the "installation of a GPS tracking device on a target's vehicle" to "monitor the vehicle's movements" for twenty-eight days "constitut[ed] a search . . . within the meaning of the Fourth Amendment." Jones, 565 U.S. at 404-05. The majority opinion in Jones based that conclusion on the common-law trespassory test for determining whether a Fourth

[7] The order was amended the following day in ways that are not relevant to the issues before us.

Amendment search had occurred because the GPS-tracking device had been affixed by law enforcement to the target's vehicle without the vehicle owner's knowledge or permission. Id. at 405-06, 409, 411. Five Justices across two concurrences, however, also found in that case that a Fourth Amendment search had occurred under the "reasonable expectation of privacy" test from Katz because "longer term GPS monitoring . . . impinges on expectations of privacy" that one reasonably has in the entirety of one's movements -- even when made in public -- over a substantial period. Id. at 430 (Alito, J., concurring in the judgment joined by three Justices); see also id. at 415 (Sotomayor, J., concurring).

Carpenter presented the Court with a somewhat similar question to the one presented in Jones, as it, too, raised a question about whether the use of warrantless, long-term electronic surveillance comported with the Fourth Amendment. Specifically, the issue in Carpenter concerned whether the government had conducted a search within the meaning of the Fourth Amendment when it "accessed" -- without a warrant -- seven days' worth of historical cell-site location information ("CSLI") from a wireless carrier by requesting that the wireless carrier provide that information. See Carpenter, 138 S. Ct. at 2212, 2217 n.3, 2219.

The Court concluded in Carpenter that, under Katz, the government had conducted a search by "access[ing]" through the request to the wireless carrier that amount of CSLI both because "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI" -- even if those movements take place in public -- and because the "access[ing]" of

that amount of the defendant's historical CSLI from the wireless carrier "contravene[d] that expectation." Id. at 2217, 2219. The Court reached that conclusion even though the government had received from the wireless carrier only two days' worth of the total of the seven days' worth of the historical CSLI that the government had requested from the wireless carrier. See id. at 2212.

The District Court "read[] Carpenter . . . to cabin -- if not repudiate -- th[e] principle" that Bucci's reasoning had rested on: that, as a categorical matter, "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." Moore-Bush, 381 F. Supp. 3d at 144 (third alteration in original) (quoting Bucci, 582 F.3d at 116-17). Having concluded that, after Carpenter, Bucci was not binding on that point, the District Court then held that a Fourth Amendment search had occurred here. Id. at 148-49.

The District Court explained that the defendants had "exhibited an actual, subjective expectation of privacy that society recognizes as objectively reasonable" in the "aggregate" of what was visible to the pole camera over the eight months that the camera was recording. Moore-Bush, 381 F. Supp. 3d at 143. The District Court also analogized the digital record accessed by the government here to the twenty-eight days' worth of GPS data that the government in Jones had obtained from the GPS tracker that the government had installed on the defendant's vehicle in that case and the seven days' worth of the historical CSLI that the government had accessed from the wireless carrier in Carpenter. Id. Moreover, as the government did not argue that it had complied with the Fourth Amendment insofar as a

search within the meaning of that Amendment had occurred, the District Court granted the defendants' motions to suppress the digital record that had been created from the pole-camera surveillance and any evidence derived from it. Id. at 149-50.

The government filed a motion for reconsideration on June 5, 2019. The government argued in that motion for the first time that even if a search had occurred the good-faith exception recognized in Davis "applies here and precludes suppression of the government's pole camera evidence" due to Bucci having been on the books at the relevant time. The District Court denied the motion.

The government, relying on 18 U.S.C. § 3731, timely appealed the District Court's order that granted the defendants' motions to suppress, as well as the District Court's order that denied the motion for reconsideration. The government's appeals of those orders were consolidated for purposes of briefing and argument.

A panel of this court reversed the order of the District Court that granted the defendants' motions to suppress. The panel concluded that the District Court transgressed both Bucci -- which the panel concluded remained binding on the "search" point in this circuit even after Jones and Carpenter -- and Carpenter, given the limitations on that ruling that the panel determined that the Supreme Court had placed on it. United States v. Moore-Bush, 963 F.3d 29, 31 (1st Cir. 2020), reh'g en banc granted, vacated, 982 F.3d 50 (1st Cir. 2020).

The opinion concurring in the result agreed that Bucci was binding on the panel and the District Court under the law-of-the-circuit doctrine. See id. at

48-49 (Barron, J., concurring in the result). The opinion concurring in the result expressed doubt, however, as to whether Bucci had correctly applied the Supreme Court's Fourth Amendment precedents tracing back to Katz, especially given the recent guidance that Carpenter had provided. See id. at 53-56. The concurring opinion thus concluded that "the proper course for our Court is to use this case to give Bucci fresh consideration en banc, so that we may determine for ourselves whether the result that it requires [the panel to reach] is one the Supreme Court's decisions . . . prohibit." Id. at 58.

The defendants filed petitions for rehearing en banc, which were granted, and the panel's ruling reversing the District Court's order granting the defendants' suppression motions was vacated. United States v. Moore-Bush, 982 F.3d 50 (1st Cir. 2020). We consider in what follows both the District Court's order granting the defendants' motions to suppress, reviewing "findings of fact for clear error and the application of the law to those facts de novo," United States v. Crespo-Ríos, 645 F.3d 37, 41 (1st Cir. 2011) (quoting United States v. Siciliano, 578 F.3d 61, 67 (1st Cir. 2009)); see also United States v. Orth, 873 F.3d 349, 353 (1st Cir. 2017), and the District Court's order denying the government's motion to reconsider, reviewing for an abuse of discretion, see United States v. Siciliano, 578 F.3d 61, 72 (1st Cir. 2009).

II.

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. That Amendment further provides that a search is

"presumptively unreasonable" in the absence of a warrant supported by probable cause. See United States v. Karo, 468 U.S. 705, 715 (1984).

The Supreme Court has, as we have indicated, set forth two tests to assess whether government conduct constitutes a "search" within the meaning of the Fourth Amendment. The parties agree that the first test -- "the common-law trespassory test," Jones, 565 U.S. at 409 -- is not relevant here because it applies only when the government "obtains information by physically intruding on a constitutionally protected area." Id. at 405, 406 n.3. Our focus, therefore, is on the second test, which is derived from Katz. Under that test, as explicated in Carpenter, "[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,'" a government action that "contravenes that expectation" "generally qualifies as a search." Carpenter, 138 S. Ct. at 2213, 2217 (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)).

Thus, we first must determine whether Moore-Bush and Moore each manifested an expectation of privacy in what each seeks to preserve as private -- namely, "the totality of [their] movements and activities and associations with family members and visitors in the front [curtilage] of" their home that was visible to the pole camera during the eight-month-long period that it recorded. As we will explain, we conclude that the District Court supportably found that the defendants did manifest such an expectation of privacy.[8]

[8] We note neither party disputes that the quantum of information at issue in this case is inclusive of not only each

Having so concluded, we next must determine whether such an expectation is one that society is prepared to accept as reasonable. As we will explain, we conclude that the District Court correctly held that it is.

Because we conclude that the defendants have shown what they must with respect to the "expectation of privacy" portion of the Katz inquiry, we then must address whether the government's "accessing" of the record at issue -- to use Carpenter's terminology -- "contravened" that expectation. As we will explain, we conclude that the accessing of that record did.

We emphasize that the government advances no argument to the en banc court -- nor, for that matter, did it advance any argument below -- that, even though it had not obtained a warrant that authorized its use of this surveillance, its use of such surveillance still comported with the Fourth Amendment because some quantum of suspicion supported the surveillance and an exception to the warrant requirement applied. Rather, the government relies solely on the contention that its use of the pole camera -- and, implicitly, the accessing of the record created by it -- was not a "search" because the camera captured only what was

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defendant's own visible activity in the defendants' front curtilage but also of what is effectively a live-action log of all visitors to their home during the eight-month period in which the pole camera operated. We note, too, that the government does not dispute that if the defendants are fairly deemed to have a subjective expectation of privacy in such information that society is prepared to accept as reasonable, then it is an expectation of privacy that the Fourth Amendment -- given its protection of "houses" -- protects, insofar as that expectation is contravened by the government.

already exposed to public view, such that the government did not need any level of suspicion whatsoever, let alone a warrant, to undertake such surveillance and access the record created by it. Thus, because we conclude that a search did occur, we conclude -- unlike our colleagues -- that the Fourth Amendment was violated.[9]

Nevertheless, as we will explain in the concluding part of this opinion, we still conclude that the District Court's order granting the defendants' suppression motions must be reversed. And, that is because we conclude that the good-faith exception to the warrant requirement that is set forth in Davis requires that result, given that Bucci was the law of this circuit at the relevant time.

III.

We start with the "expectation of privacy" portion of the Katz inquiry. That portion requires us to determine -- at least arguably -- two distinct things: whether Moore-Bush and Moore can show that they "exhibited an actual, subjective, expectation of privacy" in the aggregate of what the pole camera captured, and whether they can show that "society is prepared to recognize [that subjective expectation] as objectively reasonable." United States v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009) (citing Smith, 442 U.S. at

[9] We note that although our colleagues contend that either probable cause or reasonable suspicion supported the use of the pole-camera surveillance at issue, Concur. Op. at 105, they do not explain why the presence of reasonable suspicion or probable cause would on its own render the use of pole-camera surveillance of the kind that was used here constitutional, given that the Fourth Amendment ordinarily requires there to be both probable cause and a warrant before law enforcement can conduct a search constitutionally.

740). We address each component of this portion of the Katz inquiry in turn.

A.

The District Court found with respect to the subjective expectation of privacy portion of the Katz inquiry that Moore-Bush and Moore did show that they had "manifested a subjective expectation of privacy through the relevant actions that they took." Moore-Bush, 381 F. Supp. 3d at 143. The District Court explained that it inferred "from [Moore-Bush and Moore's] choice of neighborhood and home within it that they did not subjectively expect to be surreptitiously surveilled with meticulous precision each and every time they or a visitor came or went from their home" and that a digital and easily searchable video record of eight months of those movements would be compiled. Id. at 144.

The government does not challenge the District Court's findings regarding the characteristics of the defendants' neighborhood and home, see id. at 143. The government also does not contend that the record suggests that the occupants of 120 Hadley Street invited, in any affirmative way, long-term surveillance of the home by a digital video camera. The government does not even suggest that the defendants were aware that video cameras of any kind were trained on the Hadley Street property for any period of time and yet took no steps to shield the curtilage of the residence from that form of surveillance. Cf. Shafer v. City of Boulder, 896 F. Supp. 2d 915, 930 (D. Nev. 2012).

The government focuses solely on what the defendants failed to do despite their lack of awareness that any digital surveillance was being conducted:

"erect[] fences or plant[] hedges to obscure the view from the street." The government relies heavily in doing so on Bucci, which observed that the defendant in that case had "failed to establish . . . a subjective . . . expectation of privacy in the front of his home" because there were "no fences, gates or shrubbery located [out] front . . . that obstruct[ed] the view of the driveway or the garage from the street." Bucci, 582 F.3d at 116-17.

Bucci did not grapple, however, with the contention that is front and center here -- that the claimed expectation of privacy is only in the totality of what transpired within the area of the property at issue over the months in question and not in any discrete occurrences that, one by one, happened to take place there during that time. Instead, Bucci appeared to treat the defendant's claimed expectation of privacy in that case as if it were no different from a defendant's claimed expectation of privacy in a discrete activity that occurs in the curtilage of a residence and may be seen from the street by any passerby at the moment of its occurrence. See id.

The government is right that Bucci relied in this part of its analysis on the Supreme Court's decision in California v. Ciraolo. See Bucci, 582 F.3d at 117-18. So, we must consider whether that precedent itself compels us to credit the government's contention regarding the subjective expectation of privacy portion of the Katz inquiry even though Bucci does not. But, Ciraolo, too, is distinguishable from this case.

In Ciraolo, the Supreme Court did point to the fact that the defendant there had erected a fence in finding that he had established that he had a subjective

expectation in keeping private what he sought to hide from view -- his backyard agriculture activity, or, more pointedly, his marijuana plants. Ciraolo, 476 U.S. at 211. The Court did so, moreover, even though such "normal precautions" against "casual, accidental observation" would have provided little protection to the defendant from the type of surveillance that the government used there: photography from a low-flying plane. Id. at 211-12 (quoting Rawlings v. Kentucky, 448 U.S. 98, 105 (1980)).

Ciraolo thus does suggest, by negative implication, that because a casual observer could have noticed an unobstructed plot of marijuana plants by just walking by the defendant's home, a defendant's failure to erect a fence or hedges to protect such a plot from being casually observed in that manner would signal a willingness on the part of that defendant to permit any passerby to observe it. And, that is so, Ciraolo indicates, even if a mere passerby happened to have a vantage point -- whether from a utility truck or a double-decker bus, id. at 211 -- that was high enough to permit a view of the plot that no fence or hedges would be high enough to block.

We have not yet encountered, however, the "casual, accidental observ[er]," id. at 212 -- whether viewing from on the ground or on high -- who could take in all that occurs in a home's curtilage over the course of eight months and recall it perfectly and at a moment's notice. Thus, we see little sense in inferring that the defendants here lacked, as a subjective matter, their claimed expectation of privacy simply because they failed to take measures that would at most protect against casual observation of the curtilage of their residence when casual observation of the curtilage -- from whatever vantage -- would in no

way undermine that claimed expectation, given that the expectation inheres in the aggregate of activity in question.[10] The government thus errs in arguing that Ciraolo shows that the failure of the defendants in this case to put up a fence or similar barrier around the front of the Hadley Street home necessarily precludes them from establishing that they had the subjective expectation of privacy that they claim.

We do note, moreover, that it is possible that the inquiry into a defendant's subjective expectation of privacy in the whole of what transpires over a very long time in the front of one's home, when each discrete activity in that totality is itself exposed to public view, is a corollary of whether that claimed expectation of privacy in the aggregate of what transpires there is objectively reasonable. We can see how the objective reasonableness of an expectation that such activities

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[10] Our colleagues contend that even if no "casual" observer witnesses and records the whole of what occurs in the curtilage of a home, a nosy neighbor might. Concur. Op. at 118, 122. Our colleagues go on to contend, for that reason, that the failure of Moore-Bush and Moore to take precautions to avoid being seen by neighbors suggests that they lacked a subjective expectation of privacy with respect to the aggregate of those movements. Concur. Op. at 112-13.

Perhaps a nosy neighbor could become familiar with some of the daily rituals of those who live nearby. And, perhaps -- if particularly dedicated -- that neighbor could even log those observations as our colleagues suggest. But, it dramatically undersells the hypothesized neighbor's distinctive character to describe that neighbor as merely "nosy," given the unrelenting and all-encompassing kind of surveillance that is at issue. Thus, we do not see how the awareness of neighbors -- including even of those neighbors one might wish would move to a different block -- suffices to undermine the District Court's finding that these defendants manifested their subjective expectation of privacy in what they claim to wish to keep from public view.

are not being catalogued in a manner that would make the compendium of them accessible to an observer upon command might bear on whether a defendant's failure to protect against a casual observer's viewing each activity one by one supports an inference that the defendant is in fact, as a subjective matter, willing to permit such an easily searchable catalogue of the activities in the aggregate to be compiled. Cf. Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984) (characterizing the Katz test as primarily being about the objective inquiry and stating that "[t]he Court[] [has] refus[ed] to adopt a test of 'subjective expectation'" because "constitutional rights are generally not defined by the subjective intent of those asserting the rights" (quoting Smith, 442 U.S. at 740-41 n.5)); Smith, 442 U.S. at 741 n.5 (explaining that "[s]ituations can be imagined, of course," such as those in which "an individual's subjective expectations ha[ve] been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms," "in which Katz['s] two-pronged inquiry would provide an inadequate index of Fourth Amendment protection" and that in those "circumstances[,] . . . subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was" and instead when "determining whether a 'legitimate expectation of privacy' existed in such cases, a normative inquiry would be proper"). We can especially see the sense in so concluding to the extent that combining the subjective and objective components of the "expectation of privacy" inquiry would help to avoid the Fourth Amendment being held to mean one thing for those living in a quiet neighborhood of single-family homes and another for those living in a neighborhood of apartments or attached houses.

To that same point, there is no Supreme Court precedent of which we are aware that clearly indicates that the subjective and objective inquiries in this context are properly understood to be wholly distinct. The only cases from the Court to address an even arguably analogous claimed expectation of privacy are Jones and Carpenter. And, neither case addresses the subjective expectation of privacy component of the Katz inquiry, as Jones did not rely on the Katz test, Jones, 565 U.S. at 407-08, and Carpenter addressed only the objective component of the "expectation of privacy" portion of the Katz inquiry, Carpenter, 138 S. Ct. at 2217-19.

But, insofar as an independent inquiry into the subjective expectation of privacy is required, we conclude, for reasons that we have explained, the District Court did not err in finding that the defendants here have made the requisite showing. And, we emphasize, this conclusion accords with Carpenter, even if it is not, strictly speaking, compelled by it.

True, Carpenter did not address the subjective expectation of privacy component of the Katz inquiry. But, we decline to conclude that, after Carpenter, a court could find in a case involving the same facts as were involved there that no search had occurred simply based on the defendant's failure to have taken countermeasures that at most would have protected his public movements from being subjected to casual observation.[11] Nor, we note, does the

[11] We thus disagree with our colleagues that the defendants here were required to build a fence or otherwise "take . . . steps to prevent observation" of "many" but "not all" of the activities in the front curtilage of their home. To require as much of the defendants here would be analogous to requiring the

government suggest that Carpenter may be read to permit such an outcome.

B.

We move on, then, to the defendants' contention that their subjective expectation of privacy in what they seek to shield from the view of others is also an "expectation . . . that society is prepared to accept as reasonable." Carpenter, 138 S. Ct. at 2213 (quoting Smith, 442 U.S. at 740). Our focus in undertaking this portion of the Katz inquiry, we emphasize, is not on whether these defendants have a reasonable expectation of privacy in each discrete activity -- considered on its own and at the time that it occurred -- that was visible to the pole camera over the course of the many months that it was up and running. The expectation of privacy that Moore-Bush and Moore each claims inheres solely in what they characterize as "the totality of [their] movements and activities and associations with family members and visitors in the front [curtilage] of [their] home" that was recorded by the pole camera. In other words, they assert an expectation of privacy in the whole of the activities in that locale -- taken as a whole -- that were visible to the pole camera during the lengthy period of time in question, just as the expectation of privacy that the defendant in Carpenter -- and the defendant in Jones, for that matter -- claimed was in an aggregate of the movements taken in public over a relatively long period of time and not in each of those movements individually at the moment of its occurrence.

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defendant in Carpenter to have manifested a subjective expectation of privacy by traveling around town in a disguise, and we do not understand Carpenter to permit that requirement to be imposed.

Moreover, Moore-Bush and Moore acknowledge, as they must -- and as both Bucci and our colleagues emphasize -- that the Court has made clear that, in general, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351. They rightly point out, however, that Katz itself noted -- in a passage from that case that neither Bucci nor our colleagues invoke -- that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. The defendants also rightly emphasize that Carpenter invoked just that passage in Katz both to explain that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere," Carpenter, 138 S. Ct. at 2217, and to support the conclusion that "individuals have a reasonable expectation of privacy in the whole of their physical movements," even if those movements take place in public view, id.

Thus, a critical question here -- though an affirmative answer to it is not itself dispositive of whether a search occurred -- concerns whether Carpenter's reasons for concluding that the claimed expectation of privacy in the whole of the movements that was at issue in that case was objectively reasonable justify our reaching the same conclusion with respect to the similar, but still distinct, claimed expectation of privacy that we confront in this case. As we will next explain, we conclude that those reasons do.

1.

Carpenter acknowledged that a person generally "has no reasonable expectation of privacy in his movements from one place to another" because

such movements are "voluntarily conveyed to anyone who want[s] to look." Id. at 2215 (quoting United States v. Knotts, 460 U.S. 276, 281 (1983)).But, the Court then explained, this general point does not dictate whether society is prepared to accept as reasonable a claimed expectation of privacy in the whole of "every single movement of an individual[] . . . for a very long period." Id. at 2217 (quoting Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment)). In fact, Carpenter explained, based on the concurring opinions in Jones, "[a] majority of this Court has already recognized that individuals have a reasonable expectation in the whole of their public movements." Id. (citing Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment joined by three Justices) and Jones, 565 U.S. at 415 (Sotomayor, J., concurring)).

Carpenter elaborated that its recognition of the reasonableness of this expectation of privacy reflected the limited state of surveillance technology for most of our history. "Prior to the digital age," the Court observed, "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. (emphasis added) (quoting Jones, 565 U.S. at 429 (Alito, J., concurring in the judgment)). Carpenter noted in this regard that it was almost inconceivable until relatively recently that the government would, other than at most rarely, have the resources to "tail[] [a suspect] every moment of every day for five years," which was a reference to the amount of time that the wireless carrier for the defendant in Carpenter stored the CSLI that it collected from its customers. Id. at 2218.

Thus, Carpenter concluded, expressly drawing on the similar reasoning of the concurring

Justices in Jones, "society's expectation has been that law enforcement agents and others would not -- and, indeed, in the main, simply could not -- secretly monitor and catalogue every single movement of an individual's car for a very long period." Id. at 2217 (quoting Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment)). That being so, the Court concluded in Carpenter, it was reasonable for a person to expect that no such tracking was occurring as he moved about in public over a lengthy period and thus to expect that those public movements were, taken as a whole, private in consequence of the practical anonymity with respect to the whole of them that follows from the reality that virtually no one has a feasible means of piercing it. Id.

2.

In arguing that neither Carpenter nor Jones supports the defendants here with respect to this portion of the Katz inquiry, the government contends that neither of those two precedents is analogous to this case because each addresses a claimed expectation of privacy in the whole of a person's physical movements over a long stretch of time while that person is moving about from one place to another. See id. at 2214; Jones, 565 U.S. at 402. By contrast, the government emphasizes, as do our colleagues, Concur. Op. at 114, that the claimed expectation of privacy here is only in what occurred over a lengthy stretch of time at a single locale -- the defendants' Hadley Street home. The government contends that while society may be prepared to accept as reasonable one's expectation of privacy in the whole of one's public movements from place to place over a substantial stretch of time, society is not prepared to accept as reasonable one's expectation of privacy in the whole of

what one exposes to public view during such a period in a single place. We cannot agree -- at least given the place that we are talking about here.

a.

The government attempts to support its contention about what society is prepared to accept as reasonable in part by pointing to documented instances in which teams of law enforcement officers have diligently watched a single place of interest for a period of time that has ranged from three weeks[12] to three months.[13] That recent history fails to show, though, that one reasonably would expect such lengthy stakeouts of the home to be undertaken more than "rarely." Carpenter, 138 S. Ct. at 2217 (quoting Jones, 565 U.S. at 429 (Alito, J., concurring in the judgment)). And, under Carpenter, evidence of such infrequent surveillance does nothing to undermine the reasonableness of a claimed expectation of privacy in the whole of what transpires in a publicly visible manner over a sustained expanse of time in a single place, at least insofar as what does transpire there over that expanse of time reveals the "privacies of life" when considered in the aggregate. Id. (quoting Riley v. California, 573 U.S. 373, 403 (2014)).

Consistent with this understanding, Carpenter concluded that one reasonably leaves one's home without expecting a perfect form of surveillance to be conducted over a long period of time, even though

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[12] See, e.g., United States v. Gramlich, 551 F.2d 1359, 1362 (5th Cir. 1977) (surveilling the property for three weeks).

[13] See, e.g., United States v. Jimenez, 5 F.3d 1494, No. 92-1997, 1993 WL 391395, at *1 (5th Cir. Sept. 21, 1993) (unpublished table decision) (surveilling the property for three months).

"tailing" for non-trivial periods of time has always been possible. See id. at 2218; see also Jones, 565 U.S. at 416 (Sotomayor, J., concurring) (explaining that the Court should "not regard as dispositive the fact that the government might obtain the fruits of GPS monitoring through lawful conventional surveillances techniques"). That is so, Carpenter explained, because the time, labor, and expense of carrying out such surveillance in a pre-digital age rendered it at most a rare practice, such that one could not reasonably be expected by our society (given that it is a free one) to govern one's actions in traveling about town as if a tail were always already underway. 138 S. Ct. at 2217; cf. United States v. Tuggle, 4 F.4th 505, 526 (7th Cir. 2021), cert. denied, 142 S. Ct. 1107 (2022) ("We . . . close the door on the notion that surveillance accomplished through technological means is constitutional simply because the government could theoretically accomplish the same surveillance -- no matter how laborious -- through some nontechnological means.").

True, no tailing need be conducted here to capture what these defendants seek to keep private; a single-point stakeout would suffice. But, the government provides us with no reason to conclude that "[p]rior to the digital age," Carpenter, 138 S. Ct. at 2215, it would have been appreciably less 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 -- than it would have been to conduct roving surveillance of perfect precision of all of one's movements outside the home over the course of a week (using Carpenter's own

measure) or a month (using the measure of the majority of the Justices in Jones).[14] Indeed, we must take account of not merely the practical limits of manpower and expense that -- in the pre-digital era -- would have made such lengthy, 24/7 surveillance of anyone in any place a most rare occurrence. See Tuggle, 4 F.4th at 526 ("To assume that the government would, or even could, allocate thousands of hours of labor and thousands of dollars to station agents atop three telephone poles to constantly monitor [the defendant]'s home for eighteen months defies the reasonable limits of human nature and finite resources."). We also must take account of the practical limits in that earlier era of conducting such an enduring, undetected watch of a home.

Accordingly, we conclude that the same real-world constraints that contributed to the sense of privacy that the Court has recognized one reasonably had for most of our nation's history in the totality of the picture -- though not in each brushstroke -- painted by the whole of one's movements while traveling in public also contributed to that same sense in the full portrait of all that visibly occurs for many months in the curtilage of one's own home. Cf. Jones, 565 U.S. at 415-16 (Sotomayor, J., concurring) ("[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques, . . . it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" (quoting Illinois v. Lidster, 540 U.S. 419,

[14] We recognize that Carpenter did also refer to the fact that wireless carriers retain CSLI for five years. But, we do not see any material difference for purposes of the inquiry that Katz requires between that period and the eight-month period before us.

426 (2004))); id. at 429 (Alito, J., concurring in the judgment) ("Devices like the [GPS device] . . . make long-term monitoring relatively easy and cheap."). This understanding, we further note, comports with the protection afforded by the common law in response to developments in surveillance technology through the tort of intrusion upon seclusion. See, e.g., Nader v. Gen. Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970) (explaining that the mere fact that something occurs in public does not necessarily indicate a willingness to reveal that action to others and distinguishing between what could be seen by a "casual observer" and what could be seen by a person conducting "overzealous" surveillance); cf. Restatement (Second) of Torts § 652B (1977) (explaining that the tort of intrusion upon seclusion protects against intrusion "upon the solitude or seclusion of another or his private affairs or concerns"); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195, 206 (1890) (arguing that "existing law affords a principle which may be invoked to protect the privacy of the individual from invasion by" then-"[r]ecent innovations" such as a "modern device for recording or reproducing scenes or sounds").

b.

The government also suggests that Carpenter and Jones, with respect to this portion of the Katz inquiry, may be distinguished from this case on the ground that the depth of information revealed by one's movements in a single place over a long period pales in comparison to the depth of information revealed over such an expansive period by "a person's movements from one location to another." But, although what the defendants seek to keep private

may have occurred in only one place, it did not occur in just any place.

As Moore-Bush and Moore point out, "[a]t the very core' of the Fourth Amendment 'stands the right of man to retreat into his own home and there be free from governmental intrusion.'" Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). The curtilage is "intimately linked to the home, both physically and psychologically," which matters precisely because the home is "where privacy expectations are most heightened." Ciraolo, 476 U.S. at 213. The importance of the home to the Fourth Amendment is reflected in the text of the Amendment itself, which guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV (emphasis added), and the curtilage of a residence has long been understood to "harbor[] the 'intimate activity associated with the sanctity of a man's home and the privacies of life,'" United States v. Dunn, 480 U.S. 294, 300 (1987) (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).[15]

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[15] Our colleagues suggest that the home only carries special importance under the Fourth Amendment when courts apply the common-law trespass test to determine if a search occurred. Concur. Op. at 120-21. But, in Kyllo v. United States, 533 U.S. 27 (2001), the Court held -- relying on the Katz test -- that the use of a device that drew upon heat radiating from a home constituted a search, even though no physical trespass occurred, in part because of what the use of the device revealed about what was occurring inside the home and because "the interior of homes . . . [is] the prototypical . . . area of protected privacy . . . with roots deep in the common law," id. at 34. In so concluding, the Court did the very thing our colleagues accuse us of doing -- "hybridiz[ing] two threads of Fourth Amendment

Not surprisingly, then, the government concedes that the whole of what was visible to the pole camera here, precisely because of where the camera was pointed, reveals "information about a person's life, including, potentially, 'familial, political, professional, religious, and sexual associations.'" See Carpenter, 138 S. Ct. at 2217. And, while it is true that one has no reasonable expectation of privacy in the discrete moments of intimacy that may occur in the front of one's home -- from a parting kiss to a teary reunion to those moments most likely to cause shame -- because of what a passerby may see through casual observation, it does not follow that the same is true with respect to an aggregation of those moments over many months.

No casual observer who is merely passing by can observe (let alone instantly recall and present for others to observe) the aggregate of the months of moments between relatives, spouses, partners, and friends that uniquely occur in front of one's home. Thus, we do not see why the rarity (at least in the pre-digital world) of sustained surveillance and the "frailties of recollection," id. at 2218, cannot combine to give one a reasonable sense of security that such intimate moments -- as a whole -- will be lost to time in the same way that Carpenter recognized one can have that one's less intimate movements from place to place beyond the home will be, see id. at 2217 ("[S]ociety's

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doctrine," the Katz reasonable expectation of privacy test and the common-law trespass test. Concur. Op. at 120-21. We thus see no reason why we may not take account of the special status that the home has under the Fourth Amendment in determining whether the defendants here had a reasonable expectation of privacy in the whole of the activities that occurred in the curtilage of their home.

expectation [is] that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period." (quoting Jones, 565 U.S. 430 (Alito, J., concurring in the judgment))). That being so, it follows that the sum total of all visible activities that take place in a location that by its nature is "associated with the sanctity of a man's home and the privacies of life," Ciraolo, 476 U.S. at 212 (quoting Oliver, 466 U.S. at 180), 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.

Moreover, the exposure of the aggregate of all visible activities occurring over a substantial period in front of one's home may disclose -- by revealing patterns of movements and visits over time -- what the exposure of each discrete activity in and of itself cannot. See Commonwealth v. Mora, 150 N.E.3d 297, 311 (Mass. 2020) ("Prolonged and targeted video surveillance of a home . . . reveals how a person looks and behaves, with whom the residents of the home meet, and how they interact with others."). True, a nosy neighbor, as our colleagues emphasize, Concur. Op. at 116-18, 122, could also observe the patterns of the goings-on in front of a nearby home over a prolonged period. But, again it is worth emphasizing, as we did in our discussion of the defendants' subjective expectation of privacy, that it is the rarest of nosy neighbors -- if any there be -- who would be able to observe all the visible activity in the curtilage of the home across the street, including the license plate of every car that stopped by, the face of every visitor, and any other activity that occurred at all times of the day for a period of eight months. After all, the claimed expectation of privacy here is not in a discrete

activity or even discrete pattern of activities -- it is in the whole of the movements, visible to the pole camera, that occur in the curtilage of a home.[16]

Thus, for this reason, too, the claimed expectation of privacy here is not fairly characterized

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[16] Our colleagues suggest that the nosy neighbor could augment his observational abilities by recording the goings on with a video camera. Concur. Op. at 122. But, courts have long found such video recording of neighbors to be patently unreasonable -- so much so that such activity can be tortious. See, e.g., Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996) (explaining that the nonstop "videotaping and recording" of the plaintiffs' home made them "prisoners" in their own home and amounted to "hounding" that constituted an "invasion of privacy" sufficient to support finding that the filming was a tort); Gianoli v. Pfleiderer, 563 N.W.2d 562, 568 (Wis. App. 1997) (finding that near constant surveillance of the plaintiffs' residence constituted "extreme and outrageous conduct" giving rise to the tort of intrusion upon seclusion); Jones v. Hirschberger, No. B135112, 2002 WL 853858 (Cal App. May 6, 2002) (finding that a trier of fact could conclude that neighbors' videotaping of the plaintiffs' backyard was tortious); Mangelluzzi v. Morley, 40 N.E.3d 588 (Ohio Ct. App. 2015) (same); see also Polay v. McMahon, 10 N.E.3d 1122, 1127 (Mass. 2014) ("[E]ven where an individual's conduct is observable by the public, the individual still may possess a reasonable expectation of privacy against the use of electronic surveillance that monitors and records such conduct for a continuous and extended duration.").

To the extent that our colleagues suggest that a person cannot have an objective expectation of privacy in the whole of the activities that occur in the front curtilage of the person's home because "many of those movements, even if not all, can and will be observed by the same people," Concur. Op. at 119, we do not see how that assertion can be squared with Carpenter itself. A person's movements in public may be observed by others, and the same person may even observe many of them. But, the fact that others may have a window into some -- but not all -- of a person's movements in public does not, as Carpenter explained, render a person's expectation of privacy in the whole of their movements in public objectively unreasonable.

as inhering in a mere "sliver" of a person's publicly visible life, Tuggle, 4 F.4th at 524, any more than the sum total of one's movements beyond the home may be deemed to be. Indeed, it is not evident that our public movements from place to place could reveal that the place where we live is the site where a disfavored political group is holding weekly meetings or where a cleric is holding a worship service. But, that type of information is at risk of being disclosed when the "aggregate" of our publicly visible activity consists of all that transpires over months in the front curtilage of our home.

3.

The government does nonetheless insist that pre-Carpenter rulings -- none of which Carpenter purported to overrule, see Carpenter, 138 S. Ct. at 2220 ("Our decision today is a narrow one. We do not express a view on matters not before us.") -- require the conclusion that there is no reasonable expectation of privacy in what the defendants claim. Once again, we are not persuaded.

The government points here, for example, to Ciraolo, in which the Court rejected the defendant's argument that "because his yard was in the curtilage of his home, no government aerial observation [was] permissible under the Fourth Amendment." 476 U.S. at 212. But, Ciraolo did not dispute that the "home is, for most purposes, a place where he expects privacy." Id. at 215 (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)). Rather, it explained that the owner of the curtilage was reasonably on notice of the possible exposure to the "casual, accidental observ[er]" of what was sought to be kept private there -- especially "[i]n an age where private

and commercial flight in public airways is routine." Id. at 212, 215; see also id. at 213 ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." (emphasis added)). Ciraolo thus did not in any way suggest that the owner was similarly on notice of the possible exposure of all that was visible in the curtilage of the home over a substantial period -- recorded in a perfect visual compendium that is both endlessly re-playable and easily sifted through for the telling detail.

The same is true of Florida v. Riley, 488 U.S. 445 (1989), which concerned an officer who "circled twice over respondent's property in a helicopter" and used his "naked eye" to look through a greenhouse to discover illicit substances. Id. at 448 (plurality opinion). There, in determining that no Fourth Amendment search occurred, the Court observed merely that "[a]s a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be.'" Id. at 449 (emphasis added and second alteration in original) (quoting Ciraolo, 476 U.S. at 213); see also id. at 451 ("Any member of the public could legally have been flying over [the defendant]'s property in a helicopter . . . and could have observed [his] greenhouse."). Thus, again, the Court did not suggest that the same conclusion would follow if the question concerned one's expectation of privacy in all that visibly occurred in one's front curtilage over a long period of time.

The government also points us to the Court's pre-Jones precedent, United States v. Knotts, 460 U.S. 276 (1983), which concerned the use of an

electronic beeper to monitor the movement of a car on a public roadway. The Court unanimously held in that case that the electronic "monitoring of [a] beeper" to track a vehicle as it traveled from a store in Minnesota to a cabin in Wisconsin "was [not] a 'search' . . . within the contemplation of the Fourth Amendment," id. at 279, 285, because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," id. at 281. But, Knotts expressly cautioned that the Court was not "determin[ing] whether" technological advances that enabled longer-term tracking of those movements would similarly be permissible: If "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision," "there will be time enough then to determine whether different constitutional principles may be applicable." Id. at 283-84. So, Knotts, too, fails to support the government's contention.

Finally, the government points to Kyllo. There, the Court explained that, since the advent of the Katz test, it had yet to call into question the "lawfulness of warrantless visual surveillance of a home," Kyllo, 533 U.S. at 32, noted that traditionally "our Fourth Amendment jurisprudence was tied to common-law trespass," id. at 31, and pointed out that, under that trespass-based test, "[v]isual surveillance was unquestionably lawful because 'the eye cannot by the laws of England be guilty of a trespass,'" id. at 31-32 (quoting Boyd, 116 U.S. at 628)). But, while the government argues that Kyllo reflects a determination that all "warrantless visual surveillance of a home" is lawful, id. at 32, the Court in the passages quoted above was explaining only that

it had yet to confront a form of "visual surveillance" that was a search under the Fourth Amendment, id. at 32, while appearing to contemplate that there may be a need for future "refine[ments]" to the Katz test down the road, id. at 34.

Nor did Kyllo have reason to address long-term electronic visual surveillance of a home's curtilage. Its focus was on the capacity of technology to enhance visual surveillance in the short term: a policeman in that case had used a thermal-imaging device for "a few minutes" from outside the home to determine the heat levels within the defendant's home. Id. at 30. In fact, when discussing the lack of judicial questioning of the constitutional propriety of "warrantless visual surveillance of a home," id. at 32, Kyllo referred only to Ciraolo, which, as we have seen, involved only short-term police surveillance of a home (which there was unenhanced by digital technology), and Dow Chemical Co. v. United States, 476 U.S. 227 (1986), which also concerned only short-term observation of a "commercial property," id. at 237; see also id. at 237-38, 238 n.5 (holding that no search occurred when government regulators engaged in one days' worth of aerial surveillance "of a 2,000-acre outdoor manufacturing facility" using camera technology by which "human vision [wa]s enhanced somewhat" although not to the point that "any identifiable human faces or secret documents [were] captured in such a fashion as to implicate more serious privacy concerns").

Moreover, the subject of the surveillance in Kyllo -- "heat radiating from the external surface of the house," 533 U.S. at 35 -- was itself exposed to public "view" in a sense. Indeed, that was how a thermal imaging device operating outside the home

could enable such heat to be "seen." But, that fact did not preclude the Court from concluding in Kyllo that a resident of a heat-emitting home has a reasonable expectation of privacy in the record of the thermal radiation -- at least when the source of the heat is a home. See id. at 34. Kyllo's holding thus in some respects lends support to -- though we do not suggest that it requires -- the conclusion that a person can have a reasonable expectation of privacy in what visibly occurs in the curtilage of his home even though it is exposed to the public.

In sum, none of the pre-Carpenter decisions of the Court that the government relies on rejected claims to privacy in the aggregate of the activities that occur in front of one's home over a long period of time. Nor did any of those precedents purport to suggest that one reasonably expects to be subjected to the kind of intensive, long-term surveillance that could expose to a member of the observing public the whole of what visibly transpires in the front of one's home over many months in any practically likely scenario.[17] Accordingly, we reject the government's contention that the Supreme Court's pre-Carpenter caselaw requires us to find that the defendants here assert no objectively reasonable expectation of privacy.

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[17] The remaining Supreme Court cases cited by the government to support its contention that "law enforcement may observe what a person exposes to public view" are similarly inapposite. These cases all involve discrete incidents in which a person revealed information to the public rather than the compendium of activity at issue here. See, e.g., California v. Greenwood, 486 U.S. 35, 37, 41 (1988); New York v. Class, 475 U.S. 106, 107, 114 (1986); United States v. Dionisio, 410 U.S. 1, 3, 14 (1973); United States v. Mara, 410 U.S. 19, 21 (1973).

In so doing, we part ways with our colleagues who, persuaded by the government's canvassing of the pre-Carpenter caselaw, would conclude that there is no reasonable expectation of privacy in what the defendants here seek to shield simply because each discrete activity that took place in the front curtilage of the Hadley Street home was exposed to public view. It is worth emphasizing, though, before moving to the next part of the analysis, how sweeping a conclusion that appears to be.

By seeming to hold that a person can have no reasonable expectation of privacy in the whole of the activities in the front curtilage of a home simply because each activity is exposed to public view, our colleagues appear to be willing to close the door to a Fourth Amendment claim that could stem from the government accessing a database containing continuous video footage of every home in a neighborhood, or for that matter, in the United States as a whole. In light of the Supreme Court's warning that "as '[s]ubtler and more far-reaching means of invading privacy have become available to the [g]overnment,'" courts are "obligated . . . to ensure that the 'progress of science' does not erode Fourth Amendment protections," Carpenter, 138 U.S. at 2220 (quoting Olmstead v. United States, 277 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting)), we are not as willing as our colleagues to preclude categorically such Fourth Amendment claims.

IV.

Our conclusions to this point do not, however, suffice to support the conclusion that the surveillance at issue constituted a search. We still must address whether the government "contravene[d]" the

objectively reasonable expectation of privacy that the defendants possessed, such that the government engaged in a search by accessing a record of that surveillance. Carpenter, 138 S. Ct. at 2217. The portion of the Katz inquiry that concerns what contravenes a reasonable expectation of privacy is a necessary one for us to undertake because "[t]he obtaining of information is not alone a search unless it is achieved by . . . a trespass or invasion of privacy." Jones, 565 U.S. at 408 n.5 (emphasis added).

In opposing the defendants' motions to suppress in the District Court, the government did not distinguish between the portions of the Katz inquiry that concern the expectation of privacy and the portions that concern contravention. It was only in the motion to reconsider that the government filed after the District Court's ruling finding that a search had occurred that the government developed an argument that focused on the means of the surveillance rather than the public exposure of what was subject to that surveillance. The government contended in that motion that "[t]here was no unique or new technology used in the investigation that implicated the concerns of Carpenter," (capitalization altered), because the surveillance at issue merely involved the use of a digital camera. Then, both in its briefing to the panel on appeal and in its briefing to our full court in connection with the rehearing en banc, the government augmented that contention by emphasizing other attributes of the means of surveillance to support the contention that the defendants could not satisfy the contravention portion of the Katz test.

In addressing the assertions about contravention that the government now makes, we

must keep in mind a point related to the one that we made in connection with our discussion of the antecedent portions of the Katz test -- that the means of surveillance that the government used here did not permit merely the observation from afar of the curtilage of the Hadley Street residence. Nor did those means involve merely the use of a digital camera such that they permitted what transpired there simply to be recorded digitally. Rather, those means involved the long term, remote use of a digital video camera affixed to a utility pole and thus permitted the government to acquire an instantly searchable, perfectly accurate, and thus irrefutable digital compendium of the whole of what visibly occurred over a period of the government's choosing (and thus seemingly without limit as to duration) that ended up lasting eight months. Moreover, those means enabled the government to access that record for a criminal investigatory purpose in a manner that was not only cheap and remarkably efficient but also impossible for the target of the surveillance to evade through precautions that one may be expected to take in response to the possibility of "casual, accidental observation," Ciraolo, 476 U.S. at 212.

Notably, the government makes no contention otherwise in arguing that, even still, this means of surveillance did not contravene the defendants' claimed expectation of privacy in the aggregate of what transpired in the curtilage of the Hadley Street residence that was visible to the camera over the course of many months or, at least, did not do so in any way that would render this means of surveillance a search. And, we note, the government presses for us to credit this means-of-surveillance-based ground for ruling that no search occurred even if we were to

accept what the government vigorously disputes: that the defendants' claimed expectation of privacy in that aggregate is one that society is prepared to accept as reasonable. We decline to do so.

A.

To get our bearings, it helps to start our analysis of the "contravention" portion of the inquiry by reviewing what Carpenter had to say about why "the [g]overnment's acquisition of the cell-site records" contravened the defendant's reasonable expectation in the whole of his movements in that case and therefore constituted a search. Carpenter, 138 S. Ct. at 2223. Carpenter, after all, is the only case in which the Court has addressed the contravention portion of the Katz inquiry in connection with a contention that the long-term, electronic surveillance of an individual's publicly visible movements is not a search. It is thus a singularly instructive guide to us here, despite the distinct factual context in which the issue arose there.

It is also worth noting in this regard that the Court, in considering whether the surveillance at issue in Carpenter "contravened" the defendant's reasonable expectation of privacy, conducted that inquiry at the point at which the government "accessed" the CSLI. Carpenter, 138 S. Ct. at 2219. Thus, the Court did not consider whether or how the government ultimately utilized the seven days' worth of CSLI that it "accessed." Id. at 2217 n.3.

Carpenter recognized that it was confronting a "new phenomenon" brought on by the advent of once unimagined surveillance technology. Id. at 2216. It recognized, too, that it needed to "tread carefully . . . to ensure that [it] d[id] not 'embarrass

the future.'" Id. at 2220 (quoting Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944)). But, it also noted that, as we have already mentioned, it was "obligated -- as '[s]ubtler and more far-reaching means of invading privacy have become available to the [g]overnment' -- to ensure that the 'progress of science' does not erode Fourth Amendment protections." Id. at 2223 (first alteration in original) (quoting Olmstead, 277 U.S. at 473-74 (Brandeis, J., dissenting)).

Applying those principles, Carpenter concluded that "the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities [but which also] risk[s] [g]overnment encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." Id. (quoting Di Re, 332 U.S. at 595). And, in coming to that conclusion, we note, the Court carefully examined the precise new surveillance tool before it in combination with the way in which that tool was employed in the case at hand, "tak[ing] account of more sophisticated" versions of that tool "already in use or in development." Id. at 2218 (quoting Kyllo, 533 U.S. at 36). Moreover, the Court pointed to various aspects of that tool's features that, at least in combination, demonstrated that the tool posed a concerning risk to the constitutional balance, at least when used to acquire the quantum of information covering the expanse of time that was there at issue.

Carpenter emphasized, in this connection, "the deeply revealing nature of CSLI." Id. at 2223. Here, the Court drew upon its own explanation of why the movements tracked by the CSLI that the government accessed from the defendant's wireless carrier over the period in question revealed in the

aggregate the "privacies of life." Id. at 2217 (quoting Riley, 573 U.S. at 403). The Court pointed out in this regard that the CSLI that the government accessed provided an "intimate window into a person's life," id. at 2217, due to the "depth, breadth, and comprehensive reach" of such CSLI, id. at 2223. As the Court explained, "[m]apping a cell phone's location over the course of [several months] provides [the government with] an all-encompassing record of the holder's whereabouts" that is akin to "achiev[ing] near perfect surveillance, as if [the government] had attached an ankle monitor to the phone's user." Id. at 2217-18 (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)).

Notably, the Court also drew support for this aspect of its analysis from the reasoning of the five concurring Justices in Jones, as they had emphasized the comprehensive nature of the information that the GPS device at issue there had permitted the government to acquire in finding that the government's decision to use that device to collect twenty-eight days' worth of GPS data regarding the defendant "impinge[d] on" the defendant's reasonable expectation of privacy. id. (quoting Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment)); see also Jones, 565 U.S. at 415 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about [a person's] . . . associations. . . . The government can store such records and efficiently mine them for information years into the future."); Jones, 565 U.S. at 428-29 (Alito, J., concurring in the judgment joined by three Justices) (describing various new technologies that engage in "constant monitoring" and are thus able to track a person's "daily

movements"). Indeed, the Court in Carpenter pointed out that the tracking effectuated by the collection of the CSLI "partakes of many of the qualities of the GPS monitoring we considered in Jones," as the Court explained that "cell phone location information," too, is "detailed" and "encyclopedic." Carpenter, 138 S. Ct. at 2216.

Carpenter emphasized, as well, the relative ease with which this new surveillance tool afforded the government access to an intimate and comprehensive window into a target's life. By requesting CSLI from a wireless carrier, the Court explained, "the [g]overnment can access [a] deep repository of historical location information at practically no expense." Id. at 2218. The Court further noted that the "repository" of CSLI, once accessed by the government from a wireless carrier, is not "limited by . . . the frailties of recollection" and that, as a result, it "gives police access to a category of information otherwise unknowable." Id. In addition, the Court noted that CSLI is "effortlessly compiled." Id. at 2216. And, in doing so, the Court once again mirrored the language from the Jones concurrences. Id. at 2218.

Finally, in determining that the government's accessing of the seven days' worth of CSLI from the defendant's wireless carrier contravened the defendant's reasonable expectation of privacy and so constituted a search, Carpenter emphasized a feature of that CSLI that arguably differentiated it from the GPS-tracker information that the government had acquired through its own real-time tracking of the defendant's movements in Jones: the information had a "retrospective quality." Id. The Court pointed out that "because location information is continually logged for all of the 400 million devices in the United

States -- not just those belonging to persons who might happen to come under investigation -- this newfound tracking capacity runs against everyone." Id. Thus, the Court noted, "[w]hoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years" with no reasonable ability to take countermeasures to avoid that surveillance as a "cell phone [is] 'almost a feature of human anatomy.'" Id. at 2218, 2219 (quoting Riley, 573 U.S. at 386). In other words, this surveillance technology was especially threatening to the reasonable expectation of privacy in the whole of one's movements in public because of "the inescapable and automatic nature of its collection." Id. at 2217.

Consistent with the Court's stated concern about ensuring that new technological enhancements to law enforcement's surveillance capacity do not "erode" the basic protection that the Fourth Amendment guarantees, the Court also made a point of comparing these features of this means of pursuing a criminal investigation with less souped-up ones. Id. at 2223. In this regard, the Court, again mirroring the language of the five concurring Justices in Jones, explained that the accessing of historical CSLI by the government is "remarkably easy, cheap, and efficient compared to traditional investigative tools" because the government by doing so acquires a capacity to easily mine "the exhaustive chronicle of location information" that is not comparable to the capacity it has when relying on "traditional, investigative tools." Id. at 2217-18 ("[L]ike GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools."); see also Jones, 565 U.S. at 415-16 (Sotomayor, J., concurring) ("[B]ecause GPS

monitoring is cheap in comparison to conventional surveillance techniques, . . . it evades the ordinary checks that constrain abusive law enforcement practices."); Jones, 565 U.S. at 429 (Alito, J., concurring in the judgment) ("Devices like the [GPS device] . . . make long-term monitoring relatively easy and cheap.").

The Court was careful, moreover, to caveat that the concerns presented by unconventional, aggregative electronic surveillance -- like the accessing of the historical CSLI at issue in Carpenter -- did not apply to "conventional surveillance techniques and tools, such as security cameras." Id. at 2220. And, the Court similarly explained that it was withholding judgment about how "business records," other than CSLI, "that might incidentally reveal location information" fit into the conventional-discrete/unconventional-aggregative dichotomy that it described. Id.[18]

B.

There is no doubt, as our colleagues point out, that the factual context presented here differs in certain respects from the one that the Court confronted in Carpenter and that it does so in ways that have some bearing on the contravention portion of the Katz inquiry. Most notably, the Court had to address there whether the so-called third-party doctrine provided a reason to conclude that the government's accessing of

[18] It is possible that it is not useful to disentangle the "contravention" and the "objective" portions of the "expectation of privacy" component of the Katz inquiry from one another. But, we read Carpenter to suggest that it is useful to consider the contravention portion of the inquiry separately, and so do so. As far as we can tell, nothing of substance turns on that choice here.

the seven days' worth of the defendant's historical CSLI did not contravene the expectation of privacy that the Court had recognized that the defendant had in what that tranche of CSLI contained. See id. at 2216-17. After all, in Carpenter, the government had accessed information that it had not created through its own surveillance; it had accessed information that it had requested from a third-party to which that collection of information had already been disclosed. Thus, the disclosure to that third-party could be thought to have destroyed whatever privacy expectation the defendant might otherwise have possessed. Id. The Court thus identified the various features of the surveillance canvassed above at least in part to justify not extending the third-party doctrine to the case at hand, despite the fact that the doctrine had been held to apply to, for example, bank records, which are themselves quite revealing, see United States v. Miller, 425 U.S. 435, 443 (1976).

We, of course, have no such issue regarding the third-party doctrine to address. The government here accessed a digital compendium that it created on its own and that was not disclosed in advance to any other party. In that respect, the case for concluding that the government contravened the defendants' reasonable expectation of privacy is seemingly more straightforward than it was for concluding similarly with the respect to the reasonable expectation of privacy of the defendant in Carpenter itself.

At the same time, Carpenter, by its own terms, is not limited to situations in which the third-party doctrine is in play, despite what our colleagues suggest. Carpenter, 138 S. Ct. at 2217. Concur. Op. at 113-14. Indeed, in the paragraph of Carpenter that describes how the decision is a "limited one," the

Court expressly does not limit its decision to only those situations in which the third-party doctrine is implicated. Id. at 2220; see also id. at 2217 ("Whether the [g]overnment employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that . . . [t]he location information obtained from Carpenter's wireless carriers was the product of a search.").

It follows, then, that Carpenter's analysis of the contravention issue also bears on whether a means of electronic surveillance utilized by the government itself is a means that "contravenes" a reasonable expectation of privacy. The question for us here, therefore, is how Carpenter's analysis of the contravention question bears on our analysis of that question, even though the third-party doctrine is not at issue.

In addressing that question, we must be cautious about responding to this means of surveillance in a manner that would "embarrass the future," id. at 2220 (quoting Nw. Airlines, 322 U.S. at 300), by needlessly stripping government of a potentially useful surveillance tool insofar as that tool -- even if newfangled -- does not threaten to erode the vital protections that the Fourth Amendment provides any more than longstanding but somewhat-updated versions of more pedestrian, surveillance techniques would. At the same time, though, we must not lose sight of the fact that the Fourth Amendment was drafted with the "central aim of . . . 'plac[ing] obstacles in the way of a too permeating police surveillance,'" id. at 2214 (quoting Di Re, 332 U.S. at 595), and that courts must "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted" in assessing

evolving technologies that threaten that degree of privacy, id. (alteration in original) (quoting Kyllo, 533 U.S. at 34).

Moreover, we must attend to the fact that Carpenter, as we have pointed out, explained that it was a "narrow ruling" that did not apply to "conventional surveillance techniques." Id. at 2220. And, we must also take account of the fact that Carpenter's caveat on that score accords with Carpenter's observation that government conduct that "contravenes" a reasonable expectation of privacy "generally" -- and thus not necessarily always -- constitutes a search. Id. at 2213 (emphasis added).

With those considerations in mind, we conclude, as we will next explain, that many of the same reasons that Carpenter relied on to find that the government had contravened the reasonable expectation of privacy at issue there -- and so conducted a search -- equally support the conclusion that the government did the same in this case. For, while the databases that the government accessed in the two cases are not identical, the differences between them are not of a kind that warrants an outcome here opposite to Carpenter's with respect to the contravention issue.

1.

For starters, there is little doubt that the record generated over the months-long expanse of time by the digital pole camera in this case is "deeply revealing" of the "privacies of life." Carpenter, 138 S. Ct. at 2217, 2223 (quoting Riley, 573 U.S. at 403). Like the seven days' worth of the historical CSLI accessed by the government in Carpenter, the digital videologue that

was created here provides an "intimate window into [the defendants'] li[ves]." Id. at 2217.

That is so, in part, due to the "depth, breadth, and comprehensive" reach of the pole camera's gaze, id. at 2223, trained as it was on the front curtilage of the Hadley Street property over eight months and capable as it was of retaining in full -- and in readily searchable form -- all that it espied for as long as it looked. Indeed, while the camera at issue here records live images, the CSLI at issue in Carpenter merely reveals a dot on a map for a single person.

That is also so, because, as we explained in connection with the reasonable expectation of privacy portion of the inquiry, the focus of the pole camera's recording -- the front curtilage of the defendants' residence -- implicates the home, which is "[a]t the very core of the Fourth Amendment." Kyllo, 533 U.S. at 31 (internal quotation marks omitted). Every person has the right to "retreat into [and enjoy] his own home and there be free from unreasonable governmental intrusion." Jardines, 569 U.S. at 6 (quoting Silverman, 365 U.S. at 511). And, for good reason, as our home (curtilage included) is often the center of our lives: it is where we always return to, where our friends, family, and associates visit, where we receive packages and mail, and where we spend a good deal of time. Observing the movements in front of a home for months, therefore, can reveal quite a lot about a person -- at the very least "familial, political, professional, religious, and sexual associations," Carpenter, 138 S. Ct. at 2217 (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)) -- and perhaps to a greater extent than even a substantial swath of one's historical CSLI.

There is similarly little doubt that, like the type of surveillance at issue in Carpenter, the type of surveillance at issue here is "easy, cheap, and efficient" relative to its pre-digital substitute. Id. at 2217-18. The government can initiate the surveillance -- and then carry it through to completion -- for a pittance relative to what a traditional stakeout would cost in terms of time and expense, to say nothing of the reduction in the risk of detection that this means of surveillance makes possible.[19]

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[19] Our colleagues suggest that the long-term use of a pole camera is not "easy, cheap, and efficient" because such surveillance is "not cost-free." Concur. Op. at 113. True, the use of a pole camera comes with a cost (as does the use of a GPS tracker and the receipt and review of CSLI). But, there is no basis on this record for concluding that the cost is a great one, as our colleagues themselves also point out by emphasizing how inexpensive cameras are for the everyday consumer.

Our colleagues do suggest that while it may be inexpensive to use a single pole camera to create a searchable record, replicating that surveillance by "[p]lacing and maintaining . . . millions of pole cameras" to compile a database of "years of video" is not. Concur. Op. at 113 n.39. But, our colleagues do not explain why the ease with which the government can replicate the surveillance is the relevant comparator for purposes of determining whether a surveillance technique is cheap. Indeed, Carpenter's reliance on the Jones concurrences in explaining why CSLI is "easy, cheap, and efficient" relative to past, conventional technologies suggests the opposite. Carpenter, 138 S. Ct. at 2217-18. As we have described, in Jones, the concurrences were concerned with the resource constraints that make tailing a single individual for a long period impractical -- at no point did the concurrences in Jones consider whether it would be "easy, cheap, and efficient" to use a GPS tracker tail every person in the United States for every hour of every day. See Jones, 565 U.S. at 415-16 (Sotomayor, J., concurring); id. at 429 (Alito, J., concurring in the judgment).

In any event, the relevant question after Carpenter is not whether a technology is cost-free. It is whether the efficiencies

The digital pole camera recording here, given the substantial expanse of time that the digital record encompasses, is also an unusually efficient tool of surveillance in another way: it is easily searchable -- especially when, considering the "more sophisticated [versions of this technology] that are already in use or in development," id. at 2218-19 (quoting Kyllo, 533 U.S. at 36), the ability to utilize facial recognition and other forms of visual search technologies is factored into the searchability of this record. See also Riley, 573 U.S. at 381, 385 (considering the appropriateness of extending the search-incident-to-arrest doctrine to "modern cell phones" with "smart" features even though the phone at issue in one of the two cases on appeal was a "flip phone" with none of those "smart" features). The ease with which a voluminous digital record may be mined to yield otherwise hidden information, when combined with the capacity for that record to be stored (given cloud-based computing), makes it distinct from its analog analogues. One need only imagine the officer tasked with reviewing month three of a collection of eight months of VHS tapes -- assuming that she could retrieve them in a timely fashion from the warehouse -- to see how distinct the digital repository before us is.

Finally, the accessing by the government of the pole camera-generated, digital video record here is also similar to the accessing by the government of the CSLI in Carpenter in the third way that Carpenter

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afforded by the surveillance tool give rise to the substantial risk that what had been at best a most rare prospect of surveillance will become more routine and thereby upend the balance between security in the private realm and order that the Fourth Amendment strikes. We see no reason to doubt that the efficiencies of this tool are of that sort.

identified as salient to the contravention inquiry: the means of evading the creation of the record are not feasible. As the Court recognized in Carpenter, CSLI is generated "several times a minute" "[e]ach time the phone connects to a cells site" -- "even if the owner is not using one of the phone's features." Carpenter, 138 S. Ct. at 2211. The only way to avoid generating CSLI is to not use a cell phone, which the Court recognized was simply not a feasible precaution for a person functioning in today's society. Id. at 2218.

Evading the pole-camera surveillance here -- contrary to our colleagues' suggestion -- demands no less unreasonable efforts to thwart it. Nor is a homeowner likely to be placed on notice that the government is surveilling the property via pole camera, because, by definition, such surveillance is clandestine. In fact, a homeowner need not be on notice of even his own illegal activity to be subjected to this type of watch. By the government's own theory, no level of suspicion is needed to utilize a pole camera.

To be sure, a well-constructed fence or craftily planted hedgerows may enable the homeowner to block the gaze of a hidden camera placed at street level, to the extent financial and regulatory constraints make either countermeasure realistic. But, the saying, "show me a wall and I'll show you a ladder" comes to mind. We must assume that the government would choose to place the camera at a height sufficient to surmount whatever vertical barrier would obstruct its view. Thus, the only countermeasures certain to work -- never leaving the house or enclosing the curtilage to make it effectively part of the inside of the house -- are at least as unreasonable to expect a person to take as leaving home without a cell phone.

That said, the comparison to the government's accessing of the CSLI in Carpenter is not a perfect one. CSLI is created by wireless carriers as part of the provision of cell-phone service. As a result, any law-enforcement accessing of historical CSLI from a wireless carrier has a "retrospective quality." For this reason, in accessing the CSLI at issue in Carpenter, the Court emphasized, the government was able to overcome the "dearth of records and the frailties of recollection" and was limited instead only by "the retention policies of the wireless carriers." Id.

The accessing of that trove of historical data was in that respect more concerning than even the government's use of CSLI to track a person's movements in real time. Id. at 2220. The accessing of the historical CSLI gave the government, instantly, information that the government did not even know that it needed and so would never have collected on its own.

By contrast, because the government set up the pole camera in this case, it follows, as our colleagues emphasize, that the government must have had some reason to have done so. Concur. Op. at 113-14. In that sense, the accessing of the record of the "privacies of life," id. at 2214 (quoting Boyd, 116 U.S. at 630), follows a decision by the government to make the record in real time in a way that the accessing of the historical CSLI from the wireless carrier in Carpenter did not. See also Tuggle, 4 F.4th at 525 ("The government had to decide ex ante to collect the video footage by installing the cameras.").

But, we do not understand Carpenter to suggest that the creation of a searchable digital record that perfectly accounts for the whole of the movements of a

person over a long period of time contravenes a reasonable expectation of privacy -- and thereby effects a search -- only when that record was created before the government wished to have it. Cf. Carpenter, 138 S. Ct. at 2217 ("Whether the [g]overnment employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements."). Indeed, it is hard to understand why it would be less destructive of the "degree of privacy" that existed at the time of the Founding, id. at 2214, to have the government directly engage in scooping up visual information about all that occurs in front of a residence over a long period of time than to have the government selectively request that information from a private actor who had undertaken its own collection effort to amass a wealth of data, id. at 2218.

We recognize that democratic pressures may, of their own force, constrain the widespread use of this means of surveillance. But, the risk that this form of surveillance, given how cheap, easy, and efficient it is, would upset the Framers' balance if permitted to be deployed unrestrained by the Fourth Amendment is clear enough. There appears to be little in the nature of the technology itself that would stop the government from choosing to replicate the form of surveillance at issue here widely. Nor does the government give us reason to have confidence that limits either practical or legal are sure to restrain its use. Indeed, it asserts that it need not have even a modicum of suspicion to engage in the surveillance at issue here.[20]

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[20] Our colleagues propose a constraint of their own: They

The concern, then, is real that, in time, this form of surveillance could become a means by which the "society" to which we look for guidance in determining what "expectations of privacy" are worthy of constitutional concern would become a society that would no longer afford privacy the kind of protection that the Fourth Amendment has long been understood to provide it. See Tuggle, 4 F.4th at 527-28 (explaining that "if current technologies are any indication, . . . technological growth will predictably have an inverse and inimical relationship with individual privacy from government intrusion, presenting serious concerns for Fourth Amendment protections" because "once society sparks the promethean fire -- shifting its expectations in response to technological development -- the government receives license . . . to act with greater constitutional impunity"). For, while pole cameras are not currently in use today by law enforcement to monitor the front of every home, or even every home in a neighborhood, see, e.g., Paul Mozur & Aaron Krolik, A Surveillance Net Blankets China's Cities, Giving Police Vast Powers, N.Y. Times (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/technology/china-surveillance.html, Carpenter emphasized that courts are "obligated -- as '[s]ubtler

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suggest that "creat[ing] anything approaching cellular service providers' databases" for pole-camera footage "would entail such an enormous expenditure of scarce resources as to ensure that would never happen." Concur. Op. at 113 n.39. But, we are hesitant to so casually dismiss as impossible the notion that the government may not be surgical in the use of pole-camera surveillance in the future, as the government has collected and analyzed immense amounts of information in the recent past, see, e.g., Am. C.L. Union v. Clapper, 785 F.3d 787, 796-97 (2d Cir. 2015).

and more far-reaching means of invading privacy have become available to the [g]overnment' -- to ensure that the 'progress of science' does not erode Fourth Amendment protections," Carpenter, 138 S. Ct. at 2223 (first alteration in original) (quoting Olmstead, 277 U.S. at 473-74 (Brandeis, J., dissenting)).

Moreover, even though the government created the digital record at issue in this case, the accessing of it by the government still shares many of the features that Carpenter pointed to in expressing concern about the "retrospective quality" of the government's accessing of historical CSLI. Id. at 2218. The government claims that it can set up an unmanned digital video pole camera for law enforcement purposes without a warrant or even any constitutionally required showing of a predicate in front of any -- and by extension all -- homes and let the camera continuously record for eight months. And, Carpenter indicates that the point at which we consider whether the pole-camera surveillance "contravened" a reasonable expectation of privacy is the point at which the government "accesses" -- rather than produces -- the record. Id. at 2219. Therefore, the resulting pole-camera-generated record, if of sufficient duration, is like historical CSLI in that it also can give the government the ability both to "travel back in time" with little expense to witness with perfect precision activities that turn out to be of any focused interest to law enforcement only upon reflection and to do so "effortlessly" in a way that precursor methods of home surveillance practically could not. Id. at 2216, 2218.

C.

Notwithstanding these similarities between the surveillance means used in this case and the means at issue in Carpenter, the government contends that Carpenter's statement that it was not "call[ing] into question conventional surveillance techniques and tools, such as security cameras" precludes us from extending its reasoning to find the kind of contravention of a reasonable expectation of privacy that would show a search to have occurred here. Id. at 2220. But, we are not persuaded by this contention either.

1.

The government contends that the use of the pole camera constituted a "conventional surveillance technique[]" and that Carpenter was careful to exclude all such techniques from the ambit of its decision. Id. The government explains that "cameras with comparable capabilities [have been] employed by law enforcement" since around 1970. As a result, the government argues, a pole camera is merely a specific manifestation of a familiar policing tactic and so is not akin to the CSLI at issue in Carpenter.

We first must note that a video camera from 1970 -- or even 1987 as our colleagues suggest -- is by no means equivalent to the digital pole camera utilized here and the searchable, electronic record that it produced.[21] But, even to the extent that the

[21] To highlight one significant difference, the cameras then could not have streamed the video footage to a website; a law enforcement officer would have had to physically change the tapes. For another, the footage produced was not "searchable": an officer would have to view personally the footage to glean anything from it -- a significant undertaking that would diminish

government's argument rests on relatively contemporary versions of the pole camera -- like the digital video pole camera utilized in Bucci, for example, 582 F.3d at 116 -- we are not convinced. We do not read Carpenter to state that any technology utilized in the decade before that decision is automatically a "conventional surveillance technique." Such a conclusion would conflict with the reality of the technology in Carpenter itself: cell-phone towers, after all, had been erected decades before Carpenter itself was decided, see, e.g., Jon Van, Chicago goes cellular, Chi. Trib. (June 3, 2008), http://www.chicagotribune.com/nation-world/chi-chicagodays-cellular-story-story.html, and the location records from those towers were utilized by law enforcement as early as 2001, see United States v. Forest, 355 F.3d 942, 947 (6th Cir. 2004), vacated sub nom. Garner v. United States, 543 U.S. 1100 (2005). (Bucci, a careful reader may recall, was decided nearly a decade later.)[22]

In addition, the government points to nothing that indicates that it is a relatively common occurrence to have all the activities in front of one's residence surveilled and permanently recorded by digital video cameras.[23] In fact, the government

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the usefulness of the surveillance and make it much more akin to a stakeout.

[22] To that same point, we disagree with our colleagues that the Court aimed to include any form of surveillance of which it was aware, assuming that the Court was aware of the warrantless use of pole cameras to conduct long-term 24/7 surveillance of homes, within its reference to "conventional surveillance techniques and tools," Carpenter, 138 S. Ct. at 2220. Concur. Op. at 107-08.

[23] Many of the decisions that the government and our colleagues cite that involve the use of a video pole camera, nearly

acknowledges -- as it must -- that "there appears to be little published information concerning the prevalence of case-specific pole cameras like the one here."

We also are not persuaded by the government's various examples regarding the deployment of video camera technology in other contexts. Notably, none references government-installed hidden video cameras recording homes on residential streets and permanently storing the ensuing video footage, let alone for the purpose of carrying out a targeted criminal investigation rather than incidentally for some other purpose.[24]

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all of which were decided in the last decade, do not mention whether the pole camera in question was surveilling a residence or, if so, for how long. See, e.g., United States v. Pardo, No. 2:18-CR-00063-GZS, 2019 WL 4723751, at *1 (D. Me. Sept. 26, 2019) ("On February 23, 2018, by way of a pole camera, agents observed a gray Toyota Tundra with a Massachusetts license plate arrive at one of Bellmore's places of business in Lewiston."). And, the few cases that are analogous hardly establish that the use of a pole camera to monitor all of the activities visible in the front curtilage of a home for a prolonged period was a routine or "conventional" technique. See United States v. Bregu, 948 F.3d 408, 411 (1st Cir. 2020) (describing seven months of pole-camera surveillance of a residence); United States v. Moore, 281 F.3d 1279, 2001 WL 1692476, at *1 (5th Cir. Nov. 27, 2001) (unpublished table decision) (describing one year of pole-camera surveillance in front of a home); United States v. Carraway, 108 F.3d 745, 748 (7th Cir. 1997) (using a pole camera to surveil for 45 days a trailer that the defendant resided in). Moreover, the many civil cases that find the long-term recording of a neighbor's activities in the curtilage of the neighbor's home tortious only seem to reinforce the conclusion that long-term video surveillance of the front curtilage of a home is not a typical occurrence. See, e.g., Wolfson, 924 F. Supp. at 1413; Gianoli, 563 N.W.2d at 568; Jones, No. B135112, 2002 WL 853858; Mangelluzzi, 40 N.E.3d at 588.

[24] For example, to support its contention that this

Finally, the government asserts that "camera systems also are employed in residential areas, parking lots, and on public transportation systems." But, it cites to a single source that, in discussing the surveillance of "residential areas," appears to be discussing private, prominent surveillance cameras employed by either private property owners to keep watch over their own property in order to deter crime or neighborhood groups that use "CCTV schemes [to] cover all public areas, such as streets," for the same

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"traditional type of surveillance camera . . . has been in use for nearly five decades," (capitalization altered), the government identifies news articles that indicate that government-operated cameras were "installed in the center of Olean, New York, as a demonstration project" to guard "the main street" there in 1968, and "three fixed cameras . . . [were] placed in Times Square" in 1973. No reference is made to cameras that surreptitiously collect months of footage of the curtilage of homes for criminal investigatory purposes.

Similarly, to support the contention that there are numerous "public surveillance cameras serving law enforcement purposes . . . in municipalities around the United States," the government points us to "the approximately 2,000 cameras operated by the Chicago Police department," which the government notes are "highly visible and typically accompanied by both signage and blue flashing lights." But, the government does not undertake to explain whether (or, if so, to what extent) the Chicago cameras -- or those in any other jurisdiction -- are used surreptitiously to surveil private residences and the curtilage of them. In fact, the report cited by the government in this discussion describes Chicago's cameras as a "public surveillance system" that utilizes "highly visible" cameras that provide "real-time footage from [areas] located throughout the city," including in "the Humboldt Park neighborhood" and "the West Garfield Park neighborhood." Nancy G. La Vigne et al., Urban Institute Justice Policy Ctr., Evaluating the Use of Public Surveillance Cameras for Crime Control and Prevention, at ix (2011).

purpose.[25] Again, no mention is made of the use, let alone widespread use, of surveillance camera technology to surreptitiously surveil the front curtilage of the homes of others over a long period for a criminal investigatory purpose.

We thus are unpersuaded by the government's argument that Carpenter's analysis does not apply to the pole-camera recording here because it is a form of conventional surveillance. Even if a given piece of technological equipment is familiar, what matters for purposes of the contravention inquiry is the context of its deployment. Compare Katz, 389 U.S. 347, 353 (finding that a person has a reasonable expectation that their conversation will not be recorded when they use a phone booth), with United States v. White, 401 U.S. 745, 751-53 (1971) (concluding that a person does not have a reasonable expectation of privacy that their conversation will not be recorded by the person to whom they are speaking even when the recording device is hidden). Compare also Jardines, 569 U.S. 1, 11-12 (holding that a dog sniff for drugs in the front curtilage of the home is a search), with United States v. Place, 462 U.S. 696, 707 (1983) (concluding that a drug sniff in an airport was not a search). For, "[a]s technology has enhanced the government's capacity to encroach upon areas normally guarded from inquisitive eyes," we must apply the Fourth Amendment to those technologies to "assure []

[25] See Eric L. Piza et al., CCTV Surveillance for Crime Prevention: A 40-Year Systemic Review with Meta-Analysis, 18 Criminology & Pub. Pol'y 135 (2019) (discussing study's conclusion that "CCTV schemes in residential areas were associated with significant crime reductions" but also explaining that "flashing lights on top of CCTV cameras" or "signage w[ere] . . . frequently deployed" to make the presence of such cameras apparent).

preservation of that degree of privacy against government that existed when [that] Amendment was adopted." Carpenter, 138 S. Ct. at 2214 (second alteration in the original) (quoting Kyllo, 533 U.S. at 34).

Thus, accepting that the age-old, manned stakeout -- even if enhanced by the latest in digital cameras -- qualifies as a conventional surveillance technique, see Knotts, 460 U.S. at 283-85, we cannot agree that the months-long, digital-pole-camera variant does as well. The word "conventional" simply does not readily call to mind as unusual a technique as that. We thus disagree with our colleagues that our reasoning would somehow deprive the government of the use of an ordinary law enforcement tool.[26]

2.

The government also argues that even if the pole-camera surveillance at issue here was not necessarily "conventional surveillance," a pole camera is a species of "security camera[]." The government then argues that, for that reason alone, the use of the pole-camera surveillance at issue here is necessarily a "conventional surveillance technique[]" by Carpenter's lights. Carpenter, 138 S. Ct. at 2220. We, however, agree with the defendants that the pole camera trained by law enforcement on their home for eight months, generating a searchable digital video database of the activities visible to that camera,

[26] And, we note, to the extent that our opinion would limit law enforcement use of the surveillance at issue here, it would only deprive the government of the ability to utilize that surveillance technique without the protections that the Fourth Amendment provides.

is not like the "security cameras" left unquestioned in Carpenter.

In describing "security cameras" as a "conventional surveillance technique[]" akin to "other business records that might incidentally reveal location information," id. at 2220, the Court is most naturally understood to have been referring to the familiar "tactic[]" under which police have sought footage from third parties that had been collected by their security cameras in the area of a crime. Carpenter made its one reference to "security cameras" in the very same sentence that clarifies that the Court "do[es] not disturb" the caselaw that addresses a person's expectation of privacy in information voluntarily handed over to third parties, id. (citing Miller, 425 U.S. 435, and Smith, 442 U.S. 735), and just prior to a sentence that clarifies that the Court is not addressing "other business records," id. (emphasis added). In this way, the Court intimated that the "security cameras" were private security cameras guarding private property.[27]

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[27] We also note that the Carpenter petitioner emphasized that, although the police have long "sought security camera footage" as an investigatory "tactic[]" employed "prior to the widespread proliferation of cell phones," that "tactic[]" cannot be compared to police seeking long-term CSLI -- as this "security camera" "tactic[]" enabled "law enforcement agents [to] retrieve[] at best only fragmentary historical location records." Br. for Pet'r at 11, 18, Carpenter, 138 S. Ct. 2206 (No. 16-402) (emphasis added); see also Amicus Curiae Br. for Natl' Dist. Att'ys Ass'n at 26 & n.17, Carpenter, 138 S. Ct. 2206 (No. 16-402) (explaining that "police frequently contact multiple third parties with surveillance capabilities to piece together an individual's movements," and that under "the third-party doctrine . . . a defendant would ordinarily have no standing to preclude a third party from releasing" footage by which an "individual's location [is] captured on a third party's private security camera, or even

We note, too, that the government's briefing to us highlights the fact that conventional security cameras are typically placed so that they are overt -- not hidden or hard-to-spot, as the camera here was.[28] By contrast, cameras utilized for criminal investigatory (rather than "security") purposes are -- by definition -- covertly placed; otherwise, as our colleagues emphasize, Concur. Op. at 110 n.37, that investigatory tactic would hardly be effective.

Finally, the Carpenter opinion's passage referencing "security cameras" is immediately followed by a sentence that explains that the decision is also not disturbing the authority of law enforcement to access "other business records that might incidentally reveal location information." Carpenter, 138 S. Ct. at 2220 (emphasis added). This reference, too, suggests that even if the pole camera in question here could, in some scenarios, be viewed as a "security camera" or a "business record," the camera, as here used, is not of that kind. This camera was specifically placed so as to "reveal location

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network of cameras").

[28] By highlighting this difference, we do not mean to suggest that a search cannot occur if the pole camera conducting the surveillance is clearly and obviously placed. After all, the government may not circumvent the Fourth Amendment by merely running ads letting the population know that it is collecting CSLI for criminal investigations. See Smith, 442 U.S. at 741 n.5 ("Situations can be imagined, of course, in which Katz's two- pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry."). But, we do not rule out the possibility that, in some circumstances, the obviousness of the surveillance could play a role in assessing whether the defendant had a subjective expectation of privacy.

information" pertaining to specific individuals for law enforcement's investigative purposes -- namely the movements of the defendants in the front curtilage of the Hadley Street home. There is nothing "incidental" about the "location information" regarding the home on which the camera was trained that the camera revealed. Id. at 2220.

In that sense, the pole camera here appears in stark contrast to other types of cameras commonly operated by both private individuals and the government in which the camera fulfills a purpose distinct from tracking a person's movements at a particular residence and may only record where a particular individual is on a certain occasion as an incident of the camera's more general security-related function.[29] Thus, we reject the government's suggestion that Carpenter establishes -- by virtue of its cursory reference to "security cameras" -- that the accessing by the government of the record of the whole of the activities occurring in the curtilage of a home

[29] It is for this reason that we disagree with our colleagues that our conclusion as to what constitutes a "security camera[]" under Carpenter "would subject the less affluent who live on public streets . . . to lesser law enforcement than those in wealthy neighborhoods." Concur. Op. at 110-11. Video cameras, assuming that they are government operated, could have a purpose "incidental[]" to "reval[ing] location information," Carpenter, 138 S. Ct. at 2220, such as public safety, that is unrelated to the monitoring of a particular home for criminal investigatory purposes. And, that is true of any neighborhood in which such cameras are so used. Moreover, to the extent our colleagues' concern about excluding this type of surveillance from that conducted by "security cameras" -- as Carpenter understood that category -- stems from a worry that bias may infect the targets of such surveillance, the concern is hard to understand. It would seem to us that more rather than less constitutional protection would be -- well -- warranted if that were the concern.

for eight months that the hidden pole camera here generated does not contravene a reasonable expectation of privacy in a manner that effects a Fourth Amendment search.

D.

Shifting focus, the government suggests that even if everything that we have said in applying Carpenter to this case so far is correct, Carpenter is not the Supreme Court precedent that should control our analysis of the contravention portion of the Katz inquiry. The government contends that Carpenter concerned technology that tracks one's movements in public, while here we are faced with technology that allows for the ability to view one's home. Thus, the government contends, Kyllo, which concerned the use of advanced heat sensory technology to surveil a private residence, is the most relevant Supreme Court precedent for present purposes. See Kyllo, 544 U.S. at 40.

The government argues in this regard that Kyllo created a bright line rule that only technologies that "explore details that would previously have been unknowable without a physical intrusion" into a suspect's home raise Fourth Amendment concerns. Because the pole camera captured only what was exposed to public view and involved no such "physical intrusion," the government suggests, we must find that the government here did not contravene a reasonable expectation of privacy. But, Kyllo's holding that "surveillance is a 'search'" if "the [g]overnment uses a device that is not in general public use[] to explore details of the home that would previously have been unknowable without physical intrusion" states a sufficient rather than a necessary

condition for determining that a search has occurred.[30] Id.

Moreover, Kyllo, after framing the question presented there as "how much technological enhancement of ordinary perception . . . is too much," Kyllo, 533 U.S. at 33, found that the use of an infrared camera to see wavelengths, radiating from the exterior of the target's home, that no human eye could see increased human perception to such a degree that the use by law enforcement of the infrared camera did not merely augment an officer's ordinary observational abilities. Likewise, here, the pole camera created a searchable, digital record of moving images of all that transpired in front of the defendants' residence for eight months that is not only infallible but also shareable with others. We thus reject our colleagues' conclusion that the government's use of the pole camera here merely "augment[ed] their investigation," Concur. Op. at 122.

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[30] Furthermore, the "bright line" the government points to was drawn by the Court to respond to the suggestion by the dissent in that case that technologically-revealed details about a home can be subject to Fourth Amendment protection only if the "homeowner would even care if anybody noticed." Id. at 50 (Stevens, J., dissenting). In rejecting that suggestion by the dissent, the Kyllo majority observed that "the Fourth Amendment draws 'a firm line at the entrance to the house'" that is "not only firm but also bright." Id. at 40 (quoting Payton v. United States, 445 U.S. 573, 590 (1980)). Kyllo's observations in this regard were thus a way of explaining why "[l]imiting the prohibition . . . to [technology that reveals] 'intimate details' would . . . be wrong in principle," id. at 38, for the Fourth Amendment protects what occurs inside the home irrespective of how sensitive that activity is. Kyllo thus cannot fairly be read to sanction the government's use of any and all surveillance technology to explore details about the curtilage.

Finally, Kyllo emphasized that it was "reject[ing] a mechanical interpretation of the Fourth Amendment" that would sanction all technological observation of information gleaned from a home's exterior, no matter how revealing those observations may be. See id. at 35 (explaining that the exterior/interior approach would "leave the homeowner at the mercy of advancing technology"). Indeed, Kyllo, like Carpenter, is premised on the understanding that, in assessing Fourth Amendment questions with respect to evolving technologies, it is important to "take account of" not just the technology at issue but also "more sophisticated systems that are already in use or in development." Carpenter, 138 S. Ct. at 2218 (quoting Kyllo, 533 U.S. at 36).

Thus, in determining whether the government's accessing of the pole-camera record at issue here constitutes a search, we -- like the Court in Carpenter, Kyllo, and Riley -- must keep in mind the potential of the surveillance technology before us, given the advent of smaller and cheaper cameras with expansive memories and the emergence of facial recognition technology. See Riley, 573 U.S. at 393 (noting that "[t]he term 'cell phone' is itself misleading" because modern cell phones "are in fact minicomputers that also happen to have the capacity to be used as a telephone" and thus "in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person"). It follows that Kyllo provides no basis for ignoring Carpenter in assessing the contravention issue here.

E.

For these reasons, we conclude that the contravention portion of the Katz test is met in this case just as the other portions of that test are met as well. We thus conclude that the government's accessing of the record that the government itself generated by the pole camera in this case of the whole of what visibly occurred in the front of the Hadley Street residence during the eight months in question constituted a "search" within the meaning of the Fourth Amendment.[31]

That said, beyond answering the question before us, we do not purport to decide what (if anything) the Fourth Amendment might require when the government deploys digital technology in other circumstances, just as Carpenter did not.[32] And, that is so even as to duration -- a criterion that

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[31] Our colleagues suggest that we are "violat[ing] principles of stare decisis" by concluding as we do. But, given that we are hearing this case en banc for the express purpose of reconsidering our Court's prior decision in Bucci, we do not see how that is so. Most crucially, for the reasons we have explained, the Supreme Court's decision in Carpenter, relying on Jones, provides new support for concluding that the earlier reasoning in Bucci is no longer correct. Moreover, to the extent that our colleagues are concerned that the government has a reliance interest that would be infringed if we were to overrule Bucci, we do not see how that is the case, as we conclude that the good-faith exception to the warrant requirement would enable the government to utilize evidence that it acquired in reliance on Bucci prior to this decision.

[32] We emphasize that the government does not argue in challenging the District Court's granting of the motions to suppress before us that those motions concern only the fruits of pole-camera surveillance that occurred -- and were observed in real time -- in the early stages of the recording, such that the compendium itself provided no assistance.

Carpenter itself did not purport to define with precision, see 138 S. Ct. at 2217 n.3 -- given that the record here encompasses a period more than eight times as long as the nearly month-long period of GPS tracking thought long enough to ground the reasonable expectation of privacy recognized in the Jones concurrences and on which Carpenter itself expressly relied. See id. at 2217 (citing Jones, 565 U.S. at 415 (Sotomayor, J., concurring) and Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment)).

V.

We recognize that, as the government emphasizes, other courts that have considered the use of pole-camera surveillance -- even over a long duration -- have found no search to have occurred. But, we do not find in that body of precedent a reason to conclude other than as we do.

Many of these cases were decided before Carpenter. See, e.g., United States v. Houston, 813 F.3d 282, 289 (6th Cir. 2016); United States v. Jackson, 213 F.3d 1269, 1280-81 (10th Cir. 2000), vacated on other grounds, 538 U.S. 1033 (2000). But see, e.g., United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987); United States v. Vargas, No. CR-13-6025, 2014 U.S. Dist. LEXIS 184672, at *28-30 (E.D. Wash. Dec. 15, 2014). Indeed, since Carpenter, only a few circuit courts have been squarely faced with the issue.

Notably, some of these post-Carpenter rulings, in finding no search to have occurred, have not engaged in a fulsome way with the Supreme Court's reasoning in Carpenter. They have merely applied prior in-circuit precedent. See United States v. May-Shaw, 955 F.3d 563, 567 (6th Cir. 2020) (explaining

that "[a]lthough this argument may be compelling in theory, . . . it [was] foreclosed by th[e] [Sixth Circuit]'s case law").

In addition, the highest courts of two states have understood Carpenter to have altered the landscape. See People v. Tafoya, 494 P.3d 613, 623 (Colo. 2021); Mora, 150 N.E.3d at 311. In fact, one of them squarely holds that such pole-camera surveillance constitutes a search under the Fourth Amendment. See Tafoya, 494 P.3d at 623 (holding that the use of a pole camera to surveil the backyard of the defendant every day for three months presented the same concerns that the government's use of CSLI presented in Carpenter and thus "involved a degree of intrusion that a reasonable person would not have anticipated" such that the camera's three-month recording activity constituted a search (quoting Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment))).

An exception is the Seventh Circuit's decision in United States v. Tuggle, 4 F.4th 505 (7th Cir. 2021), cert. denied, 142 S. Ct. 1107 (2022). It squarely grappled with whether Carpenter and other Supreme Court precedents require a court to conclude that the government conducts a search if it uses a pole camera to surveil a defendant's home for a period of many months, and it holds that they do not. Id. at 517.

Tuggle relied in part on its skepticism towards what it describes as "mosaic theory" -- namely, the notion that the aggregate of discrete activities each of which is visible to the public can be the predicate for a reasonable expectation of privacy, even though the discrete activities on their own could not, because the whole is sometimes greater than the sum of its

parts. Id. at 517, 520. Tuggle acknowledged that mosaic theory has "garner[ed] passing endorsement from some -- if not most -- of the Justices in the various opinions in Jones, Riley, and Carpenter." Id. at 519. It expressed the specific concern, however, that a recognition of a reasonable expectation of privacy in such an aggregate of otherwise publicly exposed activities would present "an obvious line-drawing problem: How much pole[-]camera surveillance is too much?" Id. at 526.

We do not find this concern to loom as large. By concluding that the duration of the digital surveillance at issue here bears on whether it constitutes a search, we do not inject a type of line-drawing problem into Fourth Amendment jurisprudence that, as a matter of kind, is unknown. See, e.g., United States v. Sharpe, 470 U.S. 675, 685 (1985) (explaining that while an investigative Terry stop only requires reasonable suspicion, said stop could become a full-blown seizure requiring probable cause over time, but noting that there is "no rigid time limitation" that "distinguish[es] an investigative stop from a de facto arrest"); Knotts, 460 U.S. at 283-85 (finding no Fourth Amendment issue with the government's use of a device to track a car for a single car trip but noting that there could be a constitutional issue if such surveillance continued for upwards of a day). Nor is it a type of line-drawing in which it is improper for courts to engage. See, e.g., Maryland v. Shatzer, 559 U.S. 98, 110 (2010) (holding that an individual can be subject to interrogation after invoking the right to counsel if there is a break in custody of fourteen days or longer); Zadvydas v. Davis, 533 U.S. 678, 701, (2001) (permitting the government to detain a removable individual for up to six months before the government, upon a showing by

that individual that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," must present its own evidence to rebut that showing); County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (establishing that an individual arrested without a warrant must be brought before a magistrate judge to establish probable cause within 48 hours from the time of the arrest). More fundamentally, by relying expressly on the concurring opinions in Jones -- a case involving lengthy electronic tracking -- to conclude that there is a "reasonable expectation of privacy in the whole of [one's] movements" in public, Carpenter was necessarily rejecting the notion that temporal line-drawing in that clearly related context is not possible. Carpenter, 138 S. Ct. at 2217.

The Seventh Circuit could be read to be making a related point that also merits consideration. It concerns the role of lower courts in taking account of Carpenter.

Tuggle suggested that the Supreme Court has not yet bound us either to apply mosaic theory or to find the accessing of any digital video surveillance of activity that is exposed to public view beyond that addressed in Carpenter itself to constitute a Fourth Amendment search. Tuggle then indicated that, for that reason alone, it made sense for a lower court not to so find. Tuggle, 4 F.4th at 519-20.

As we have just noted, the Court in Carpenter did appear to embrace the long-term/short-term distinction in finding a reasonable expectation of privacy in the whole of the defendant's movements in public because the Court there in so holding relied on the views of the concurring Justices in Jones. See

Carpenter, 138 S. Ct. at 2217 (citing Jones, 565 U.S. at 415 (Sotomayor, J., concurring) and Jones, 565 U.S. at 430 (Alito, J., concurring in the judgement)). But, we acknowledge that the Court's conclusion that the government's accessing of CSLI in Carpenter contravened the defendant's reasonable expectation of privacy -- and was not a conventional surveillance technique -- arguably did not depend solely on an embrace of the mosaic theory at that stage of the analysis. The Court also relied in that portion of its analysis on the "retrospective quality" of the CSLI -- namely, the CSLI had been generated before the government accessed it. Id. at 2218.

Even still, the Court in Carpenter did embrace something akin to the mosaic theory in finding the government's accessing of the CSLI contravened the reasonable expectation of privacy of the defendant in that case and so constituted a search. Notably, the Court in Carpenter did not suggest that it was holding that the government's accessing of any information from a pre-existing store of CSLI in and of itself would contravene a reasonable expectation of privacy. It held only that accessing seven days' worth of such CSLI did -- in part because the Court concluded that such a seven-day-long record of historical CSLI was sufficiently "comprehensive" to contravene a reasonable expectation of privacy. Id. at 2217 n.3, 2223.

In any event, we see no reason why lower courts must -- uniquely in this specific context of constitutional interpretation -- await controlling word from the Supreme Court before finding the Constitution to be protective. In fact, our circuit has some experience with a like question that suggests that it would be a mistake for us to take that view.

A little less than ten years ago, we were presented with the question of whether we should allow the search-incident-to-arrest exception to the warrant requirement to enable an officer to search a cell phone possessed by the defendant at the time of arrest. See United States v. Wurie, 728 F.3d 1 (1st Cir. 2013). Supreme Court precedent at the time did not on its own compel us to find a search; it had not addressed a case involving acquisition of a personal device so chock-full of a person's privacies as the cell phone. But, given the new technological realities involved, we declined to allow the exception to include a search of a cell phone, as we concluded that any other approach would "create 'a serious and recurring threat to the privacy of countless individuals.'" Id. at 14 (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)). A year later, our approach was endorsed by the Supreme Court, which emphasized the concerns that applying the traditional warrant exception to cell phones would pose given the immense amount of uniquely revealing information cell phones contain. See Riley, 573 U.S. at 393-97.

Here, we emphasize, the Court has already invoked the principles that we rely on to find that the use of digital surveillance is a search under the Fourth Amendment. Our application of those principles to find that a search occurred here, moreover, transgresses no existing precedent of the Court. We instead rely on the Court's precedents to reach a conclusion that accords with an animating purpose of the Fourth Amendment, which is "to place obstacles in the way of a too permeating police surveillance." Carpenter, 138 S. Ct. at 2215 (quoting Di Re, 332 U.S. at 595).

Nor can we ignore the reality that sheer fear "that the government may be watching chills associational and expressive freedoms." Jones, 565 U.S. at 416 (Sotomayor, J., concurring). From that perspective, our concern in deciding whether a search occurred is not only with the use of evidence in this one case. It is also with the expectations of privacy that understandings of the Fourth Amendment's reach -- as articulated by courts, including lower ones -- themselves shape.

VI.

The government contends that even if the creation of a searchable digital compendium of the activities in the front curtilage of a home via the use of a digital video pole camera effectuated an unreasonable search in violation of the Fourth Amendment, the exclusionary sanction should not apply in this case pursuant to the rationale set forth in Davis v. United States, 564 U.S. 229 (2011). We agree.

In Davis, the Supreme Court held "that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Id. at 232. There, the police officers in question had acted in reasonable reliance on an Eleventh Circuit precedent. See id. at 235 (citing United States v. Gonzalez, 71 F.3d 819 (11th Cir. 1996)). But, that precedent was overturned "while Davis's appeal was pending [in the Eleventh Circuit]." Id. at 236 (citing Gant, 556 U.S. 332). The Eleventh Circuit then applied that new precedent to find that a search occurred, thereby determining -- for the first time on appeal -- that the exclusionary sanction should not apply. See id. (describing opinion below). The Supreme Court granted certiorari to determine

"whether to apply [the exclusionary] sanction when the police conduct a search in compliance with binding precedent that is later overruled," id. at 232, and answered that question in the negative, id.; cf. United States v. Campbell, 26 F.4th 860, 873, 887-88 (11th Cir. 2022) (en banc) (explaining that issues forfeited by a party can be resurrected by a court of appeals and applying the good-faith exception even though it had not been raised by the parties in their initial briefing).

Similarly here, we conclude that the government's use of a pole camera to create a searchable digital record of the whole of the activities that occurred in the front curtilage of a home constituted a "search" and that this search was "conducted in objectively reasonable reliance on binding appellate precedent," Davis, 564 U.S. at 232, namely, Bucci. Accordingly, as in Davis, there is no basis for applying the exclusionary sanction here.[33]

VII.

For the reasons that we have given, we conclude that the government conducted a warrantless "search" in violation of the Fourth Amendment when the government "accessed" the compendium of all the activities that occurred over a period of eight months in the front curtilage of the Moore-Bush and Moore

[33] Moore-Bush and Moore do point out that the government raised its "good faith" argument only in the briefing to us and in its motion for reconsideration before the District Court. But, under the circumstances here, we do not consider the "good faith" issue to have been waived. As noted, Bucci was law of the circuit at the time of the District Court's decision. Thus, the circumstances here are not materially different than those in Davis, where the government similarly raised no "good-faith reliance" argument in the District Court when as of that time the relevant appellate precedent had not been overruled.

home that the government created surreptitiously through its use of a digital video camera affixed to a utility pole. But, because the government relied in good faith on our Court's prior decision in Bucci, in which we permitted the accessing of the record of such warrantless surveillance, we also conclude that the District Court erred in not granting the defendants' motions to suppress.

Our colleagues view the case differently. They would permit the government to conduct such long-term, warrantless pole-camera surveillance of a home without a warrant, let alone probable cause or even reasonable suspicion. They would do so, moreover, even when that surveillance creates a searchable, digital record of all the activities that occur in front of that home for that prolonged period, such that the government then can mine that record for information at any point in the future. And, finally, they would do so even though, for the reasons that we have explained, the government is able to undertake such surveillance and access the resulting record with relative ease, given how "easy, cheap, and efficient" the technology at issue is, Carpenter, 138 S. Ct. at 2218.

Our colleagues in doing so brush past the obvious concerns that such a decision here would generate. They do so by explaining that law enforcement will use pole cameras sparingly and that when law enforcement does use the technology it will have good "reason to believe that the camera will provide information to assist investigators." Concur. Op. at 113.

But, in determining whether a "search" occurred for Fourth Amendment purposes, our focus is not on the number of people subject to the surveillance

in the specific case before us. Law enforcement officers are no less engaged in a search when they barge into a single individual's home without a warrant than when they make a habit of barging into homes that way.

Nor in making such a determination may we assume that, going forward, the government will conduct the surveillance differently in future cases. The Court in Terry v. Ohio, 392 U.S. 1 (1968), did not excuse the government from having articulable suspicion to make a stop because it assumed, in the future, such stops would be made with it, id. at 30.

New surveillance technologies do present especially difficult questions for courts -- and not only when it comes to the Fourth Amendment. Our knowledge is limited. It is also unlikely to be fully up to date.

But, as the Supreme Court explained in Carpenter, courts are still "obligated -- as '[s]ubtler and more far-reaching means of invading privacy have become available to the [g]overnment' -- to ensure that the 'progress of science' does not erode Fourth Amendment protections," Carpenter, 138 S. Ct. at 2223 (quoting Olmstead, 277 U.S. at 473-74 (Brandeis, J., dissenting)), as measured against the "degree of privacy against government that existed when the Fourth Amendment was adopted," id. at 2214 (quoting Kyllo, 533 U.S. at 34). The advance of technology has made the surveillance at issue here -- the creation of a searchable, digital videologue of all the activities in the front curtilage of a home for many months -- possible to an extent that has been unimaginable for most of our history. The result is that the government is newly able to conduct

aggregative surveillance that undermines long held expectations of privacy. For that reason, while our colleagues conclude that the Fourth Amendment places no limits on the use of such surveillance by the government, we conclude that the Fourth Amendment does because its very point is to secure the "privacies of life," id. at 2214 (quoting Boyd, 116 U.S. at 630), by placing "obstacles in the way of [that] too permeating police surveillance," id. (quoting Di Re, 332 U.S. at 595).

LYNCH, HOWARD, and GELPÍ, Circuit Judges, concurring. Law enforcement installed without a warrant, as the law permits, a camera on a utility pole on a public street to further an investigation into illegal drug and firearms dealing from a house. The camera provided a view of certain portions of the exterior of the front of the house, though not the front door, and the driveway and garage door. All of these views were totally exposed to public observation. The camera produced evidence of criminal activity by the residents of this house from this outside view in a residential neighborhood.

The actions of the law enforcement officers did not, contrary to Chief Judge Barron's concurrence (which we refer to as the "concurrence" or the "concurring opinion"), violate the Fourth Amendment. The concurrence, purporting to rely on Carpenter v. United States, 138 S. Ct. 2206 (2018), wrongly applies that precedent. Carpenter forbids and does not support the concurrence's contention that the use of the video taken from the pole camera by the prosecution violated the Fourth Amendment. The concurring opinion contradicts a fundamental Fourth

Amendment doctrine enshrined in the Constitution from the founding, as recognized by Justice Scalia in Kyllo v. United States, 533 U.S. 27, 31-32 (2001). This concurring opinion would, were it a majority opinion, have unfortunate practical ramifications.

I.

We set forth the relevant facts. The record shows that law enforcement had ample reason to install the pole camera when it did so on or about May 17, 2017. It shows that the pole camera was a well-elaborated and targeted use of limited government resources, and that the duration of the pole camera's use was dictated by the needs of the investigation.

The investigation into Moore-Bush and Moore began in January 2017 when a cooperating witness ("CW") tipped off the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") that Nia Moore-Bush was trying to sell "dirty" firearms illegally, and that Moore-Bush and her then-boyfriend (now-husband) Dinelson Dinzey were trafficking heroin. The CW also stated that Dinzey might be trafficking in cocaine. On January 23, 2017, the CW met with Moore-Bush to examine two firearms.

Around February 2017, Moore-Bush and Dinzey began residing at 120 Hadley Street in Springfield, Massachusetts, where defendant Daphne Moore, Moore-Bush's mother, resided.[34] ATF agents had reason to believe that Moore-Bush and Dinzey

[34] The ATF concluded Moore-Bush's primary residence had changed to 120 Hadley Street based on information from the CW, her eviction for nonpayment at her prior apartment, Massachusetts RMV records (both Moore-Bush and Dinzey's drivers' licenses listed the Hadley Street house as their address), bank records, surveillance, and Verizon Wireless records.

were conducting illegal arms and drug sales from the Hadley Street house.

The CW, wearing a recording device, met with Moore-Bush at the house at 120 Hadley Street on May 4, 2017 as instructed by Moore-Bush, and looked at the firearms in the garage in preparation for purchasing them. During the meeting, Moore-Bush made statements relating to her drug dealing, which the agents listening to the recording device heard. The CW, again wearing a recording device, returned to the house the next day, May 5, and purchased four firearms from Dinzey, who was on the phone with Moore-Bush during the transaction.

A few days later, on May 8, 2017, Moore-Bush and Dinzey were driving on Route 91 North near the Vermont border when state police stopped them for a traffic violation. During the stop, the state police recovered 921 bags of heroin.

Law enforcement reviewed the suspects' criminal histories as part of the investigation. Moore-Bush's criminal history revealed that she had been arraigned on charges of improper storage of a firearm, trafficking of narcotics, assault and battery, larceny of a motor vehicle, uttering, larceny by check, and forgery in Massachusetts state courts. Some of the narcotics charges resulted from a traffic stop on November 4, 2014 where Massachusetts State Police recovered 10 packs of heroin (1,000 single-dose bags) from the spare tire compartment of the vehicle. All charges against her were ultimately dismissed.

Dinzey's criminal history revealed convictions for conspiracy to possess heroin with intent to distribute, possession with intent to distribute heroin, possession with intent to distribute cocaine,

distribution of cocaine, assault and battery on a police officer, and others.

Further, the ATF accessed phone calls between Moore-Bush and Edgar Johnson, which were recorded while Johnson was in jail. In one such phone call, on December 2, 2016, Johnson was recorded advising Moore-Bush on the details of running a drug trafficking business.

About a week after the traffic stop and two weeks after the CW purchased firearms at 120 Hadley Street, on or around May 17, 2017, the agents installed the pole camera[35] on the utility pole outside of the Hadley Street house. The camera showed the right side of the house, including the attached garage, a side door, and the driveway. The front door was not in the camera's view. A tree partially obstructed the camera's view when it had leaves, a substantial portion of the time the camera was in place. The pole camera video was streamed to a password-protected website which ATF agents could view in real time. When they watched the video stream live, they could zoom, tilt, and pan the camera. At night, the video had a lower resolution and showed less detail.

The pole camera remained in place until shortly after the indictment issued against the defendants on January 11, 2018. Law enforcement used the record created by the pole camera to obtain stills and images of cars and individuals coming to and departing from the Hadley Street house. The camera's zoom function permitted the government on some occasions to read license plates and see individuals' faces. Throughout

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[35] The concurrence asserts that the pole camera was installed "surreptitiously," Concur. Op. at 8, but has not identified any evidence in the record to support this assertion.

the period that it was in place, the pole camera provided further evidence of the defendants' criminality. For example, on July 17, 2017, the pole camera captured footage in the driveway of two male subjects, one of whom appeared to be Dinzey, placing a white bag in the engine compartment of a car rented by Moore-Bush, a known tactic of narcotics dealers to conceal contraband.

The government used information learned from the pole camera in its applications for Title III wiretaps and other warrants relating to the investigation. This includes its application for a warrant to search Dinzey's Facebook account granted August 4, 2017; its application for a wiretap granted November 9, 2017; its application for a wiretap granted November 27, 2017; its application for a wiretap granted December 14, 2017; and its application for a search warrant of the 120 Hadley Street house granted January 12, 2018.

The concurrence emphasizes that the government did not argue that it had probable cause to take the actions it did regarding the pole camera. Concur. Op. at 7 n.2. The government had no need to so argue because binding circuit and Supreme Court precedent authorized the warrantless use of a pole camera for the duration of the time that the government was actively conducting its investigation. There has been no waiver by the government. The concurrence disregards that both reasonable suspicion, and likely probable cause, supported the installation of the pole camera, and reasonable suspicion and probable cause supported the duration of its use. Had the Supreme Court held that continued pole camera recording of what was in public view was a search (in actuality, the operative Supreme

Court case law was that it was not a search) then law enforcement would have met the probable cause requirement to obtain a warrant.

II.

The Supreme Court's decision in Carpenter does not support the concurrence's reasoning; to the contrary, Carpenter forbids it. See 138 S. Ct. at 2220. Carpenter did not upend the longstanding fundamental proposition of Fourth Amendment law, that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). Carpenter was explicitly narrow and did not alter case law surrounding conventional technologies like pole cameras. It left undisturbed the case law concerning use of pole cameras to capture what is in public view. Further, differences between the cell site location information ("CSLI") at issue in Carpenter and the pole camera video in this case render an expectation of privacy in the aggregate of a person's movements in the curtilage of their residential neighborhood home unreasonable.

In order to demonstrate a legitimate expectation of privacy, the defendants must show (1) that they had an actual, subjective expectation of privacy and (2) that this subjective expectation of privacy is one society is prepared to recognize as objectively reasonable. See United States v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009) (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)). These defendants fail on both prongs.

A.

The concurring opinion contradicts Carpenter in a number of ways. The Carpenter Court was explicit that "[o]ur decision today is a narrow one." 138 S. Ct. at 2220. It went on to explain that it expressed no view on technologies other than the CSLI at issue in the case, and it did not "call into question conventional surveillance techniques and tools, such as security cameras." Id. Pole cameras are certainly a conventional surveillance tool. Moreover, Carpenter did not overrule the precedents the First Circuit relied on when it upheld the use of pole camera surveillance in United States v. Bucci, 582 F.3d 108 (1st Cir. 2009). And Carpenter's specific reference to "security cameras" as a technology whose use the decision did not disturb should clearly encompass the case at hand.

Pole cameras are plainly a conventional surveillance tool. The concurrence's portrayal of video surveillance as a novel technique comparable to obtaining location tracking data from cell service providers misconstrues reality. Pole cameras have been described in circuit opinions since at least 1987, see, e.g., United States v. Cuevas-Sanchez, 821 F.2d 248, 250-51 (5th Cir. 1987), and in this circuit as early as 2003, see United States v. Montegio, 274 F. Supp. 2d 190, 201 (D.R.I. 2003). In cases stretching back decades, several circuits, including this one, had upheld the constitutionality of pole cameras prior to Carpenter. See Bucci, 582 F.3d at 116-17; United States v. Houston, 813 F.3d 282, 287-88 (6th Cir. 2016); United States v. Jackson, 213 F.3d 1269, 1280-81 (10th Cir.), vacated on other grounds, 531 U.S. 1033, 1033 (2000).

Pole cameras are routinely used by law enforcement across the United States in order to conduct investigations and have been for many years.[36] Pole cameras often, as in this case, produce

[36] See, e.g., United States v. Bregu, 948 F.3d 408, 411 (1st Cir. 2020) (noting use of pole camera outside suspect's residence to gather evidence); United States v. Christie, 825 F.3d 1048, 1067 (9th Cir. 2016) ("Before applying for the wiretaps, the government also installed a pole camera outside the Ministry's front entrance . . . ."); United States v. Gaskins, 690 F.3d 569, 574 (D.C. Cir. 2012) (noting use of pole camera in narcotics conspiracy investigation); United States v. Foy, 641 F.3d 455, 461 (10th Cir. 2011) (noting use of pole camera in conspiracy investigation); United States v. Marquez, 605 F.3d 604, 607 (8th Cir. 2010) (noting use of pole cameras in drug trafficking investigation); United States v. Zepeda-Lopez, 478 F.3d 1213, 1217, 1220 (10th Cir. 2007) (noting use of pole camera in drug investigation); United States v. Price, 418 F.3d 771, 781-82 (7th Cir. 2005) (noting use of pole camera in conspiracy investigation); United States v. Gonzalez, Inc., 412 F.3d 1102, 1106 (9th Cir. 2005), amended on denial of reh'g, United States v. Gonzalez, Inc., 437 F.3d 854 (Mem) (9th Cir. 2006) (noting use of pole cameras in smuggling investigation); United States v. Moore, 281 F.3d 1279, 2001 WL 1692476, at *1 (5th Cir. Nov. 27, 2001) (unpublished) (noting use of pole camera in drug dealing investigation); United States v. Carraway, 108 F.3d 745, 749 (7th Cir. 1997) (noting use of pole camera in investigation); United States v. Asghedom, 992 F. Supp. 2d 1167, 1168 n.2 (N.D. Ala. 2014) (noting use of pole camera in drug investigation); United States v. Brooks, 911 F. Supp. 2d 836, 837-39 (D. Ariz. 2012) (describing use of pole camera in drug trafficking investigation); United States v. Lisbon, 835 F. Supp. 2d 1329, 1348 (N.D. Ga. 2011) (noting use of pole camera in investigation); United States v. Tranquillo, 606 F. Supp. 2d 370, 375 (S.D.N.Y. 2009) (noting use of pole camera in corruption investigation); United States v. Gonzalez De Arias, 510 F. Supp. 2d 969, 971 (M.D. Fla. 2007) (noting use of pole camera in drug investigation); United States v. Le, 377 F. Supp. 2d 245, 259 (D. Me. 2005) (noting use of pole camera in drug distribution conspiracy investigation); Montegio, 274 F. Supp. 2d at 201 (noting use of pole cameras in drug trafficking investigation).

evidence which provides a basis for warrant and wiretap applications. The Carpenter Court would certainly have been aware of their use. The concurrence's reasoning that CSLI was used by law enforcement prior to Carpenter, so other technologies extant prior to Carpenter are implicated by its reasoning, renders meaningless the Court's explicit exemption of conventional techniques and tools of surveillance.

The concurrence would overrule circuit precedent in Bucci, but Bucci is based on solid Supreme Court precedents which are not undermined by Carpenter. See 138 S. Ct. at 2220. In Bucci, a case with facts indistinguishable from the present case, the First Circuit found that warrantless surveillance of the curtilage of a home for eight months by a pole camera was not a search under the Fourth Amendment. 582 F.3d at 116-17. In finding that the defendant in that case had no objectively reasonable expectation of privacy in the actions captured by the pole camera, the court relied on a core principle of Fourth Amendment law elucidated in Katz, that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." Bucci, 582 F.3d at 117 (quoting Katz, 389 U.S. at 351); see also California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."). The Bucci court also relied on Kyllo v. United States, where Justice Scalia reiterated this principle, explaining its origins in the common law of England. 533 U.S. 27, 31-32 (2001). Carpenter did not disturb any of these cases and did not disturb the fundamental principle that

observing what is knowingly exposed to public view is not a search. Katz's rule reflects the common and commonsense understanding of privacy as "the state of being alone and not watched or interrupted by other people." See Privacy, Oxford Learners Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/privacy (last visited May 26, 2022). It also provides a workable standard for courts and law enforcement that protects privacy.

Carpenter's reference to "security cameras" as an example of a traditional surveillance tool whose use it would not disturb clearly encompasses the pole camera footage at issue here. 138 S. Ct. at 2220. The concurrence parses this language in order to argue that the Court was referring to "private security cameras guarding private property" rather than covertly placed pole cameras. Concur. Op. at 80. The Supreme Court in Carpenter said no such thing. Further, the concurrence's purported distinction is itself erroneous.[37] The concurrence draws a distinction

[37] The concurrence argues that the opinion's reference to security cameras is irrelevant to pole cameras in part because "conventional security cameras are typically placed so that they are overt -- not hidden or hard-to-spot, as the camera here was." Concur. Op. at 81. The argument is factually and legally unsubstantiated. The camera here was on a publicly visible utility pole on a public street. It was not hidden. The record reveals nothing about whether the majority of private security cameras are hidden or not. That simply was not an issue in the district court and the parties have been deprived of an opportunity to create any record, if the issue were relevant at all. The logic of the concurrence's reasoning is that police can contravene an individual's reasonable expectation of privacy merely by making the camera less visible. The Constitution does not require law enforcement to announce themselves with a brass band every time they undertake an investigation. If a person does not have a reasonable expectation of privacy in her actions, it does not

which would subject the less affluent who live on public streets, who perhaps cannot afford "private security cameras" to deter or detect crime, to lesser law enforcement than those in wealthy neighborhoods who can and do.

B.

The concurrence waves away the fact that Carpenter concerned only CSLI, explaining that its reasoning is nevertheless applicable to the case at hand. Concur. Op. at 63-64. In so doing, the concurrence ignores features of CSLI as business records that were crucial to the Court's reasoning. In Carpenter, the Court rejected the government's assertion that CSLI was not subject to a reasonable expectation of privacy.[38] The Carpenter Court found that though cellphone users ostensibly voluntarily share their location information with providers, people retain their expectation of privacy in the whole of their movements. 138 S. Ct. at 2217. The Court reasoned that people cannot really be said to share their location with cellphone companies, because CSLI is generated automatically and incidentally when one carries a phone, and carrying a phone is essentially a requirement for participation in modern life. Id. at 2220. The Court reasoned that the use of CSLI allows creation of a comprehensive map of a person's movements with "just the click of a button."

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matter if the police use a covert means of surveillance to capture such actions. The Fourth Amendment does not guarantee that suspects have fair notice that an investigation is ongoing.

[38] The theory underlying the government's argument was that a person generally does not have an expectation of privacy in information voluntarily turned over to third parties. See Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

Id. at 2217-18. The Court also relied on the data's "retrospective quality," limited only by companies' data storage policies, recognizing that owning and carrying a cellphone makes it as if every cellphone user has been perfectly tailed for years, and that police could simply tap into this repository of detailed information at will. Id. at 2218.

The information captured by the pole camera in this case is distinct from the CSLI data at issue in Carpenter. The Court in Carpenter reasoned that because most people must carry cellphones everywhere they go, and because cellphones share the user's location with the service provider automatically without any affirmative action on the user's part, it does not make sense to say that cellphone users have consented to sharing a comprehensive record of their movements with cellphone companies. Id. at 2220.

By contrast, any purported expectation of privacy in observations of a house unshielded from view on a public street is not in the least like the expectation of privacy in CSLI data by cellphone users. People can take measures, as defendants here did not, to avoid being seen by neighbors or by passersby. Absent such steps, these defendants certainly knew that when they stepped outside of their house, their activities were exposed to public view. Unlike the automatic sharing of location data by cellphones carried everywhere as a matter of course, people are actively aware when they have entered the public view upon leaving their houses.

Eight months of pole camera surveillance cannot be generated with the push of a button. In arguing that pole camera data is similar to CSLI because it is cheap and easy to produce, the

concurrence is mistaken.[39] Concur. Op. at 65-66. Pole cameras are not cost-free, and the expenditure is justified only if law enforcement has reason to believe that the camera will provide information to assist investigators. If the camera provides such information, as was true here, the camera remains so long as it is useful. If the camera does not provide such information, it is removed.

Carpenter's concern about the ease of creation of records of people's movements is linked to what it called the "retrospective quality" of CSLI data, a concern which is not implicated in this case. Id. at 2218. In Carpenter, the Court recognized that the vast majority of people carry cellphones everywhere that they go, and their cell service providers typically stored five years of CSLI for each cellphone user. Allowing law enforcement to access such data allows them to "travel back in time to retrace a person's whereabouts." Id. Here, the police suspected Moore-Bush of illegal firearm and narcotics dealings and placed a pole camera in front of her residence in order to investigate their suspicions. All data collection was prospective, and it targeted these particular suspects.

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[39] In Carpenter, the Court confronted law enforcement gaining warrantless access to a privately created, maintained, and funded database of the comprehensive movements of millions of Americans for the preceding five years that cellular service providers typically maintained. 138 S. Ct. at 2218. The Court reasoned that, given such access, the state's ability to access round-the-clock surveillance would not be resource-limited in the way that investigations are normally resource-limited. Id. Placing and maintaining the millions of pole cameras, not to mention storing the years of video, that it would take to create anything approaching cellular service providers' databases would entail such an enormous expenditure of scarce resources as to ensure that would never happen.

The police did not tap into a vast repository of data collected by and at the expense of third parties. The concurrence disregards this distinction by erroneously concluding that the government, in placing a pole camera in front of a single residence for eight months, is engaging in surveillance on par with a cellphone company's storage of millions of users' comprehensive movements for five years. Concur. Op. at 70. This comparison does not hold ground. Placing a single camera on a public street outside of a single house does not create a vast database allowing police to tap into the complete movements of millions of people with the push of a button, which was the Court's concern in Carpenter.

C.

The concurrence attempts to justify its result by arguing that one has a reasonable expectation of privacy in the whole of their movements occurring in the curtilage of their home. Again, the concurrence's reasoning does not support this result. The defendants did not manifest a subjective expectation of privacy in their movements in the curtilage of their home. Nor would it have been objectively reasonable for them to expect privacy in such movements.

The concurrence declares that Supreme Court precedent does not prevent it from combining the subjective and objective inquiries, reasoning that so doing will avoid the problem of the Fourth Amendment meaning different things in different contexts. Concur. Op. at 29. This is not what the Supreme Court has held. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) ("The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society

recognizes as 'legitimate.' What expectations are legitimate varies, of course, with context[.]" (citation omitted)). To be protected by the Fourth Amendment, an expectation of privacy must be subjective, but that alone is not sufficient; it must also be objectively reasonable in the given context. It is important to preserve the distinction. Law enforcement cannot always know whether someone subjectively expects privacy, but they can more easily determine whether an expectation of privacy is one that society is prepared to accept as reasonable. The concurrence is concerned about, for example, different Fourth Amendment rules for different types of housing. Katz already provides a clear line that can be applied uniformly across various contexts: there is no expectation of privacy in what is knowingly exposed to the public view. 389 U.S. at 351. The concurrence's approach undercuts privacy by eroding this bright line.

In Carpenter, the Supreme Court recognized that, even in the public sphere, a person could reasonably expect privacy in the "whole of their physical movements." 138 S. Ct. at 2217. The Court noted that before the "digital age," a suspect could be tailed for a brief time, but a person would reasonably not expect all of their movements in public to be tracked. Id. When a person leaves the house and enters the public realm, she knows that people will see her activities, but she does not expect that the passerby who sees her at the grocery store will also see her at the bank, the political rally, the religious meeting, or the doctor's office. This is particularly so if these trips are taken over a number of days.

In contrast, the pole camera only captured the defendants' and coconspirators' movements in one

place in the public view and did not track their movements once they left the curtilage of 120 Hadley Street. There can be no expectation of privacy in the aggregate of these movements because they occur in one place where a person expects to encounter and be seen by people again and again. The defendants living on a public street alongside neighbors faced the reality that neighbors would come to know the patterns of when they left in the morning and returned in the evening. They would also know when an unfamiliar car was parked outside, and when the defendants were likely not in residence because the yard was overgrown, and packages piled up on the front porch. These observations do not violate the defendants' reasonable expectations of privacy.

That details about a person's life might be deduced from an aggregation of activities observed in the curtilage of the home does not imply a reasonable expectation of privacy.[40] The concurrence argues that

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[40] Both the district court and the concurring opinion rely heavily on the proposition that a pole camera may reveal "intimate" details and mundane details of a suspect's life. Concur. Op. at 64. In Carpenter, the Court stated that CSLI data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217 (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). It is not difficult to see how the expectation of privacy in these kinds of details which are revealed in the curtilage of one's home must be different than the expectation of privacy in such details revealed by a record of someone's entire movements over a number of days. Any political, professional, religious, or sexual associations which are revealed in the curtilage of one's home are known to be exposed to public scrutiny. One does not put up a yard sign endorsing a political candidate or set out decorations on the porch for a religious holiday with the expectation that such

> while it is true that one has no reasonable expectation of privacy in the discrete moments of intimacy that may occur in the front of one's home -- from a parting kiss to a teary reunion to those most likely to cause shame -- because of what a passerby may see through casual observation, it does not follow that the same is true with respect to an aggregation of those moments over many months.

Concur. Op. at 41. This does not ring true. A next-door neighbor could easily observe both the sad parting and the joyous reunion. And while doubtless people would prefer that their neighbors did not see the moments "most likely to cause shame," they cannot reasonably expect people living within sight and sound not to, for example, hear the screaming matches, see the front door slam, notice the absence of one partner's car for weeks, and draw the obvious inference.

That people who live on public streets will be observed over the months and years by the same people and others necessarily informs expectations of privacy and affects what actions they take in the curtilage of their home.[41] In public, we are surrounded by others,

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associations will remain private.

[41] For example, a woman not ready to announce her pregnancy to the world might feel comfortable shopping at a baby store in public, but might carefully conceal the items she bought before carrying them from her trunk to her front door to evade neighbors' prying eyes. Someone struggling with alcohol addiction might readily purchase alcohol in person at liquor stores, but might take great pains to put spent bottles at the bottom of the recycling bin so that neighbors do not see them piled up week after week. And so on.

but the public is an ever-shifting group; not only will the people at the grocery store likely not be the same people at the bank, but the people at the grocery store on Monday will mostly not be the same people at the grocery store on Wednesday. The concurrence attempts to conflate the communal experience of living in a residential neighborhood where houses are situated close together and lawns are not fenced or walled in with the relatively anonymous experience of moving between various public spaces over a number of days.

We disagree with the concurrence's contention that it does not matter that a person living in a neighborhood would expect their neighbors (even the ones that mind their own business) to observe them moving around in the curtilage of their homes, to remember their various observations over time, and to draw inferences from these observations. Concur. Op. at 34-35. It is not determinative for the expectation of privacy analysis that such a "record" is in some respects less complete and less searchable than digital video. It is not objectively reasonable to expect privacy in the whole of your movements when you know many of those movements, even if not all, can and will be observed by the same people day in and day out. To live in such a neighborhood and take no steps to prevent observation cannot be understood as manifesting a subjective expectation of privacy.

The concurrence contends that two other characteristics of pole camera surveillance make it violate expectations of privacy. The concurrence asserts that the curtilage of the home is sacred in Fourth Amendment jurisprudence, Concur. Op. at 39-40, 64-65, and it asserts that a pole camera creates a perfect and comprehensive record of a person's

movements in the curtilage, Concur. Op. at 41-43. Neither of these justifications holds up.

Admitting that the depth of information gleaned from surveilling the front of someone's home is less than that of round-the-clock surveillance of their movements, the concurrence reasons that a greater expectation of privacy in the home counterbalances this deficit. Not so. As explained above, the fact that this surveillance is occurring in the curtilage of the home in a residential neighborhood renders an expectation of privacy in the aggregate of one's movements less reasonable, not more. Moreover, Carpenter did not concern or rely at all on the curtilage purportedly being encompassed by the "sanctity" of the home.

The case the concurrence primarily relies on for this argument, Florida v. Jardines, 569 U.S. 1 (2013), is about physical intrusions into the curtilage of the home, not observation from a public vantage point.[42] The concurrence's effort to hybridize two

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[42] The concurrence also misreads Kyllo. In that case, the Court found that the use of a thermal imaging device to detect details about the inside of a house was a search under the Fourth Amendment. 533 U.S. at 40. However, the Court's holding explicitly was tied to physical intrusion. Id. (holding that using a device "not in general public use, to explore details of the home that would previously have been unknowable without intrusion" constitutes a search). Moreover, the Court emphasized that it was maintaining a "firm line at the entrance to the house," id. (quoting Payton v. New York, 445 U.S. 573, 590 (1980)), so the concurrence's extrapolation from Kyllo's holding regarding information about the walled-off interior of the home to publicly visible movements outside the home fails. Concur. Op. at 40 n.15. The Kyllo Court explained that the search at issue did not present any of the difficulties of applying the Katz reasonable expectation of privacy test because "in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the

threads of Fourth Amendment doctrine, the Carpenter aggregate expectation of privacy and the privacy of the home from trespass, is inadequate. Generally, a person has no expectation of privacy in what has been knowingly exposed to the public, whether it is "in his own home or office," in the curtilage of his home, or in the town square. Katz, 389 U.S. at 351.

The concurrence attempts to treat Carpenter's "whole of [a person's] physical movements," 138 S. Ct. at 2217, as applicable to a person's movements solely in the curtilage of their home. There is no contention that people spend even close to the majority of their time in the curtilage of their homes, so the contention that the whole of a person's movements and their movements in the curtilage are equivalent fails for that, as well as other, reasons. See United States v. Tuggle, 4 F.4th 505, 524 (7th Cir. 2021) ("[T]he stationary cameras placed around [the defendant]'s house captured an important sliver of [his] life, but they did not paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon."); see also United States v. Hay, No. 19-20044-JAR, 2022 WL 1421562, at *7 & n.62 (D. Kan. May 5, 2022) ("Far from revealing the 'whole of his physical movements,' the pole camera surveillance revealed just a small part of that much larger whole, even if an important one." (quoting Carpenter, 138 S. Ct. at 2219)).

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common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable." Id. at 34. It contrasted the interior of the house with places where expectations of privacy were less clear including "telephone booths, automobiles, or even the curtilage and uncovered portions of residences." Id.

Neither does the fact that a pole camera creates a record justify the concurrence's departure from precedent. The concurrence argues that "[n]o casual observer who is merely passing by can observe (let alone instantly recall and present for others to observe) the aggregate of the months of moments . . . that uniquely occur in front of one's home." Concur. Op. at 41. The concurrence invokes the casual passerby but ignores the neighbors, including, for example, the retiree who has lived across the street for years and monitors activity seen from her windows and may recall or even record her observations.

There is no Fourth Amendment problem with police augmenting their investigation with technologies commonly used, including to create records.[43] See, e.g., Kyllo, 533 U.S. at 34. Video

[43] The concurrence relies on Kyllo to argue that a video camera enhances law enforcement's perception beyond what the Fourth Amendment allows. Concur. Op. at 85. Our colleagues once again misread Kyllo. The Court there was focused on "sense-enhancing technology," noting that "the lawfulness of warrantless visual surveillance of a home has . . . been preserved." 533 U.S. at 32, 34. There is no argument in this case that the pole camera could see anything the human eye could not, unlike the thermal imaging device that the Court considered in Kyllo, which captured infrared radiation invisible to the human eye. Our concurring colleagues argue that because a camera creates a record that they contend is more easily searchable and more infallible than human memory, or notes taken by an officer on a stakeout, that it is an impermissible enhancement of human perception. This is unsupportable, for human memory and recordkeeping ability are not senses; devices like tape recorders, cameras, and video cameras, which record only what the human senses can detect, are not the "sense-enhancing technolog[ies]" that were the Court's concern in Kyllo. Further, in Kyllo the court referred only to technologies "not in general public use," id. at 40, which video cameras indisputably are.

cameras have been routinely used by law enforcement and the public for decades. Moreover, the concurrence repeatedly insists that digital records are more perfect, an argument that is legally irrelevant and factually untrue. Even eight months of continuous footage is not a comprehensive record of movements in the curtilage of the home. The camera is limited to what can be viewed from the lens in its fixed position. In this case, the camera's view was sometimes obscured by foliage, and it only captured a partial view of the front of the house, which did not include the front door. In many cases a neighbor, or the concurrence's "casual observer who is merely passing by," would have a more complete view of the entirety of the house's curtilage.

As a final note, the concurrence is understandably concerned about advances in technology and their implications for the future. Concur. Op. at 99. But the advances in video camera technology since our ruling in Bucci, or the Supreme Court's ruling in Carpenter, do not justify the concurrence's position. Law enforcement has long had the capacity to access pole camera video remotely, see Gonzalez De Arias, 510 F. Supp. 2d at 971, and to use pole cameras to conduct surveillance over time, see Gonzalez, Inc., 412 F.3d at 1106 (noting use of pole cameras to conduct "about 25,000 hours" of video surveillance). That those capacities are sharpening does not mean that the pole cameras of today represent a different technology than the pole cameras around the time of the Carpenter decision when the Supreme Court specifically exempted "conventional surveillance techniques and tools." 138 S. Ct. at 2220. The incremental improvements over the years from pole cameras to better pole cameras are nothing like

the rapid transformation of cellphones to location-tracking devices which are "indispensable to participation in modern society" for people to carry around everywhere they go. Id.

III.

The concurrence's reasoning would have many negative consequences. It would radically alter the surveillance tools available to police. It would needlessly complicate Fourth Amendment doctrine and would open accepted policing tools and techniques to challenge. It would place law enforcement at a disadvantage to the rest of the population. It is not hard to believe that if law enforcement is so hampered, neighbors would be encouraged to assume the burdens of policing to keep their own neighborhoods safe.

The investigation in this case was targeted and proportional to the police's needs. Here, police reasonably investigating a house that ultimately was determined to be a site of illegal drug and firearm transactions over a long period of time utilized a conventional tool of surveillance to gather evidence. Under the concurrence's rule, police would no longer be allowed to use their own judgment for how to investigate crimes occurring in the public view. This is in spite of the fact that this circuit has long recognized the difficulty of investigating drug conspiracies and has noted that "[b]ecause drug trafficking is inherently difficult to detect and presents formidable problems in pinning down the participants and defining their roles, investigative personnel must be accorded some latitude in choosing their approaches." United States v. Santana-Dones, 920 F.3d 70, 76 (1st Cir. 2019) (alteration in original)

(quoting United States v. David, 940 F.2d 722, 728 (1st Cir. 1991)).

It is unfortunate that, under the concurrence's reasoning, law enforcement would be deprived of the use of an ordinary law enforcement tool -- pole camera video -- at a time when video cameras are becoming more common and more used. Indeed, there are now often demands that officers wear video cameras on their persons as they perform their duties. See M.D. Fan, Justice Visualized: Courts and the Body Camera Revolution, 50 U.C. Davis L. Rev. 897, 901 (2017) (noting that "a police body camera revolution is fast unfolding"). The cellphones that the Court in Carpenter called "almost a 'feature of human anatomy'" generally have video cameras built in. 138 S. Ct. at 2218 (quoting Riley v. California, 573 U.S. 373, 385 (2014)). People are frequently filmed in public, with or without their consent, and these videos can be posted online and viewed thousands of times. A basic model of one brand of doorbell security camera can be purchased for just $51.99. Video Doorbell Wired, Ring, https://ring.com/products/video-doorbell-wired (last visited May 26, 2022). Millions of people have already equipped their front doors with cameras. See J. Herrman, Who's Watching Your Porch?, N.Y. Times (Jan. 19, 2020), https://www.nytimes.com/2020/01/19/style/ring-video-doorbell-home-security.html. The CSLI data at issue in Carpenter is not available to the average person; digital video cameras, both large and undetectably small, certainly are. It is counterproductive that, as more and more people are placing cameras on their houses and businesses, and even filming unpleasant or violent interpersonal interactions on their cellphones, the concurrence

would make pole cameras less available to law enforcement.

An appellate court must faithfully apply the law as set out by the Supreme Court. The concurrence violates that rule. The concurrence also assumes the policymaking role of elected officials. It is the role of legislatures, which are more flexible, adaptable, and responsive than courts, to regulate swiftly evolving technologies, as many already have. See, e.g., A. Jarmanning, Boston Bans Use of Facial Recognition Technology. It's the 2nd-Largest City To Do So, WBUR (June 24, 2020), https://www.wbur.org/news/2020/06/23/boston-facial-recognition-ban.

IV.

Bucci is scarcely over a decade old, and the concurrence would have this circuit come out the opposite way on indistinguishable facts, despite the fact that Carpenter certainly does not require this outcome. Stare decisis ("to stand by things decided") "requires us, absent special circumstances, to treat like cases alike." June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment). It is "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." Id. (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)). This is to ensure that "decisions reflect the 'evenhanded' and 'consistent development of legal principles,' not just shifts in the [c]ourt's personnel." Collins v. Yellen, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring in part and concurring in the judgment) (quoting Payne v. Tennessee, 501 U.S. 808, 827

(1991)). It is true that the court sitting en banc may depart from principles of stare decisis. See Arecibo Cmty. Health Care, Inc. v. Comm. of P.R., 270 F.3d 17, 23 (1st Cir. 2001). But the concurrence's reasoning unnecessarily injects instability into our circuit's law. The concurrence is challenging and undermining the Supreme Court cases on which Bucci rested. Those cases, as described before, are sound. Only the Supreme Court can overrule those cases.

We are not the only federal court to confront whether Carpenter changed the constitutionality of pole cameras. The Sixth Circuit concluded that it did not. See United States v. May-Shaw, 955 F.3d 563, 567 (6th Cir. 2020) (holding that the argument that "long-term video surveillance of a home's curtilage is problematic under the Fourth Amendment" "is foreclosed by this circuit's case law, which has consistently held that this type of warrantless surveillance does not violate the Fourth Amendment"), cert. denied, 141 S. Ct. 2763 (2021); see also Hay, 2022 WL 1421562, at *3, *7 (finding that "pole camera surveillance . . . does not present the same privacy concerns that animated the majority in Carpenter and the concurrences in Jones," and rejecting the argument that Carpenter overruled Tenth Circuit precedent permitting warrantless pole cameras). The Seventh Circuit considered as a matter of first impression whether Carpenter rendered the use of three pole cameras capturing a total of eighteen months of footage a search and found that it did not. See Tuggle, 4 F.4th at 511 ("[T]he government's use of a technology in public use, while occupying a place it was lawfully entitled to be, to observe plainly visible happenings, did not run afoul of the Fourth Amendment."). We should follow our sister circuits'

lead. Carpenter plainly does not require the concurrence's reasoning and provides no basis for ignoring established principles of stare decisis.

It is clear in this case that the defendants did not have a subjective expectation of privacy, nor would it have been objectively reasonable for them to. If new constitutional durational limits are to be set on the use of long-used, widely-available technology that detects only what is plainly in the public view, it is for the Supreme Court to set those limits.

V.

We concur in the reversal of the district court's grant of the motions to suppress.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO. 3:18-30001-WGY
v.	)	
NIA MOORE-BUSH and DAPHNE MOORE,	)	
Defendants.	)	

YOUNG, D.J. June 4, 2019

AMENDED MEMORANDUM AND ORDER[*]

I. INTRODUCTION

Casual observations of a person's forays in and out of her home do not usually fall within the Fourth Amendment's protections. Here, the defendants ask the Court to consider whether a precise video log of the whole of their travels in and out of their home over the course of eight months, created by a camera affixed to a utility pole that could also read the license plates of their guests, raises Fourth Amendment concerns. After a thorough analysis of the parties' arguments and recent Supreme Court authority, the Court rules

[*] This amended memorandum and order deletes a superfluous word in footnote 5 and corrects a citation in section IV.B.2.

that it does. Accordingly, the Court ALLOWS the defendants' motions to suppress, ECF Nos. 326, 358.

II. BACKGROUND

A. Procedural History

A federal grand jury indicted defendant Nia Moore-Bush ("Moore-Bush") on January 11, 2018. ECF No. 3. Almost a year later, on December 20, 2018, the grand jury returned a superseding indictment naming defendant Daphne Moore ("Moore"), Moore-Bush's mother, as well. ECF No. 206. Moore and Moore- Bush moved on April 22 and May 2, 2019, respectively, to suppress evidence that the Government collected using a video camera installed on a utility pole across the street from Moore's house (the "Pole Camera").[1] See Def. Daphne Moore's Mot. Suppress ("Moore Mot."), ECF No. 326; Def. Nia Moore-Bush's Mot. & Mem. Suppress ("Moore-Bush Mot."), ECF No. 358. Moore-Bush and Moore argue that the Government's use of the Pole Camera constituted a search under the Fourth Amendment to the United States Constitution. See generally Moore Mot.; Moore-Bush Mot. The Government opposed the motions to suppress on May 6, 2019. Government's Opp'n Defs.' Mots. Suppress Pole Camera Evidence ("Gov't Opp'n"), ECF No. 367.

On March 13, the Court heard oral argument on the motion and took it under advisement. Electronic Clerk's Notes, ECF No. 396. For the

[1] Defendant Oscar Rosario also moved to suppress the Pole Camera's video, ECF Nos. 321 & 332, but he pled guilty on May 13, 2019, thereby obviating resolution of his motion, ECF No. 393.

following reasons, the Court ALLOWS the motions to suppress.

B. Facts

The Court draws the facts from the parties' undisputed statements at the motion hearing and in their briefing.

The Government installed the Pole Camera on a utility pole across the street from Moore's house, located at 120 Hadley Street, Springfield, Massachusetts. Gov't Opp'n 1. The Pole Camera captured video of, but not audio from, events occurring near the exterior of Moore's house for approximately eight months. Gov't Opp'n 2; Tr. 15:4, ECF No. 414. During this time, Moore-Bush resided in Moore's house. Gov't Opp'n 1.

The Pole Camera surveilled the driveway and part of the front of Moore's house. Tr. 34:13-15; Gov't Opp'n 2, 4. A tree partially obscured its view. Gov't Opp'n 2. Although the Pole Camera could zoom in so as to permit law enforcement officers to read license plates, it could not peer inside windows. Tr. 26:5-22. Law enforcement officers also could pan and tilt the camera. Gov't Opp'n 3. Additionally, law enforcement officers could operate the Pole Camera's zoom feature remotely. Tr. 13:19-14:14. The Pole Camera produced a digitized recording that the Government could search. Tr. 16:2-16.

Although the Government has not stated the exact nature of the evidence that it seeks to admit from the Pole Camera, the parties assume that the Government will introduce video, much of it the Pole Camera recorded well into its eight-month existence. Tr. 20:5-23, 35:1-14.

III. LEGAL FRAMEWORK

Moore-Bush and Moore argue that the Pole Camera's eight-month video log of Moore's house constitutes an unconstitutional search. Moore-Bush Mot. 1; Moore Mot. 1.

The Fourth Amendment to the United States Constitution guarantees:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Government does not justify its use of the Pole Camera with a warrant or probable cause. See generally Gov't Opp'n. Instead, it insists that its use of the Pole Camera does not amount to a search. Id. at 2. Consequently, as the parties have presented this case, the use of the Pole Camera violates the Fourth Amendment if its operation constitutes a search. Although there are some exceptions -- none of which the Government invokes here[2] -- courts exclude

[2] For instance, the Government might have argued that the good faith exception to the exclusionary rule applies to its use of the Pole Cameras. See Davis v. United States, 564 U.S. 229, 239 (2011) (holding that the exclusionary rule does not apply "when the police conduct a search in objectively reasonable reliance on binding judicial precedent"). It did not. Accordingly, the Government did not carry its "'heavy burden' of proving that the good-faith exception applies." See United States v. Wurie, 728 F.3d 1, 13 (1st Cir. 2013) (quoting United States v. Syphers, 426 F.3d 461, 468 (1st Cir. 2005)), aff'd sub nom. Riley v. California, 573 U.S. 373 (2014). The Government thereby

evidence that federal officers obtain using a search that violates the Fourth Amendment. See United States v. Dedrick, 840 F. Supp. 2d 482, 492 (D. Mass. 2012) (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

The Supreme Court has formulated two tests for analyzing whether the Government has conducted a Fourth Amendment "search." See United States v. Bain, 874 F.3d 1, 11–12 (1st Cir. 2017). For one, "[u]nder the common law trespassory test," a Fourth Amendment search occurs "[w]hen the Government obtains information by physically intruding on persons, houses, papers, or effects." Id. at 12 (quoting Florida v. Jardines, 569 U.S. 1, 5 (2013)). In this case, neither Moore-Bush nor Moore assert that a search occurred under the common law trespassory test. See generally Moore-Bush Mot.; Moore Mot.

Instead, they rely on the "reasonable expectations test." See id.; Bain, 874 F.3d at 12. Under this test, "a search occurs whenever the government intrudes upon any place in which a person has a 'reasonable expectation of privacy.'" Bain, 874 F.3d at 12 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). To show that a search occurred under this test, then, each defendant has the burden of showing that (1) she "exhibited an actual, subjective expectation of privacy" and (2) her "subjective expectation is one that society is prepared to recognize as objectively reasonable." See United States v. Morel, 922 F.3d 1, 8 (1st Cir. 2019) (quoting United States v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009); United States v. Stokes, 829 F.3d 47, 51 (1st Cir. 2016)).

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waived that argument. See United States v. Ramirez-Rivera, 800 F.3d 1, 32 (1st Cir. 2015).

Although the reasonable expectations test represents a relatively recent doctrinal innovation, the Supreme Court has taught that the public's understanding of unreasonable searches at the Fourth Amendment's framing informs the test's application. See Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)). The Supreme Court thus has identified two "basic guideposts" from history: "First, that the [Fourth] Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" Id. (quoting Boyd v. United States, 116 U.S. 616, 630 (1886); United States v. Di Re, 332 U.S. 581, 595 (1948)). These timeless guideposts point the Court on its way towards resolving this motion.

IV. ANALYSIS

The Court ALLOWS Moore-Bush and Moore's motion to suppress because they have exhibited an actual, subjective expectation of privacy that society recognizes as objectively reasonable. See Morel, 922 F.3d at 8. First, the Court infers from their choice of neighborhood that they subjectively expected that their and their houseguests' comings and goings over the course of eight months would not be surreptitiously surveilled. See Moore Mot. 7. Second, the Court rules that the Pole Cameras collected information that permitted the Government to peer into Moore-Bush and Moore's private lives and constitutionally protected associations in an objectively unreasonable manner. See United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

A. Subjective Expectation of Privacy

Moore-Bush and Moore have established that they had a subjective expectation of privacy in their and their guests' comings and goings from Moore's house.

As a preliminary matter, the Government suggests that, to establish this prong of the test, Moore-Bush and Moore needed to file affidavits or otherwise testify to their expectations. See Gov't Opp'n 4 (citing United States v. Ruth, 65 F.3d 599, 604-05 (7th Cir. 1995)). The First Circuit requires nothing of the sort: In United States v. Rheault, the First Circuit rejected a similar suggestion and instead inferred a subjective expectation of privacy from the defendant's actions. 561 F.3d at 59. The Court thus analyzes whether Moore-Bush and Moore have manifested a subjective expectation of privacy through the relevant actions that they took.

Moore-Bush and Moore contend that they have established a subjective expectation of privacy by choosing to live in a quiet, residential neighborhood in a house obstructed by a large tree. Moore Mot. 7.[3] The Government maintains that this amounts to insufficient "conjecture" and "speculation." Gov't

[3] The Court imputes Moore's expectations to Moore-Bush. See Minnesota v. Olson, 495 U.S. 91, 99–100 (1990) (observing that "an adult daughter temporarily living in the home of her parents" has an expectation of privacy in her parents' home). In opposing the motion, it seems that the Government does so, too. See Gov't Opp'n 4 (stating "by pointing out just the tree, Defendants effectively acknowledge that there are no fences, shrubs, or other constructions that suggest that the inhabitants meant to shield the front of the house or driveway from public view" but then stating that "[t]he Defendant, however, uses the reference . . . to the solitary tree") (emphasis added).

Opp'n 4-5. Further, the Government tries to turn Moore-Bush and Moore's tree argument around on them: It insists that the tree "miminiz[ed] any potential intrusion." Id. at 5.

The Government sidesteps Moore-Bush and Moore's asserted privacy interest: it focuses on whether Moore-Bush and Moore had a broader privacy interest in the front of their house. See Gov't Opp'n 4. Construed broadly, perhaps they did not. See California v. Ciraolo, 476 U.S. 207, 213 (1986) (observing that law enforcement officers need not "shield their eyes when passing by a home on public thoroughfares").

Yet that is not the narrower privacy interest that Moore- Bush and Moore assert here. Instead, Moore-Bush and Moore claim that they expected privacy in the whole of their movements over the course of eight months from continuous video recording with magnification and logging features in the front of their house. Moore Mot. 9-10; Moore-Bush Mot. 5. The Court infers from Moore-Bush and Moore's choice of neighborhood and home within it that they did not subjectively expect to be surreptitiously surveilled with meticulous precision each and every time they or a visitor came or went from their home.

Therefore, the Court rules that Moore-Bush and Moore meet the first prong of the reasonable expectations test. See United States v. Childs, Crim. A. No. 06-10339-DPW, 2008 WL 941779, at *7 (D. Mass. Apr. 4, 2008) (Woodlock, J.) (inferring from "circumstantial evidence" that the defendant "had a subjective expectation of privacy").

B. Objectively Reasonable Expectation of Privacy

Moore-Bush and Moore's expectation of privacy "is one that society is prepared to recognize as objectively reasonable." See Morel, 922 F.3d at 8.

The First Circuit previously approved the use of a pole camera in United States v. Bucci, 582 F.3d 108, 116-17 (1st Cir. 2009). Bucci, however, no longer binds this Court in light of subsequent Supreme Court precedent undermining it. See Carpenter, 138 S. Ct. at 2217-18. Consequently, this Court considers the issue as matter of first impression and rules that the surveillance conducted here exceeds the objectively reasonable expectation of privacy of the public at the time of the Fourth Amendment's framing. See id. at 2214.

1. Bucci Does Not Control

Moore-Bush and Moore offer two reasons why Bucci ought not dictate the outcome here. First, they claim that Bucci's holding is limited to the camera that the Government used there, which had fewer capabilities than this Pole Camera. Moore-Bush Mot. 2-3; Moore Mot. 7. Second, they argue that Carpenter changed the law and requires a different result. Moore-Bush Mot. 3-6; Moore Mot. 8-12. The Court disagrees with Moore-Bush and Moore's first contention and agrees with their second.

True, the First Circuit noted some factual distinctions between the camera in Bucci and the Pole Camera here. Although the camera in Bucci pointed at the front of a house for eight months, law enforcement officers lacked the capability to control the camera remotely "without being physically at the scene."[4] 582 F.3d at 116. That distinction is too thin

[4] It is unclear whether the law enforcement officers in Bucci could pan or zoom that camera when physically at the

to distinguish Bucci from this case, however, especially in light of the legal rules that the First Circuit applied. In Bucci, the First Circuit reasoned that the "legal principle" that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public" disposed of the matter. Id. at 116-17 (citing Katz, 389 U.S. at 351). If that principle remains an accurate depiction of the law, Moore and Moore-Bush lack an objectively reasonable expectation of privacy in the activities just outside their home, regardless of the camera's unique capabilities.

The Court reads Carpenter, however, to cabin -- if not repudiate -- that principle. There, the Supreme Court stated that: "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" Carpenter, 138 S. Ct. at 2217 (quoting Katz, 389 U.S. at 351–52). What's more, the Supreme Court recognized that long-term tracking of a person's movements "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" Id. (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)); see also United States v. Garcia-Gonzalez, Crim. A. No. 14- 10296-LTS, 2015 WL 5145537, at *9 (D. Mass. Sept. 1, 2015) (Sorokin, J.) (observing that Justices Alito and Sotomayor's concurrences in Jones "undermine Bucci's legal [and] analytic foundations"). Additionally, the Supreme

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scene. 582 F.3d at 116.

Court distinguished the tracking involved in Carpenter from historical surveillance methods on the ground that the tracking produced a log that law enforcement officers could use to "travel back in time to retrace a person's whereabouts" whereas "a dearth of records and the frailties of recollection" limited surveillance in the past. 138 S. Ct. at 2218.

The Government protests that the Supreme Court characterized its holding in Carpenter as "narrow" and thus limited to the technology addressed in that case, cell-site location information. Gov't Opp'n 6 (quoting Carpenter, 138 S. Ct. at 2217, 2219). The Court, however, does not ground its decision on Carpenter's holding but instead on its necessary reasoning; that is, a person does have some objectively reasonable expectations of privacy when in spaces visible to the public. See 138 S. Ct. at 2217. The Court cannot reconcile that reasoning with Bucci's blanket statement that no such expectations exist. See 582 F.3d at 117.[5]

The Government also brings to this Court's attention two out-of-circuit district courts' rejections

[5] One possible route to reconcile the First Circuit's pronouncement in Bucci with the Supreme Court's reasoning in Carpenter would be to distinguish between real-time observations of the front of a house and a video log recording them. See Carpenter, 138 S. Ct. at 2217; Bucci, 582 F.3d at 116-17. The First Circuit, however, did not specify whether law enforcement officers monitored the camera used in Bucci contemporaneously or reviewed digitized recordings afterwards. See Bucci, 582 F.3d at 116-17. The Court explains in section IV.B.2 why, at least, the latter scenario sparks severe Fourth -- and First -- Amendment concerns. The Court therefore reads Carpenter to overrule Bucci to the extent that Bucci sanctioned constant law enforcement video logging of activities outside a home for eight months. See Carpenter, 138 S. Ct. at 2217; Bucci, 582 F.3d at 116-17.

of post-Carpenter challenges to pole cameras. Gov't Opp'n 6 (citing United States v. Kay, No. 17-CR-16, 2018 WL 3995902 (E.D. Wis. Aug. 21, 2018); United States v. Kubasiak, No. 18-CR-120, 2018 WL 6164346 (E.D. Wis. Aug. 23, 2018), report and recommendation adopted 2018 WL 4846761 (Oct. 5, 2018)). Nevertheless, in each of those cases -- and the two others that this Court located -- the district courts premised their approval of the pole cameras in large part on the claim that those cameras were "security cameras." See Kubasiak, 2018 WL 6164346, at *4 (basing its reasoning on the Supreme Court's emphasis in Carpenter that it did not "call into question conventional surveillance techniques and tools, such as security cameras" (quoting 138 S. Ct. at 2220)); Kay, 2018 WL 3995902, at *2 (same); United States v. Tirado, No. 16-CR-168, 2018 WL 3995901, at *2 (E.D. Wis. Aug. 21, 2018) (same); United States v. Tuggle, No. 16-CR-20070-JES-JEH, 2018 WL 3631881, at *3 (C.D. Ill. July 31, 2018) (same).

This Pole Camera is not a security camera by any stretch of the imagination. As relevant here, Merriam-Webster defines security as "something that secures . . . measures taken to guard against espionage or sabotage, crime, attack, or escape." Security, Merriam-Webster, https://www.merriam-webster.com/dictionary/security (last accessed May 15, 2019); see also Security, Black's Law Dictionary (10th ed. 2014) ("The quality, state, or condition of being secure, esp. from danger or attack."). Law enforcement officers did not install the Pole Camera here "to guard against . . . crime," but to investigate suspects. Indeed, the prototypical security camera exists to monitor a heavily trafficked area or commercial establishment. Security camera

operators often install their cameras in plain view or with warning signs to deter wrongdoers. See, e.g., Commonwealth v. Rivera, 445 Mass. 119, 133-34 (2005) (Cowin, J.) (observing, in a different context, that the defendant should have expected that a "standard security surveillance camera mounted by the store owner in plain view" would record him). The Government hid the Pole Camera out of sight of its targets and does not suggest that it did so to prevent criminal activity. Instead, the Government explained that it used the Pole Camera simply to track suspects' travels, which, standing alone, were not crimes. See Defs.' Exs. Pretrial Mots., Ex. 2 at 132 (describing the installation of Pole Camera and explaining that it "proved to be useful in identifying several vehicles visiting" Moore-Bush, "confirm[ing] when MOORE-BUSH [was] in the Springfield area," and "identifying rental vehicles used by MOORE-BUSH").[6] Accordingly, though Carpenter does not discuss pole cameras, its logic contradicts Bucci's and requires this Court to examine whether the Government's use of the Pole Camera constitutes a search.

2. The Use of the Pole Camera Invaded Moore-Bush and Moore's Objectively Reasonable Expectations of Privacy

In light of the principles that the Supreme Court elucidated in Carpenter, this Court holds that Moore-Bush and Moore had an objectively reasonable expectation of privacy in their and their guests' activities around the front of the house for a

[6] Moore-Bush and Moore manually filed their exhibits, so the exhibits do not appear on the electronic court filing system.

continuous eight-month period. See 138 S. Ct. at 2213-14, 2217-18.

In Garcia-Gonzalez, Judge Sorokin came close to suppressing video from a pole camera similar to the one here on the basis of Jones but ultimately pulled back. 2015 WL 5145537, at *9. Jones addressed whether the Government could surreptitiously attach a location tracking device to a car. 565 U.S. at 402. Although the opinion of the Court invalidated the tracking under the common law trespassory test, Justices Alito and Sotomayor filed concurrences that applied the reasonable expectations test, which, combined, obtained the support of a majority of the justices. 565 U.S. at 413-31. Judge Sorokin noted this apparent Supreme Court majority and observed that extended pole camera surveillance raised more serious concerns than the location tracking in Jones:

> [T]he two concurrences in Jones, emphasized that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Justice Sotomayor remarked that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associates." . . . GPS data provides only the "where" and "how long" of a person's public movements insofar as the person remains close to the monitored vehicle. Long-term around-the-clock monitoring of a residence chronicles and informs the "who, what, when, why, where from, and how long" of a person's

> activities and associations unfolding at the threshold adjoining one's private and public lives.

Garcia-Gonzalez, 2015 WL 5145537, at *8 (quoting Jones, 565 U.S. at 414 (Sotomayor, J., concurring)). Nevertheless, Judge Sorokin viewed himself bound to apply Bucci's reasoning because neither Justice Alito nor Justice Sotomayor spoke for the Supreme Court in Jones. Garcia-Gonzalez, 2015 WL 5145537, at *9.

The Supreme Court's Carpenter decision, however, incorporates the Jones concurrences. See, e.g., Carpenter, 138 S. Ct. at 2215 (quoting with approval Justices Alito and Sotomayor's conclusion that "'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy' -- regardless whether those movements were disclosed to the public at large"); id. at 2217 (quoting Justice Alito's concurrence stating that "[p]rior to the digital age, law enforcement officers 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 2220 (citing Justices Alito and Sotomayor's Jones concurrences that a search occurs when the Government subjects a vehicle to "pervasive tracking" on public roads). As a consequence, this Court interprets Carpenter to apply the Jones concurrences. This Court thus applies the principles from Carpenter and the Jones concurrences to the Pole Camera here.

In the Court's view, three principles from the Jones concurrences and Carpenter dictate the resolution of this motion. First, as Justice Sotomayor points out in Jones, "[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power

to assemble data that reveal private aspects of identity is susceptible to abuse." 565 U.S. at 416.[7] Second, as Chief Justice Roberts observes in Carpenter, technologies that permit law enforcement officers to access and search vast amounts of passively

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[7] The Supreme Court has long instructed magistrates to consider First Amendment values in analyzing whether a warrant's proposed search is reasonable. See Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) (in "determining the reasonableness of a search, state and federal magistrates should be aware that 'unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.'" (quoting Marcus v. Search Warrant, 367 U.S. 717, 729 (1961))). The Fourth Amendment's framers recalled the use of general warrants that the King used to harass and persecute Catholic and Puritan publishers. Stanford v. Texas, 379 U.S. 476, 482 (1965). A line of cases establishes that when a magistrate analyzes a warrant application for expressive material, as opposed to physical contraband such as "weapons or drugs," the magistrate must review the application "with 'scrupulous exactitude.'" New York v. P.J. Video, Inc., 475 U.S. 868, 871 (1986) (quoting Stanford, 379 U.S. at 481–85).

As far as this Court can tell, Jones and Carpenter represent the first cases in which the Supreme Court instructed courts to consider First Amendment values in deciding whether a search occurred at all. See United States v. Sparks, 750 F. Supp. 2d 384, 387 n.5 (D. Mass. 2010) (pre-Jones, rejecting the defendant's arguments that "evidence must be excluded because the government violated his First Amendment right to free association"). Indeed, in Katz, Justice Stewart's opinion for the Supreme Court -- upon which courts seldom now rely in favor of Justice Harlan's concurrence -- takes pains to differentiate the spheres of protection provided by the First and Fourth Amendments. 389 U.S. at 350-51 & n.5. The Court views the addition of First Amendment principles to the Katz reasonable expectations test as a welcome development in Fourth Amendment law. See Rachel Levinson-Waldman, Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public, 66 Emory L.J. 527, 552, 557 (2017); Daniel J. Solove, The First Amendment As Criminal Procedure, 82 N.Y.U. L. Rev. 112, 127-28 (2007).

collected data may "give police access to a category of information otherwise unknowable." See 138 S. Ct. at 2218. Third, as Justice Alito reasons in Jones, "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer-term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U.S. at 430 (citing United States v. Knotts, 460 U.S. 276, 281–82 (1983)).

The surveillance here risks chilling core First Amendment activities. Consider religious dissenters. Surely the public at the time of the Fourth Amendment's framing would be familiar with the dissenting religious groups that objected to the Church of England's practices, such as the Methodists, Pilgrims, Puritans, and Quakers. After Parliament enacted the Act of Uniformity, which compelled all Englishmen to attend Church of England services and criminalized "conduct[ing] or attend[ing} religious gatherings of any other kind," religious dissenters continued to hold their worship gatherings in secret. See Engel v. Vitale, 370 U.S. 421, 432–33 (1962). Many of those gatherings took place in private homes to avoid prosecution -- often unsuccessfully. See id.; John C. English, John Wesley and the Rights of Conscience, 37 J. Church & St. 349, 350, 360 (1995) (noting that early Methodist ministers preached in private houses notwithstanding the risk that magistrates would fine them for violating the Conventicle Act); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 530-31 (1993) (striking down city ordinance outlawing religious practice that took place in secret); Congregation Jeshuat Israel v. Congregation Shearith Israel, 186 F. Supp. 3d 158, 169 (D.R.I. 2016)

(recounting that the first Jewish families to emigrate to the colonies "met to worship at private dwelling houses"), rev'd, 866 F.3d 53 (1st Cir. 2017) (not disturbing this finding of fact). It stands to reason that the public at the time of the amendment's framing would have understood the King's constables to violate their understanding of privacy if they discovered that constables had managed to collect a detailed log of when a home's occupants were inside and when visitors arrived and whom they were.

What's more, people use their homes for all sorts of liaisons. For example, the Government has no business knowing that someone other than the occupant's spouse visited the home late at night when the spouse was away and left early in the morning. See Lawrence v. Texas, 539 U.S. 558, 574 (2003) (reconfirming that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)). Nor does the Government have any business tracking a homeowners' hobbies or regular trips for appointments. Perhaps people would hesitate to have supporters of opposition political parties visit if they knew that the Government might be monitoring their driveway. The continuous video taken by the Pole Camera thus threatens to chill these religious, political, and associational activities. See U.S. Const. amend. I; Jones, 565 U.S. at 416 (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms.").

Moreover, the video from the Pole Camera was not only continuous, but also recorded and digitized.

Thus, even if the Government were to show no contemporaneous interest in these intimate personal details, the Government can go back on a whim and determine a home occupant's routines with to-the-second specificity. See Carpenter, 138 S. Ct. at 2218. This capability distinguishes this surveillance from human surveillance. Humans are imperfect note-takers and not all blessed with photographic memory. See id. The Pole Camera, however, captured every single second that passed over eight months in a digitally searchable form. Information that a law enforcement officer might have ignored at the time as irrelevant to the investigation or mis-recorded no longer prevents the Government's prying eyes from wandering. See id. This power also sets the Pole Camera apart from neighbors; even -- or perhaps especially -- on a residential street, neighbors notice each other's peculiar habits. Yet they would not notice all of their neighbors' habits, especially those activities occurring during traditional working hours or in the dark.

While Jones involved a car on a public road, Justice Alito's conclusion that society reasonably expects to be free from long-term surveillance in public applies with equal force to society's reasonable expectations about the public space in front of a person's home. See 565 U.S. at 430. Indeed, Fourth Amendment doctrine treats the home with due reverence. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). Here, for eight months, the Government monitored every single time that Moore-

Bush and Moore retreated into their home, thereby impairing their freedom to retreat as they pleased.

While the Government neither trespassed onto Moore's home's curtilage nor peeked inside her home, the Court is sensitive to the different expectations people reasonably may have about activities on their driveway and near their front door. Cf. Jardines, 569 U.S. at 7-9 (applying the common law trespassory test to a home's curtilage, limiting the "implicit license" permitting visitors to approach a home's front door). Although these activities, taken one by one, may not give rise to a reasonable expectation of privacy, as on the public roads, the Court aggregates their sum total for its analysis. In Jones, a majority of justices reasoned that law enforcement officers conducted a search when they surveilled a car for four weeks. 565 U.S. at 413-14 (Sotomayor, J., concurring). Here, law enforcement officers surveilled the home for eight months. A home occupant would not reasonably expect that. While the law does not "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares," Ciraolo, 476 U.S. at 213 (emphasis added), it does forbid the intrusive, constant surveillance here.

The Government counters that it has long used pole camera technology to surveil suspects at home. This Pole Camera, however, is unique in this Court's experience. As discussed above, this Pole Camera did not require monitoring in real time because the Pole Camera created a digitally searchable log. The Government provides no evidence that pole cameras have long had this capability. Moreover, the Court observes that in three of the four post-Carpenter cases and in Bucci the Government could not magnify images without traveling to the scene. See Kay, 2018 WL 3995902, at *2; Tirado, 2018 WL 3995901, at *2;

Tuggle, 2018 WL 3631881, at *3; Bucci, 582 F.3d at 116. Law enforcement officers could also pan and tilt this camera. The ability to take all these action from afar, potentially using a cellphone or tablet computer, seems to be a new development. Compare Gov't Opp'n 3 & n.1 with Moore Mot. 6.

Therefore, the Court holds that the Pole Camera, as used here, does not constitute a "conventional security technique[.]" Carpenter, 138 S. Ct. at 2220. Accordingly, Moore-Bush and Moore meet the second prong of the reasonable expectations test.[8]

V. CONCLUSION

In sum, this Court does not rule that the use of a pole camera necessarily constitutes a search. Instead, the Court rules narrowly that several aspects

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[8] While beyond the record here, it is worth noting that "[p]olice surveillance equipment (including both dashboard cameras and body cameras) has become both cheaper and more effective . . . ." United States v. Paxton, 848 F.3d 803, 812 (7th Cir. 2017); see also Farhad Manjoo, San Francisco Is Right: Facial Recognition Must Be Put On Hold, N.Y. Times (May 16, 2019), https://www.nytimes.com/2019/05/16/opinion/columnists/facial-recognition-ban-privacy.html (noting, among other things, that cameras "keep getting cheaper and -- in ways both amazing and alarming -- they are getting smarter"); Jones, 565 U.S. at 415-16 (Sotomayor, J., concurring) (observing that "because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." (quoting Illinois v. Lidster, 540 U.S. 419, 426 (2004)). Although this Court's decision does not rely on this trend, it appears beyond serious debate that the costs of pole camera surveillance have shrunk significantly, thereby tilting any cost-benefit calculation that the Government might perform in favor of using that technique.

of the Government's use of this Pole Camera does. Those aspects are the Pole Camera's (1) continuous video recording for approximately eight months; (2) focus on the driveway and front of the house; (3) ability to zoom in so close that it can read license plate numbers; and (4) creation of a digitally searchable log. Taken together, these features permit the Government to piece together intimate details of a suspect's life. See Carpenter, 138 S. Ct. at 2217 (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)).

Therefore, the Court ALLOWS Moore-Bush and Moore's motions to suppress evidence obtained directly from the Pole Camera, ECF Nos. 326, 358. Although Moore-Bush and Moore say that the Pole Camera may have led to the discovery of other tainted evidence, they do not identify that evidence for the Court. The Court thus takes no action with regard to evidence collected indirectly from the Pole Camera.[9]

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

[9] A preliminary review of the record before this Court indicates that the independent source exception may preclude suppression of any other evidence. See United States v. Flores, 888 F.3d 537, 546 (1st Cir. 2018) (providing that a court ought not suppress evidence when the Government decided to obtain a warrant "independent" of constitutional violations and if the warrant, excised of knowledge obtained from those violations, otherwise establishes probable cause) (citing United States v. Murray, 487 U.S. 533, 542 (1988); United States v. Dessesaure, 429 F.3d 359, 367 (1st Cir. 2005)).

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO. 3:18-30001-WGY
v.	)	
NIA MOORE-BUSH and DAPHNE MOORE,	)	
Defendants.	)	

YOUNG, D.J. June 5, 2019

ORDER

After a careful review of the Government's motion for reconsideration, ECF No. 423, the Court DENIES the Government's motion. Though the Government now seeks to suggest that defendants Nia Moore-Bush and Daphne Moore lacked a subjective expectation of privacy because the tree in front of their home lacked leaves during much of the surveillance, this new argument flatly contradicts the Government's earlier assertion that "it is clear from the Affidavit that the tree partially obstructed the view of the pole camera across the street, thus actually minimizing any potential intrusion." Compare Mot. Recons. Mem. & Order & Continue Trial Date Allow Recons. ("Mot. Recons.") 6 with Government's Opp'n Defs.' Mot Suppress Pole Camera Evid. 5, ECF No. 367.

Further, the Government neglects to explain to the Court why the Court ought excuse the Government's waiver of its argument that the good faith exception to the exclusionary rule applies. Compare Am. Mem. & Order 4-5 n.2, ECF No. 422 with Mot. Recons. 7-8. The Court concludes that the Government's remaining arguments lack merit.

Accordingly, the Court DENIES the Court DENIES the Government's motion, ECF No. 423. There shall be no continuance.

SO ORDERED.

William G. Young

WILLIAM G. YOUNG
DISTRICT JUDGE

APPENDIX D

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,

Defendant, Appellee.

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Howard, Chief Judge,

Lynch and Barron, Circuit Judges.

Randall E. Kromm, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellant.

Judith H. Mizner, Assistant Federal Public Defender, for appellee Nia Moore-Bush, a/k/a Nia Dinzey.

Linda J. Thompson, with whom John M. Thompson and Thompson & Thompson, P.C. were on brief, for appellee Daphne Moore.

Matthew R. Segal, Jessie J. Rossman, Kristin M. Mulvey, American Civil Liberties Union Foundation of Massachusetts, Nathan Freed Wessler, Brett Max Kaufman, and American Civil Liberties Union Foundation on brief for American Civil Liberties Union and American Civil Liberties Union of Massachusetts, amici curiae.

Trisha B. Anderson, Alexander A. Berengaut, Jadzia Pierce, and Covington & Burling LLP on brief for Center for Democracy & Technology, amicus curiae.

June 16, 2020

LYNCH, **Circuit Judge**. This appeal by the prosecution raises the question of whether the Supreme Court's opinion in Carpenter v. United States, 138 S. Ct. 2206 (2018), a cell phone location

automatic tracking technology case, provides a basis for departing from otherwise binding and factually indistinguishable First Circuit precedent in United States v. Bucci, 582 F.3d 108 (1st Cir. 2009), and Supreme Court precedent, including Katz v. United States, 389 U.S. 347 (1967), on which Bucci is based. In departing from that precedent and suppressing evidence obtained from a pole camera, the district court erred by violating the doctrine of stare decisis.

Under the doctrine of stare decisis, all lower federal courts must follow the commands of the Supreme Court, and only the Supreme Court may reverse its prior precedent. The Court in Carpenter was concerned with the extent of the third-party exception to the Fourth Amendment law of reasonable expectation of privacy and not with the in-public-view doctrine spelled out in Katz and involved in this case.

Carpenter was explicit: (1) its opinion was a "narrow" one, (2) it does not "call into question conventional surveillance techniques and tools," and (3) such conventional technologies include "security cameras." Carpenter, 138 S. Ct. at 2220. Pole cameras are a conventional surveillance technique and are easily thought to be a species of surveillance security cameras. Thus, Carpenter, by its explicit terms, cannot be used to overrule Bucci.

The district court erred for other separate reasons as well. The Bucci decision firmly rooted its analysis in language from previous Supreme Court decisions, including Katz, Smith v. Maryland, 442 U.S. 735 (1979), California v. Ciraolo, 476 U.S. 207 (1986), and Kyllo v. United States, 533 U.S. 27 (2001). Bucci, 582 F.3d at 116-17. The Court in Carpenter was clear that its decision does not call into question the

principles Bucci relied on from those cases. Carpenter, 138 S. Ct. at 2213-19.

The district court also transgressed a fundamental Fourth Amendment doctrine not revoked by Carpenter, that what one knowingly exposes to public view does not invoke reasonable expectations of privacy protected by the Fourth Amendment. This understanding, as explained by Justice Scalia in Kyllo, was part of the original understanding of the Fourth Amendment at the time of its enactment. Kyllo, 533 U.S. at 31-32.

Affirming the district court's order would mean violating the law of the circuit doctrine, that "newly constituted panels in a multi-panel circuit court are bound by prior panel decisions that are closely on point." San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010). Although there are two exceptions to the doctrine, "their incidence is hen's-teeth-rare." Id. And neither exception is applicable here.

The argument made in support of the district court's suppression order is that the logic of the opinion in Carpenter should be extended to other technologies and other Fourth Amendment doctrines, and this extension provides a basis to overturn this circuit's earlier precedent in Bucci. Nothing in Carpenter's stated "narrow" analysis triggers the rare second exception to the law of the circuit doctrine. Carpenter, 138 S. Ct. at 2220.

The defendants thus ask us to violate the vertical rule of stare decisis, that all lower federal courts must follow the commands of the Supreme Court and that only the Supreme Court may reverse its prior precedent, and the law of the circuit, binding

courts to follow circuit precedent. See Bryan A. Garner et al., The Law of Judicial Precedent 21-43 (2016). Affirming the district court would also violate the original understanding of the Fourth Amendment.

I.

A. The Investigation and Indictments

The following facts are undisputed. Following a tip from a cooperating witness ("CW"), the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") began investigating defendant Nia Moore-Bush in January 2017 for the unlicensed sale of firearms. About a month into the investigation, in February 2017, Moore-Bush and her then-boyfriend, later-husband, Dinelson Dinzey moved in with Moore-Bush's mother, defendant Daphne Moore, at 120 Hadley Street in Springfield, Massachusetts, in a quiet residential neighborhood. At the time, Moore was a lawyer and Assistant Clerk Magistrate for the Hampden County, Massachusetts, Superior Court. Moore-Bush and Dinzey lived at the property "off and on" for the period relevant to this appeal.

The government had evidence that 120 Hadley Street, Moore's property, was the site of illegal activity even before installation of the pole camera. For example, on May 5, 2017, the CW, acting on the government's orders, wore a recording device and purchased four guns illegally from Moore-Bush, through Dinzey, at that location.

Approximately two weeks later, on or about May 17, 2017, ATF installed a camera towards the top of the public utility pole across the public street from the unfenced-in house at 120 Hadley Street (the "pole camera"). The record is silent as to whether the camera was visible. The camera was used until mid-

January 2018, when Moore-Bush and Dinzey were arrested. Investigators did not seek any judicial authorization to install the pole camera and did not need to do so under the law at that time in May of 2017. The images from the pole camera captured one side of the front of Moore's house. The camera did not capture the house's front door; it did show the area immediately in front of the side door, the attached garage, the driveway to the garage, part of the lawn, and a portion of the public street in front of the house. A tree in the front yard, when it had leaves, partially obstructed the camera's view.

The government also from time to time had investigators conduct physical surveillance of these same areas, and presumably more areas, from the public street. Those surveillance officers could see everything the pole camera could see, and even more. The tree, when it had leaves, did not obstruct their view. The record is silent as to whether the officers on the street used cameras, binoculars, or the like, but during physical surveillance they were often close enough to observe and record license plate numbers of vehicles in the driveway.

The district court declined to hold an evidentiary hearing on the technical capabilities of the pole camera; nonetheless, the following is established by the record. The pole camera operated 24/7. Officers could access the video feed either live or via recordings. When they were watching the pole camera's live stream, but only then, officers could control the camera's zoom, pan, and tilt features remotely, akin to what an observer on the street could see with or without visual aids. The zoom feature was powerful enough for officers observing live to read the license plates on cars parked in the driveway. The

camera's resolution was much lower at night in the darkness. Regardless of the zoom feature, the pole camera could not capture anything happening inside of the house. Everything it captured was visible to a passerby on the street. The pole camera did not and could not capture audio, and so captured no sound, even sounds which could be heard on the street. The record does not indicate what the pole camera looked like or its manufacturer.

The camera did not cover or capture all aspects of life at 120 Hadley Street. According to an affidavit from a government investigator appended to one of the wiretap applications, the pole camera footage was only of limited use because it captured just a portion of the front of the house, was partially obstructed by a tree, and had to be monitored live in order to use the zoom feature to see faces, license plates, and other details clearly.

The government used different investigative tools over time to investigate Moore-Bush and those thought to be co-conspirators at this location, including using a CW and having officers conduct physical surveillance of the property. Warrants were obtained, based in part on the pole camera evidence. Pursuant to warrants, law enforcement tracked suspects' locations using cell phone location data. Pursuant to warrants, investigators mounted GPS trackers on suspects' vehicles. Pursuant to a warrant, officers searched the private contents of Dinzey's Facebook account. Pursuant to court orders, officers installed pen registers and trap and trace devices on several cell phones. They received judicial authorization to wiretap several phones. They also listened to consensually recorded jail calls made by Moore's long-time romantic partner, who they

believed was also involved in illegal activities; looked through discarded trash; and subpoenaed financial and other records.

The pole camera recorded useful evidence throughout its duration. The record shows that officers included evidence from the pole camera, along with many other pieces of evidence, in successful wiretap and search warrant applications starting in July 2017 and continuing throughout the fall and winter. This usefulness explains the eight-month duration of the use of the camera.

By the end of 2017, the government was prepared to bring charges that Moore-Bush and Dinzey were trafficking narcotics from Springfield to Vermont, where they would exchange drugs for cash, firearms, and other valuables. A federal grand jury indicted Moore-Bush, Dinzey, and three others from Vermont as co-conspirators, but not the mother Moore, on January 11, 2018, for conspiracy to distribute and possess with intent to distribute heroin and twenty-eight grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B)(iii). Moore-Bush and Dinzey were arrested the following day. The pole camera, which at this point had been up for about eight months, was removed soon after her arrest, in "mid-January 2018."

Over the course of 2018, the government gathered evidence that Moore was involved in her daughter's drug trafficking scheme, in part based on evidence that Moore-Bush was depositing cash from her drug sales into bank accounts in Massachusetts and Vermont held by Moore in trust for Moore-Bush. Almost a year after the original indictment, on December 20, 2018, the grand jury returned a

superseding indictment naming Moore-Bush,[1] Dinzey, the three Vermont co-conspirators, and adding three other co-conspirators and Moore, Moore-Bush's mother.[2]

Moore was charged with one count of conspiracy to distribute and possess with intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. § 846 (Count One); one count of distribution and possession with intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. § 841(a)(1) on November 17, 2017 (Count Three); one count of money laundering conspiracy in financial transactions in Hampden County, Massachusetts, Washington County, Vermont, and elsewhere, in violation of 18 U.S.C. § 1956(h) (Count Eight); multiple counts of money laundering in those same locations, in violation of 18 U.S.C. § 1956(a)(1) with her daughter at T.D. Bank (Counts Fourteen through Nineteen); one count of making false

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[1] Moore-Bush was charged with one count of conspiracy to distribute and possess with intent to distribute heroin, cocaine, and 280 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(iii) (Count One); five counts of distribution and/or possession with intent to distribute narcotics, in violation of 21 U.S.C. § 841(a)(1) (Counts Two through Six); two counts of money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Counts Seven and Eight); seven counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1) (Counts Eleven and Fourteen through Nineteen); one count of conspiracy to deal firearms without a license, in violation of 18 U.S.C. § 371 (Count Twenty); two counts of dealing firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A) (Counts Twenty-One and Twenty-Two); and one count of aiding and abetting the possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 2 (Count Twenty-Three).

[2] The superseding indictment also removed one of the original Vermont co-conspirators.

statements to federal agents around January 12, 2018, in violation of 18 U.S.C. § 1001 (Count Twenty-Four); and a drug forfeiture charge.

B. The Motions to Suppress and District Court Opinion

On April 22, 2019, Moore moved to suppress the pole camera evidence and the fruits of that evidence. Moore-Bush filed a very similar motion on May 2, 2019. The motions argued that the government's use of the pole camera was a search under the Fourth Amendment to the United States Constitution that required judicial authorization. They argued they had both subjective and objectively reasonable expectations of privacy in "the whole of [their] physical movements in and out of [their] home for a period of eight months."[3] They argued the entire recording over the eight months was a search, and they did not attempt to define what period of time the government might legally have recorded them, if any.

Moore-Bush and Moore acknowledged that the Bucci decision from this circuit upheld the constitutionality of a pole camera that also operated for eight months. They argued that Bucci was no longer controlling precedent because "[t]he search and seizure landscape, particularly regarding the scope of individual privacy rights, has changed considerably since Bucci was decided." In particular, they pointed to the Supreme Court case Carpenter v. United

[3] They did not argue that the government had "physically intrud[ed]" onto their property under the "trespass" theory of Fourth Amendment searches. See Florida v. Jardines, 569 U.S. 1, 5 (2013). Indeed, the pole on which the camera was installed was a public utility pole across the street from Moore's home and not on her property.

States. They also cited Florida v. Jardines, 569 U.S. 1 (2013), and United States v. Jones, 565 U.S. 400 (2012). They did not argue that the good faith exception could not apply or that probable cause did not exist.

The government opposed the motions to suppress on May 6, 2019, addressing its arguments to the grounds Moore-Bush and Moore asserted in their motions. It argued that neither defendant had shown enough to support a finding of a subjective expectation of privacy. Further, it argued that Bucci was controlling and Bucci directly foreclosed any argument that Moore-Bush or Moore had an objectively reasonable expectation of privacy in the front of their home. It argued Carpenter did not impact, much less overrule, Bucci because Carpenter was a "narrow" decision about cell-site location information that did not "call into question conventional surveillance techniques and tools, such as security cameras." Carpenter, 138 S. Ct. at 2220. And the government argued Jardines and Jones could not overrule Bucci because those cases primarily dealt with physical trespass, which is not at issue in this case. The government did not argue at any time that probable cause existed for either the installation of the pole camera or its eight-month duration. In its opposition, the government did not raise the good faith exception to argue that, regardless, the evidence could not be suppressed.

The district court heard oral argument on the motions on March 13, 2019. On June 4, 2019, it released a memorandum and order granting Moore-

Bush and Moore's motions to suppress.[4] In its order, the court found that both defendants subjectively "expected privacy in the whole of their movements over the course of eight months from continuous video recording with magnification and logging features in the front of their house." The court held that defendants' direct and imputed subjective privacy interests were "infer[red]" from their choice to live in a home in a quiet suburban neighborhood. The court reasoned that persons who live in quiet suburban neighborhoods have greater privacy interests than persons who live in other neighborhoods.

The court held that Bucci was not controlling because of the Supreme Court's decision in Carpenter, which it found freed it to reevaluate the issue of whether warrantless pole camera surveillance requires a warrant. The district court held that: "(1) continuous video recording for approximately eight months; (2) focus on the driveway and front of house; (3) ability to zoom in so close that [the pole camera] can read license plate numbers; and (4) creation of a digitally searchable log" made the use of the pole camera a search. It did not determine if any discrete part of the recording was not a search or at what point during the duration of the pole camera's recording a warrant was required. It simply suppressed the entirety of the pole camera evidence.

Since no exception under Davis v. United States, 564 U.S. 229, 239 (2011), was raised by the government in its opposition to the defendants' suppression motions, the district court considered any

[4] The June 4, 2019, order made minor, non-substantive corrections to an otherwise identical order from June 3, 2019.

government argument as to the good faith exception to have been waived. The court suppressed all evidence obtained directly by the pole camera, but "[took] no action with regard to evidence collected indirectly from the Pole Camera."[5]

The government filed a motion for reconsideration on June 4, 2019. For the first time in the proceedings, it attached the specific photos and videos from the pole camera that it intended to introduce at trial. Based on those photos and the record as a whole, it argued that the district court had inaccurately exaggerated the pole camera's technical capabilities. Citing Davis and United States v. Sparks, 711 F.3d 58 (1st Cir. 2013), for the first time, the government argued that the good faith exception to the Fourth Amendment's exclusionary rule should apply and permit it to introduce the pole camera evidence even if the evidence were unconstitutionally obtained.

The district court denied the motion for reconsideration on June 5, 2019. On June 6, 2019, the government appealed the suppression order. On June 19, 2019, it appealed the order denying reconsideration.

II.

A. The Doctrine of Stare Decisis Controls This Case

[5] On June 6, 2019, Moore filed a "Renewed Motion for Evidentiary Hearing on Derivative Evidence and Suppression of Evidence Derived From Fruits of Pole Camera Surveillance," with argument on this point. The district court has not ruled on it yet because of these appeals.

The doctrine of stare decisis comes from the Latin maxim "stare decisis et non quieta movere," meaning "to stand by the thing decided and not disturb the calm." Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part). "The doctrine of stare decisis renders the ruling of law in a case binding in future cases before the same court or other courts owing obedience to the decision." Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993). It "precludes the relitigation of legal issues that have previously been heard and authoritatively determined." Eulitt ex rel. Eulitt v. Me., Dep't of Educ., 386 F.3d 344, 348 (1st Cir. 2004) (citing Stewart v. Dutra Constr. Co., 230 F.3d 461, 467 (1st Cir. 2000) (subsequent history omitted)).

The role of stare decisis is to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." Ramos, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)). It is "a foundation stone of the rule of law." Allen v. Cooper, 140 S. Ct. 994, 1003 (2020) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).

The doctrine is commonly divided into horizontal and vertical precedent. See Garner et al., supra, at 27. Vertical precedents are decisions in "the path of appellate review," meaning Supreme Court decisions control all lower federal courts and circuit court decisions control federal district courts in their circuits. Id. at 28 (citing Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 825 (1994)). Courts are absolutely bound to follow vertical precedents. Id. at 27.

The Supreme Court has repeatedly stressed the importance of both circuit and district courts faithfully following vertical precedent. See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents."); Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam), reh'g denied, 455 U.S. 1038 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); see also Eberhart v. United States, 546 U.S. 12, 19-20 (2005) (praising the Seventh Circuit for following Supreme Court precedent despite its doubts).

The law of the circuit doctrine protects horizontal precedent, or precedent from the same court, meaning that generally "a prior panel decision shall not be disturbed." United States v. Lewko, 269 F.3d 63, 66 (1st Cir. 2001). The law of the circuit doctrine has two recognized, narrow exceptions, but "their incidence is hen's-teeth-rare." San Juan Cable LLC, 612 F.3d at 33. The first exception applies when "the holding of the prior panel is 'contradicted by controlling authority, subsequently announced.'" Id. (quoting United States v. Rodríguez, 527 F.3d 221, 225 (1st Cir. 2008)).[6] The second exception, which is even more uncommon, applies only in those "rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that

[6] No one contends that Carpenter directly overrules prior law approving the use of pole cameras by law enforcement without obtaining a warrant, the first exception to the law of the circuit doctrine.

the former panel, in light of fresh developments, would change its collective mind." Id. (quoting Williams v. Ashland Eng'g Co., 45 F.3d 558, 592 (1st Cir. 1995) (subsequent history omitted)).[7]

The respecting of both kinds of precedent is essential at all levels in the operation of the federal courts. As the Supreme Court recently explained, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

The Supreme Court has decided several recent appeals based on stare decisis. In Allen v. Cooper, for instance, the Court looked to not only the relevant precedent's narrow legal holding but also its method of analysis. See Allen, 140 S. Ct. at 1003-07. And the Court noted that even it, the final court of appeal in our judicial system, will not overrule past Supreme Court precedent absent a "'special justification' over and above the belief 'the precedent was wrongly decided.'" Id. at 1003. See also Gundy v. United States, 139 S. Ct. 2116, 2123-26 (2019) (following the Court's previous interpretation of the Sex Offender Registration and Notification Act and therefore finding no non-delegation issue); Ramos, 140 S. Ct. at 1390 (discussed more below).

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[7] Other circuits have an even more restrictive test. See Garner et al., supra, at 492-93.

B. Bucci Built on Supreme Court Case Law and Is Controlling Here

Bucci is a First Circuit case, decided in 2009, which held that the government's use of a pole camera across the street from Bucci's home for eight months was not a search because Bucci did not have an objectively reasonable expectation of privacy in the front of his home. Bucci, 582 F.3d at 116-17. That holding is on all fours[8] with the issue presented in

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[8] Bucci is not factually distinguishable from the case at hand. Law enforcement officials installed a video camera on the utility pole across the street from both defendants' houses. Bucci, 582 F.3d at 116. Both cameras were directed at the respective homes' garages and driveways. Id. Both cameras operated for eight months. Id. Both defendants challenged law enforcement's use of a pole camera on Fourth Amendment grounds and moved to suppress the evidence obtained from it. Id.

There are even more factual similarities. Bucci, like Moore-Bush and Moore, was implicated in a drug trafficking conspiracy. Id. at 111. Neither home had fences, gates, or shrubbery to block a passerby's view of the garage or driveway from the street. Id. at 116-17. We take judicial notice that the record in the Bucci case makes clear that the pole camera's footage there also could be viewed live and was recorded. Order Denying Motion to Suppress, United States v. Bucci, No. 1:03-cr-10220-NMG (D. Mass. Dec. 22, 2004), ECF No. 114. Agents in both cases monitored the footage to track the movements of the houses' inhabitants and guests. Id.

The only factual difference of any note between the two cases is that law enforcement officers in Bucci were not able to zoom, pan, or tilt the camera remotely while they directly viewed the images in real time. Bucci, 582 F.3d at 116. The district court correctly determined that this distinction is "too thin" to distinguish Bucci.

On appeal, defendants argue that their case is distinguishable from Bucci because they have a privacy interest "in the whole of their movements over the course of eight months from continuous video recording with magnification and logging

Moore-Bush and Moore's cases. That holding in Bucci relied on basic Fourth Amendment principles explicated by the Supreme Court in cases stretching back decades, and even to the Founders. Those cases relied on in Bucci remain good law today.

Bucci began its analysis by laying out a legal test first established by the Supreme Court in Katz and later formalized in Smith v. Maryland, 442 U.S. at 740. Id. (citing United States v. Rodríguez-Lozada, 558 F.3d 29, 37 (1st Cir. 2009)) (explaining that a reasonable expectation of privacy must be established before a court may reach the merits of a motion to suppress). To establish that he had a reasonable expectation of privacy, "Bucci must show that 1) he 'has exhibited an actual, subjective expectation of privacy' in the area searched; and 2) 'such subjective expectation is one that society is prepared to recognize as objectively reasonable.'" Id. (quoting United States v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009) (itself citing Smith, 442 U.S. at 740)).

Bucci focused on the second part of the test about "the lack of a reasonable objective expectation of privacy because this failure is so clear." Id. (citing United States v. Vilches-Navarrete, 523 F.3d 1, 14 (1st Cir. 2008)). It said that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public," like Bucci's front yard, and held that "[t]hat legal principle is dispositive here." Id. at 117.

Bucci based that statement of law on language from three Supreme Court cases. First, it relied on and

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features in the front of their house," while we described Bucci's privacy interest as an interest "in the front of his home." Id. We reject the attempt to distinguish these two cases merely by describing the same privacy interest with different words.

cited to a principle from Katz that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id. (quoting Katz, 389 U.S. at 351). Then Bucci cited to the part of the Court's decision in Ciraolo, 476 U.S. at 213, that says, "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id. Finally, Bucci cited to the portion of Kyllo, 533 U.S. at 31-33, that discusses the lawfulness of unenhanced visual surveillance of a home.[9] Id.

C. Carpenter Directly Prohibits Any Departure from Stare Decisis

No case from the Supreme Court decided since Bucci, including Carpenter, undermines Bucci or the Supreme Court cases on which Bucci relied. To the contrary, Carpenter reaffirms the analysis the Bucci court undertook by explicitly protecting conventional surveillance techniques and by repeatedly affirming

[9] The First Circuit cases cited to in Bucci -- Rodríguez-Lozada, Rheault, and Vilches-Navarrete -- themselves also relied on the Supreme Court's decisions in Smith, Kyllo, and Ciraolo, or circuit precedents based on those cases. In each of those cases, this court rejected that there was a reasonable expectation of privacy as to areas far more private and less accessible to public view than the views here, all visible to anyone on the street. See Rheault, 561 F.3d at 61 (relying on fact tenant could not exclude other tenants from a third-floor landing in a building); Rodríguez-Lozada, 558 F.3d at 37 (stating casual visitor has no expectation of privacy as to apartment of another); Vilches-Navarrete, 523 F.3d at 14 (holding there is no reasonable expectation of privacy in secret apartment under hidden hatch in maritime vessel).

the underlying language from Supreme Court cases which Bucci cited and which provided the rationale of the Bucci decision. Because we are strictly bound to apply Supreme Court precedent, this language in Carpenter prohibits us and the district court from departing from stare decisis.

The limitations expressed in the Carpenter analyses are not mere dicta. We consider both the language protecting conventional surveillance technology and the reaffirmation of the existing Fourth Amendment case law quoted in Bucci to be essential to the Court's holding in Carpenter.

But even if both the analyses and the express limiting language were dicta, federal circuit and district courts are not free to ignore them. See United States v. Santana, 6 F.3d 1, 9 (1st Cir. 1993) ("Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative when, as in this instance, badges of reliability abound."); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); see also Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1250 (2006) (describing how dicta are "often treated as binding law").

Even beyond Carpenter's expressly stated limitations, Carpenter did not provide cause to question Bucci for a different reason. Carpenter concerned whether the doctrine that there can be no

reasonable expectation of privacy in information placed in the hands of third parties should be extended to the new situation of the government obtaining from cellular telephone companies over a period of time cell-site location information ("CSLI"). Carpenter, 138 S. Ct. at 2211. CSLI generates a time-stamped record of the user's past location whenever a phone accesses the wireless network, which, for smartphone users, is often several times a minute. Id. Carpenter holds that the collection of seven days of CSLI constitutes a search within the meaning of the Fourth Amendment, but it did not reach the question of the consequences of data collection over a shorter period. Id. at 2217 n.3.

Carpenter's limitations unquestionably apply here. Pole cameras are conventional, not new, technology.[10] They are the exact kind of "conventional surveillance technique[]" the Court carefully said it was not calling into question. Id. at 2220. Pole cameras have been mentioned in published decisions in our circuit since at least 2003, see United States v. Montegio, 274 F. Supp. 2d 190, 201 (D.R.I. 2003), and

[10] The district court erred as to the record, doing so in service of its conclusion that pole cameras, or at least this pole camera, represent a potential new privacy threat. Pole cameras are video cameras. The record does not indicate that the "digitally searchable log" the district court relied on is anything more than a recording that could be started at different points in time, much like VHS tapes. The fact that the camera could zoom, pan, and tilt also does not significantly set it apart from preexisting technology, especially since these features were only available to officers observing the footage live. Amicus curiae the Center for Democracy & Technology warn us that pole cameras could be abused in the future if the government were to combine them with facial recognition technology or artificial intelligence. But those issues are simply not present in this case.

outside of the circuit since at least 1987, see United States v. Cuevas-Sanchez, 821 F.2d 248, 250-51 (5th Cir. 1987). This is in sharp contrast to the much more recent technology at issue in Carpenter, which was unique to "modern" phones that "generate increasingly vast amounts of increasingly precise CSLI." Carpenter, 138 S. Ct. at 2212.

Indeed, in common parlance, pole cameras are "security cameras." The Court in Carpenter described "security cameras" as a type of a "surveillance technique[]" that the Court's opinion did not call into question, a longstanding technique routinely deployed by government and private actors alike. While there may be other uses for security cameras, they are clearly used for surveillance, and that use was specifically referred to by the Court. Thus, pole cameras are security cameras in the way that is relevant for this analysis.[11]

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[11] The district court attempted to distinguish pole surveillance cameras from security cameras by arguing that security cameras "guard against . . . crime" (alteration in original), while pole cameras "investigate suspects." The concurrence attempts to make a similar distinction. Both attempts fail, and neither provides any basis to avoid the rule of stare decisis. Most neighborhoods, for their own safety and for other reasons, do not want crime within their boundaries, and guarding against crime involves investigating suspects. Privately owned cameras routinely record property privately owned by others or common areas with multiple owners.

In addition, recordings from privately owned video cameras have been used many times in this circuit to prosecute people accused of crimes. See, e.g., United States v. Smiley, 3:19-CR-00752-RAM, 2019 WL 6529395, at *5 (D.P.R. Dec. 4, 2019) (discussing the government's use of footage from a privately owned camera installed on a cruise ship to prove a domestic violence charge); United States v. Tsarnaev, 53 F. Supp. 3d 450, 458 (D. Mass. 2014) (discussing evidence obtained from a camera

In addition, the government argues that Carpenter leaves intact the principles Bucci relies on from Supreme Court precedents in Katz and Ciraolo. We agree. The Supreme Court was clear in Carpenter that its decision does not call into question the language Bucci cited from Supreme Court precedent in Katz, 389 U.S. at 351, Ciraolo, 476 U.S. at 213, and Kyllo, 533 U.S. at 3133. Two of those cases, Katz and Kyllo, were cited repeatedly throughout the Court's

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installed in a Macy's department store). The attempted distinction, in any event, misses the point Carpenter was making.

Similarly, "security cameras" are not exclusively owned by private parties; they are commonly owned by the government and are often used for law enforcement purposes. It is not true that the government only uses security cameras as if it were acting to protect its own proprietary interests. The City of Springfield, for example, reports on its website that it operates more than forty cameras located throughout the city to "get a real time look at resident and business complaints or concerns." Real Time Camera's Assist DPW, City of Springfield (Dec. 24, 2013 7:46 AM), https://www.springfield-ma.gov/dpw/index.php?id=cameras. The Massachusetts Bay Transit Authority ("MBTA") has installed hundreds of cameras on its buses that live-stream footage to central dispatch and MBTA Transit Police officers' cars. Martine Powers, New Cameras Keep Watch on MBTA Buses, The Boston Globe (Feb. 12, 2014), https://www.bostonglobe.com/metro/2014/02/11/begins-installation-bus-security-cameras/Z1QwILHvLb3TgsgOPXa9yM/ story.html. When these cameras were installed, the Suffolk County District Attorney commented that they would be useful both to deter crime and to investigate it after it has occurred. Id.

As said, Carpenter holds that particular surveillance technologies, including security cameras, are not called into question. And even if the limitations in Carpenter were only dicta, the doctrine of stare decisis would apply. See Santana, 6 F.3d at 9.

decision in Carpenter. Carpenter, 138 S. Ct. at 2213-19. Indeed, Carpenter cited some of the same language from Katz that was cited in Bucci. Id. at 2213 ("the Fourth Amendment protects people, not places").

Nowhere in the Carpenter opinion does the Court suggest that any of those cases, or any part of the Court's existing Fourth Amendment framework involving the lack of Fourth Amendment protection for places a defendant knowingly exposes to public view, has been overruled or modified. Instead, the opinion was framed as "how to apply the Fourth Amendment to a new phenomenon." Id. at 2216. In Carpenter, the Court refused to extend the third-party doctrine that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" to long-term monitoring of CSLI. Id. at 2216 (quoting Smith, 442 U.S. at 743-44). It explicitly framed its holding in terms of the third-party doctrine, a doctrine not relevant here. Id. ("We therefore decline to extend Smith and [United States v.] Miller[, 425 U.S. 435 (1976),] to the collection of CSLI."). Indeed, it specifically criticized Justice Thomas's and Justice Gorsuch's dissents for attempting to revisit Katz when neither party asked the Court to do so. Id. at 2214 n.1.

The cases cited by Katz, Ciraolo, and Kyllo naturally extend to the circumstances here. The defendants and the concurrence argue that law enforcement's eight-month use of the pole camera is distinguishable because it was particularly "unrelenting, 24/7, perfect." But the Court's existing Fourth Amendment case law has already considered and allowed behavior that might be described as "unrelenting" and found no violation of any reasonable expectation of privacy. Any home located on a busy

public street is subject to the unrelenting gaze of passersby, yet "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Ciraolo, 476 U.S. at 213.

Conversely, the Court in Carpenter explained why CSLI is different than the information obtained by a public view of a particular location, such as from pole cameras. CSLI "provides an all-encompassing record of the [cell phone] holder's whereabouts," id. at 2217, "beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales," id. at 2218. There is no equivalent analogy to what is captured by the pole camera on the public street, which is taking images of public views and not more. A pole camera does not track the whole of a person's movement over time.

The Carpenter Court reasoned that CSLI creates "otherwise unknowable" data and is as comprehensively invasive for law enforcement to use "as if it had attached an ankle monitor to the phone's user." Id. That is not this situation, and pole cameras are plainly not an equivalent to CSLI. The pole camera here captured only a small slice of the daily lives of any residents, and then only when they were in particular locations outside and in full view of the public. Pole cameras are fixed in place and do not move with the person as do cell phones generating CSLI. In many ways, as described earlier, this pole camera captured less information about Moore and Moore-Bush than someone on the street could have seen and captured.

D. The Language from Supreme Court Cases on Which Bucci Relied Requires Reversal of the District Court

Because they were not altered in Carpenter or any other case, the principles in the case law relied on in Bucci continue to be good law. The government argued that the cases cited in Bucci have "the most closely on-point holdings" and "provide the same support for the conclusion that use of a pole camera is not a 'search' that they did when Bucci and cases like it were decided." We agree. The concurrence is wrong to say that Bucci misreads the Supreme Court precedents on which it relies. If anything, Carpenter reinforces Bucci's reading of these existing precedents, and we remain bound by Supreme Court precedent to reach the same conclusion this court did when it decided Bucci. It remains true, as a general matter, that:

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz, 389 U.S. at 351 (internal citations omitted); see also Ciraolo, 476 U.S. at 213 (quoting a portion of the language from Katz copied above).

The government also argues that nothing in Jones or Jardines purports to overrule the rule of Katz and Ciraolo that a person does not have a reasonable expectation of privacy in the actions he or she exposes to the public view. Indeed, the majority opinions in

Jones and Jardines are inapposite because they rely on a trespass theory, not a reasonable expectations theory.

Our analysis must be "informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" Carpenter, 138 S. Ct. at 2214 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)). Justice Scalia's majority opinion in Kyllo establishes that, at the time of adoption of the Fourth Amendment, "[v]isual surveillance was unquestionably lawful because 'the eye cannot by the laws of England be guilty of a trespass.'" Kyllo, 533 U.S. at 31-32. Indeed, Justice Scalia's opinion in Kyllo quoted Boyd v. United States, 116 U.S. 616, 628 (1886), which itself quoted from English law, Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765).

Bucci cited Kyllo. Bucci, 582 F.3d at 117. In Kyllo, the Court affirmed that "the lawfulness of warrantless visual surveillance of a home has still been preserved." Kyllo, 533 U.S. at 32. By granting Moore-Bush and Moore's suppression motions, the district court broke with the original understanding of the Fourth Amendment as found by the Supreme Court.

Kyllo also aids our analysis in another way. The issue there concerned "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home." Id. at 29. In particular, in holding that the use of a thermal-imaging device is a search, the Court distinguished between this uncommon and then new

technology and technology that is "in general public use." Id. at 34.

E. No Exception to Stare Decisis Applies for Other Reasons

Even absent the explicit limiting language in Carpenter, Carpenter's reasoning does not undermine Bucci's reasoning. Moore-Bush and Moore disagree and make the following argument. Bucci rests on what they characterize as a categorical statement: "An individual does not have an expectation of privacy in items or places he exposes to the public." Bucci, 582 F.3d at 117 (citing Katz, 389 U.S. at 351). "That legal principle is dispositive here." Id.

Carpenter, on the other hand, contains the following passage that, in the words of the district court, seems "to cabin -- if not repudiate -- that principle": "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" Carpenter, 138 S. Ct. at 2217 (alteration in original) (quoting Katz, 389 U.S. at 351-52).

The alleged tension between these two statements, according to the defendants, "offers a sound reason for believing that the former panel [in Bucci], in light of fresh developments, would change its collective mind," permitting this panel to revise otherwise binding horizontal precedent. Williams, 45 F.3d at 592. There is no such reason.

The referred-to passage from Bucci and the "cabining" language from Carpenter both quote from the same decision, Katz. And the specific quotes at issue immediately follow one another in the opinion.

Katz, 389 U.S. at 351. It is true that Katz said generally, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id. It then provided a possible exception to that rule: "[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. Bucci's statement that the general rule "is dispositive here" certainly meant that no established exception applied in that case, not that no exceptions exist. Bucci quoted Katz at page 351, and the exception was raised in the very next sentence of the opinion in Katz.[12] Indeed, here, the only images recorded were those of the front areas of Moore's house, exposed to the view of any member of the public. Defendants clearly did nothing to seek to preserve those views as private.

Moreover, as discussed above, Carpenter did not purport to alter Katz as to what constitutes a search when law enforcement uses traditional technology.[13] Instead, it rooted its analysis in existing

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[12] In a Fed. R. App. P. 28(j) letter, Moore stated that the government cited Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997), to support the "categorical rule" in Bucci that "an individual does not have an expectation of privacy in items or places he exposes to the public." The government did no such thing. It cited Vega-Rodriguez for the proposition that "the mere fact that the observation is accomplished by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one." Id. at 181. This, too, remains good law.

[13] Further, the district court erred in interpreting statements of general law made in a Fourth Amendment case as it did. "Fourth Amendment analysis is renownedly fact specific." United States v. Beaudoin, 362 F.3d 60, 70 (1st Cir. 2004),

case law, which was untouched or affirmed in Carpenter. Carpenter and Bucci are not in tension for several reasons. One is that they rely on the same case law foundation. And we note that it is up to the Supreme Court, not this court, to address arguments that anything in the Katz line of cases has been overruled. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should . . . leav[e] to this Court the prerogative of overruling its own decisions.")

Nor can any basis for overruling Bucci be found in the Carpenter Court's reference to "some basic guideposts" in Fourth Amendment jurisprudence, including the amendment's goals of "secur[ing] 'the privacies of life' against 'arbitrary power'," Carpenter, 138 S. Ct. at 2214 (quoting Boyd, 116 U.S. at 630) and "plac[ing] obstacles in the way of a too permeating police surveillance," id. (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)). These general principles were firmly in place before Carpenter (and Bucci) and acknowledged in Carpenter as such. Id.

We agree with the government that nothing in Jones undermines the principle from Katz and Ciraolo, repeated in Bucci, that a person does not have a reasonable expectation of privacy in the actions he or she knowingly exposes to public view. No basis for revisiting Bucci can be found in Carpenter's noting that five justices, in concurrences written by Justice Alito and Justice Sotomayor, had agreed in the 2012

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vacated on other grounds by Champagne v. United States, 543 U.S. 1102 (2005). Chief Justice Marshall's warning from almost two centuries ago applies here: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821).

case Jones that a GPS tracker attached to someone's car could violate someone's expectation of privacy in the whole of their physical movements. Id. at 2217 (citing Jones, 565 U.S. at 430 (Alito, J., concurring in judgment); id. at 415 (Sotomayor, J., concurring)). The Carpenter Court reasoned that this would apply with equal force to CSLI. But it did so by closely analogizing between the two technologies, stating that CSLI, like GPS information, "provides an intimate window into a person's life" because it "provides an all-encompassing record of the holder's whereabouts." Carpenter, 138 S. Ct. at 2217.

As the Sixth Circuit has noted in affirming the denial of a motion to suppress evidence obtained from pole cameras, the concurrences in Jones are easily distinguished on this point. The concurrences were concerned "that long-term GPS monitoring would 'secretly monitor and catalogue every single movement," United States v. Houston, 813 F.3d 282, 290 (6th Cir. 2016) (quoting Jones, 565 U.S. at 430 (Alito, J., concurring in judgment)), and "generate[] a precise, comprehensive record of a person's public movements," id. (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)).[14] Information obtained

[14] The Sixth Circuit again rejected this argument in United States v. May-Shaw, 955 F.3d 563, 567 (6th Cir. 2020). In addition, several district courts have also considered the issue, and they have all found that pole cameras still do not constitute a search. See United States v. Fanning, No. 1:18-cr-362-AT-CMS, 2019 WL 6462830 (N.D. Ga. May 28, 2019); United States v. Gbenedio, No. 1:17-CR-430-TWT, 2019 WL 2173994 (N.D. Ga. May 17, 2019); United States v. Kelly, No. 17-cr-175-pp, 2019 WL 2137370 (E.D. Wis. May 16, 2019); United States v. Harris, No. 17-CR-175, 2019 WL 2996897 (E.D. Wis. Feb. 19, 2019); United States v. Kubasiak, No. 18-CR-120, 2018 WL 6164346 (E.D. Wis. Aug. 23, 2018); United States v. Tirado, No. 16-CR-168, 2018 WL 3995901 (E.D. Wis. Aug. 21, 2018); United States v. Kay, No. 17-

from pole cameras does not give rise to the same concerns.

Recently, the Supreme Court in Ramos v. Louisiana had an extensive discussion of the role of stare decisis in deciding constitutional cases, with various justices laying out their own tests for when to overrule precedent. Ramos, 140 S. Ct. 1390. None of their respective tests suggest that we should understand Carpenter as having overruled or modified existing Fourth Amendment precedent so as to put it in tension with our analysis in Bucci.

The majority opinion in Ramos, written by Justice Gorsuch, states that the Court should consider "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." Id. at 1405 (quoting Franchise Tax Bd. Of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).[15]

The decisions in Katz v. United States, 389 U.S. 347 (1967) (Stewart, J.), Smith v. Maryland, 442 U.S. 735 (1979) (Blackmun, J.), California v. Ciraolo, 476 U.S. 207 (1986) (Burger, C.J.), and Kyllo v. United States, 533 U.S. 27 (2001) (Scalia, J.), cannot be called less than high-quality. As described above, nothing before or since those decisions draw into question their reasoning. And law enforcement has substantially relied on these precedents to deploy

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CR-16, 2018 WL 3995902 (E.D. Wis. Aug. 21, 2018); United States v. Tuggle, No. 16-cr-20070-JES-JEH, 2018 WL 3631881 (C.D. Ill. July 31, 2018). The Sixth Circuit affirmed the constitutionality of pole cameras after the Supreme Court's decision in Jones. See Houston, 813 F.3d 282.

[15] Justice Sotomayor joined this part of the majority's opinion, while also filing a concurrence.

surveillance technologies like pole cameras in countless criminal investigations.

In this case, law enforcement officers relied on these precedents in deciding not to obtain a warrant for the pole camera, both when it was initially installed and later as they continued to use the camera over an eight-month period during this major drug crime conspiracy investigation. This was not an example of law enforcement installing a camera without even reasonable suspicion. Before the camera was installed, a CW, acting on the government's orders, purchased four guns illegally from Moore-Bush, through Dinzey, at Moore's house. Evidence obtained from the pole camera after it was installed was used in successful wiretap and search warrant applications starting in July 2017 and continuing throughout the fall and winter. Their reliance interest is particularly strong here, where evidence obtained after a short period of surveillance likely could have supported a warrant application and showed the need for continuing surveillance.

As stressed by the government in their briefing, law enforcement's reliance interest is not limited to just this case. Pole cameras are often used by law enforcement officers to show that they exhausted other investigative techniques before seeking a warrant for a more invasive surveillance. See, e.g., United States v. Bregu, 948 F.3d 408, 411 (1st Cir. 2020) (noting that pole camera evidence was used to obtain a warrant for cell phone location information); United States v. Figueroa, 501 F. App'x 5, 6 (1st Cir. 2013) (unpublished) (same for wiretap). Indeed, law enforcement did so in this case. As the government has argued, affirmance of the district court would call into question other surveillance technologies that

similarly have been used for decades, which would be in direct conflict with the Supreme Court's statement in Carpenter that it did not call into question "conventional surveillance techniques." Carpenter, 138 S. Ct. at 2220. This is particularly true if it were to call into question the use of security cameras, which have long been used for continuing surveillance over time and, for the reasons discussed above, are hard to distinguish from pole cameras. It is hardly an answer to these reliance concerns to say that law enforcement can no longer rely on clear Supreme Court precedent and First Circuit precedent in Bucci and must take refuge in the good faith doctrine, as the concurrence suggests.

Although the court in Ramos overruled the relevant precedent in that case, Apodaca v. Oregon, 25 U.S. 404 (1972) (plurality opinion), it did so because Apodaca was "unusual" in the way the opinions were divided 4-1-4. Ramos, 140 S. Ct. at 1399 (quoting McDonald v. Chicago, 561 U.S. 742, 766 n.14 (2010)). We note that, of all the cases that stand for the proposition that there is no objective privacy interest in what is exposed to public view, none were similarly divided.

The dissent in Ramos was even more concerned with the harm of upsetting reliance interests than the majority was. Id. at 1436-39 (Alito, J., dissenting). In particular, it highlighted the state's interest in the finality of its verdicts and warned of a "potential tsunami of litigation" following the majority's ruling. Id. at 1436. If we were to interpret Carpenter as overruling part of the Court's existing Fourth Amendment legal framework, it would raise the same concerns.

Justice Kavanaugh's partial concurrence lays out a three-part test for when to overrule precedent: if the precedent is "egregiously wrong"; it has "caused significant negative jurisprudential or real-world consequences"; and "overruling the prior decision [would] unduly upset reliance interests." Id. at 1414-15. Again, there is nothing to suggest that any of the Supreme Court cases relied on by Bucci are wrong, let alone "egregiously wrong." Pole cameras are commonly used by law enforcement and, particularly in their current iteration, have not had significant negative real-world consequences. The government's reliance interest in the sustained use of the pole camera was significant. Had the government been put on any notice that it needed to obtain a warrant to continue surveillance, it likely would have sought and obtained a warrant early on based on the new evidence the camera revealed.[16]

The district court's view of Carpenter also conflicts with other binding First Circuit precedent. This court has already rejected the proposition that Carpenter produced "a sea change in the law of reasonable expectation of privacy," United States v. Morel, 922 F.3d 1, 8 (1st Cir. 2019), and consequently, that argument also cannot provide a basis. In United States v. López, 890 F.3d 332, 340 (1st Cir. 2018), this

[16] Justice Thomas's opinion concurring in the judgment noted his disagreement with "the Court's typical formulation of the stare decisis standard . . . because it elevates demonstrably erroneous decisions -- meaning decisions outside of the realm of permissible interpretation -- over the text of the Constitution and other duly enacted federal law." Ramos, 140 S. Ct. at 1421 (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring in judgment)). Again, there is no indication that any of the existing Fourth Amendment cases relevant here were wrongly decided.

court declined to invoke the second exception where we had already rejected a party's interpretation of Supreme Court case law in an unpublished opinion.

Finally, this court has never found the second exception to the law of the circuit to be permissible in the face of such explicit commands from the Supreme Court. To the contrary, we have declined to apply the exception where the Supreme Court explicitly narrowed its holding. See Wallace v. Reno, 194 F.3d 279, 281 (1st Cir. 1999) ("Although this provision might appear to channel judicial intervention in all deportation matters to the court of appeals, the Supreme Court concluded that section 242(g) governed only three specific decisions by the Attorney General . . . .").

III.

We reverse and remand with instruction to deny the motions to suppress.

-Concurring Opinion Follows-

BARRON, **Circuit Judge, concurring in the judgment.** When a catcher flashes the sign for a fastball rather than a curve, he takes the risk that the runner on second will tip off the batter to the pitch that's coming. But, while that runner's sign stealing breaks no rules, his team's does if it involves hiding a high-resolution video camera with zooming capacity behind the wall in center field, recording every move that the opposing catcher makes behind the plate, and using that video log to keep hitters in the know for all nine innings. See Statement of the Commissioner from Robert D. Manfred, Jr., Commissioner of

Baseball, Major League Baseball (Jan. 13, 2020), https://img.mlbstatic.com/mlb-images/image/upload/mlb/cglrhmlrwwbkacty27l7.pdf.

The defendants in this case share Major League Baseball's intuition that expectations of privacy are not merely the residue of technological capacity. They ask us to be guided by it, however, for a more consequential purpose than setting the rules for America's pastime. They ask us to rely on it to find that the Fourth Amendment of the United States Constitution bars law enforcement's warrantless and suspicionless use of surreptitious, unrelenting remote-control video surveillance of the entryways of private residences.

The defendants concede that -- at least to some significant extent -- both their home's side entrance and its garage were knowingly exposed to public view. They thus acknowledge that they knowingly took the risk of exposing their comings and goings to and from their home to the equivalent of the runner on second -- whether an undercover detective in the bushes across the street or a neighbor walking his dog.

But, the defendants contend, law enforcement's warrantless use of a remotely controlled video camera stealthily affixed to a neighborhood utility pole, supplying a live feed to the station house, and trained on those parts of their residence without relent for eight months still interfered with their reasonable expectations of privacy. And, for that reason, they contend, it still constituted a search that violated the Fourth Amendment.

For most of our nation's history, the most vigilant voyeur could not replicate this kind of surveillance of the concededly observable but often

intimate daily activities of life that occur so close to home. For that reason, the defendants contend, society should be prepared to accept the legitimacy of their expectation of privacy in them, even though their unblinking and ceaseless electronic monitoring is now possible. Otherwise, the defendants -- like the amici -- warn that, given the pace of innovation, law enforcement will have license to conduct a degree of unchecked criminal investigatory surveillance that the Fourth Amendment could not possibly have been intended to allow. See Br. for The Center for Democracy & Technology at 19-25 (describing how technological advances, such as facial recognition software and rapid search capabilities, will enable pole cameras, and thereby law enforcement, to be more intrusive and efficient in the immediate future).

Based on this concern, the District Court ruled that the government's continuous, unmanned, and warrantless video surveillance of the defendants' movements in and out of their residence did interfere with their reasonable expectation of privacy. For that reason, it granted the defendants' motions to suppress all evidence traceable to the pole camera, as the government had offered no reason for concluding that, insofar as its use constituted a search, it was a constitutional one.

The government's appeal from that ruling raises the two distinct questions that the majority's opinion addresses. The first is whether one of our own precedents from 2009, United States v. Bucci, 582 F.3d 108 (1st Cir. 2009), requires that we reverse the District Court and accept the government's contention that the video surveillance at issue here did not violate the defendants' reasonable expectation of privacy and thus did not constitute a search for Fourth

Amendment purposes. The second is whether, even if Bucci does not compel that outcome, we are nonetheless bound to reach it as a matter of stare decisis, due to the United States Supreme Court's post-Bucci decision in Carpenter v. United States, 138 S. Ct. 2206 (2018).

I agree with my colleagues' conclusion that Bucci, per the law-of-the-circuit doctrine, stands in the way of the defendants' contention that the surveillance here amounted to a search. I do not agree, however, with my colleagues' further suggestion that Carpenter not only prevents us, as a panel, from concluding that Bucci called it wrong, but also requires us, as a Circuit, to conclude that Bucci called it right.

If that were so, then Bucci's one-paragraph analysis of this constitutional issue would suffice as our Circuit's explanation for why, seemingly, whole neighborhoods may be subjected to this type of warrantless surveillance without law enforcement first having to offer up so much as an articulable suspicion that it will turn up evidence of a crime. In my view, Carpenter is better read to be but the Supreme Court's latest sign that we must be more attentive than Bucci was in its brief discussion of the Fourth Amendment to the risk that new technology poses even to those "privacies of life" that are not wholly shielded from public view. Carpenter, 138 S. Ct. at 2214 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). And, because that sign is one that we are obliged to steal, I thus read Carpenter, if anything, only to underscore the need for us to reconsider Bucci en banc.

I.

Bucci held that the use of a video pole camera pointed at the front door of the defendant's home for eight months was not a search because such surveillance did not interfere with any objectively reasonable expectation of privacy that the defendant had. See 582 F.3d at 116-17. Under the law-of-the-circuit doctrine, that no-search ruling controls the outcome for us here unless: (1) it "is contradicted by subsequent controlling authority, such as a decision by the Supreme Court, an en banc decision of the originating court, or a statutory overruling," United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018) (citing United States v. Rodríguez, 527 F.3d 221, 225 (1st Cir. 2008)), cert. denied, 139 S. Ct. 579 (2018); or (2) "authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind," id. (citing Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir. 1995)).

The defendants respond that Bucci rested on a single "legal principle" that it deemed to be "dispositive": "An individual does not have an expectation of privacy in items or places he exposes to the public." 582 F.3d at 117 (citing Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."")). But, the defendants go on to point out, Carpenter, which held that the government's subpoena of the cell-site location records of a defendant from his cell phone carrier constituted a "search" subject to the Fourth Amendment,

explained that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." 138 S. Ct. at 2217. And, the defendants then note, even though the target of the "surveillance" in Carpenter had not taken explicit steps to "preserve" that information "as private," id. (quoting Katz, 389 U.S. at 351), the Court held that he had a reasonable expectation of privacy in it in part because "society's expectation has been that law enforcement agents and others would not -- and indeed, in the main, simply could not -- secretly monitor and catalogue" such information, id. (quoting United States v. Jones, 565 U.S. 400, 430 (2012) (Alito, J., concurring in judgment)).

The defendants contend that these passages from Carpenter give a "new gloss," Rodríguez, 527 F.3d at 222, to the single legal principle on which Bucci claimed to have relied, such that we must conclude that the panel in that case now "would change its collective mind," id. at 225 (quoting Williams, 45 F.3d at 592). They thus argue that, as the District Court held, Carpenter at least triggers the second exception to the law-of-the-circuit doctrine.

I am not persuaded that Carpenter strips Bucci of its precedential force, given the differing factual contexts in which the two cases arise. See Williams, 45 F.3d at 592 (noting that the second exception "pertains to . . . relatively rare instances"). In Bucci, the defendant's movements all occurred on his own property. Yet, the panel there explained, he had not shielded that property from outside prying eyes by, say, erecting a privacy fence or planting a tree. 582 F.3d at 116-17. The "surveillance" at issue in Carpenter, however, was of the defendant's movements all over town and thus in places over

which he had no control akin to that of the defendant in Bucci. See Carpenter, 138 S. Ct. at 2218. That meant that those movements occurred where the target of the "surveillance" could not undertake the kinds of countermeasures that Bucci highlighted. Thus, because Carpenter did not have any occasion to address whether the failure to take them might bear on the reasonableness of one's expectation of privacy in going in and out of one's own home, I cannot say that we, as a panel, are free to disregard Bucci based on Carpenter.

Still, it is important to keep in mind that the law-of-the-circuit doctrine provides an orderly means by which a Circuit may operate through panels until it collectively decides that its precedent requires revision through the en banc process. I thus think it is important to explain my disagreement with the additional suggestion that my colleagues make, which is that Bucci controls not just this panel but our Court because Carpenter -- far from casting doubt on Bucci -- "reaffirms" what it held. Maj. Op. at 22. For, in making that contention, my colleagues necessarily conclude not merely that our panel must accept a prior panel's holding, but also that our Circuit must do so because the Supreme Court has held the same.

II.

In making that additional holding, my colleagues point first to the fact that Carpenter "explicitly protect[s] conventional surveillance techniques." Maj. Op. at 22. But, I do not read that statement in Carpenter to affirm Bucci.

Carpenter did describe the acquisition of the cell-site location records at issue in that case as having been enabled by "modern cell phones," which, unlike

predecessor phones, "generate[] increasingly vast amounts of increasingly precise" cell-site location information. 138 S. Ct. at 2212. It is also true that, as my colleagues note, published cases involving the use of video pole camera surveillance date back to the late 1980s. See United States v. Cuevas-Sanchez, 821 F.2d 248, 250-51 (5th Cir. 1987) (finding that law enforcement's use of a video pole camera to surveil the backyard of a home protected by a ten-foot-high privacy fence was a Fourth Amendment search).

But, the first commercial cell-site tower was erected years before the first opinions about video pole camera surveillance that my colleagues highlight were issued, see Jon Van, Chicago goes cellular, Chi. Trib. (June 3, 2008), http://www.chicagotribune.com/nation-world/chi-chicagodays-cellular-story-story.html, and the use of locational records from those towers by law enforcement began at least as early as 2001, see United States v. Forest, 355 F.3d 942 (6th Cir. 2004), vacated sub nom. Garner v. United States, 543 U.S. 1100 (2005). I doubt that Carpenter meant to embrace a construction of the Fourth Amendment that would cast doubt on law enforcement's use of sophisticated technologies to conduct surveillance if they emerged just over a decade after the bicentennial of the Constitution but endorse them if they occurred on its eve. Thus, in referring to "conventional surveillance techniques and tools," Carpenter, 138 S. Ct. at 2220, I do not understand the Court to have signaled that it had in mind even a quite contemporary variant of the stakeout rather than simply its age-old predecessor.

My colleagues also rightly point out, however, that Carpenter expressly names "security cameras" as a type of "conventional" surveillance tool, Maj. Op. at

24 (quoting Carpenter, 138 S. Ct. at 2220), and they contend that video pole cameras like the one used here "are easily thought" of as "security cameras," id. at 3-4. For that reason, they conclude that Carpenter made clear, in this one brief passage, that it did have the kind of surveillance that Bucci confronted -- and that we confront here -- very much in mind.

But, "security camera" is hardly the only way -- or even the most natural way -- to describe a pole camera like the one at issue either in Bucci or this case. Conventional "security cameras" are typically deployed by property owners to keep watch over their own surroundings, not as a law enforcement tool for conducting a criminal investigation by peering into property owned by others. In fact, that Carpenter had only "security cameras" of the former ilk in mind would appear to be evidenced by the opinion's choice to make its one reference to them in the very same sentence that clarifies that the Court "do[es] not disturb" the case law that addresses a person's expectation of privacy in information voluntarily handed over to third parties, 138 S. Ct. at 2220 (discussing United States v. Miller, 425 U.S. 435 (1976) and Smith v. Maryland, 442 U.S. 735 (1979)). The following sentence -- in which the Court explained that the opinion also was not "address[ing] other business records that might incidentally reveal location information," id. (emphasis added) -- further supports the conclusion that the Court was referencing "security cameras" as a "business" record, rather than as a tool deployed by law enforcement to conduct criminal investigations by surveilling the comings and goings on the thresholds of private homes. And, consistent with this same understanding, the government itself explains in its briefing to us that

"a 'security camera' is typically a private recording system that law enforcement would access under the third-party doctrine."

That a governmental entity intent on protecting its own property -- such as a municipal transit authority watching over its tracks and trains -- may employ such video surveillance in the same manner as a private business owner is of no moment for purposes of construing this aspect of Carpenter. We may assume that Carpenter meant to treat the government in its role as property owner no differently from a private business with respect to the use of security cameras for purposes of monitoring places under its control. For, even with that assumption in place, I do not see how Carpenter's reference to "security cameras" is best read impliedly to bless a police department's warrantless and suspicionless use of a video pole camera continuously and secretly to surveil the entryways of a private home in an effort to make a criminal case rather than merely to keep watch over its own parking lots or station houses as a standard safety precaution that property owners now routinely take.

Of course, even security cameras used in this conventional manner by private businesses to keep watch over their own surroundings -- or by governmental entities to patrol theirs -- may, in certain instances, pick up images of ordinary people on a public sidewalk or street. They might even, in certain cityscapes, capture people going in and out of their residences, depending on how the camera is aimed.

But, the fact that such cameras -- to say nothing of cell phones -- capture more and more of the publicly

visible spaces that we find ourselves in hardly suggests to me that Carpenter's reference to "security cameras" is properly read to be a holding that no one now has a reasonable expectation of privacy in their presence in any place in public view that some other property owner -- whether private or public -- might incidentally record. And, that being so, I cannot see how Carpenter may be read to go even a step further and to hold -- by virtue of its reference to "security cameras" -- that the months-long, uninterrupted video surveillance of the activities surrounding one's home by law enforcement invades no privacy expectation that society should be prepared to accept. In fact, I note that Carpenter said nothing about security camera footage of someone else's home, let alone about such footage when it is picked up not in passing by another property owner's camera, but by law enforcement's use of one for months for the dedicated purpose of capturing every moment of what transpires in the curtilage of that residence.[17]

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[17] The government is no ordinary property owner, of course, given the kinds of property that it controls. As my colleagues note, for example, the City of Springfield, Massachusetts uses its cameras to monitor for "[t]raffic light configurations," "[t]raffic backups," "[r]oad closures," "[c]onstruction projects," "[s]now plow progress," and "[r]oad conditions," and for "get[ting] a real time look" when responding to "resident and business complaints." Real Time Camera's assist DPW, City of Springfield (Dec. 24, 2013 7:46 AM), https://www.springfieldma.gov/dpw/index.php?id=cameras. The further one gets from the traditional private property owner's use of video surveillance to keep watch over what they own, however, the less plausible it becomes to me to conclude that Carpenter meant blithely to sign off on the notion that the government's use of that type of surveillance technology for security rather than law enforcement necessarily poses no threat to individual expectations of privacy or that such use, in and of itself, renders

For these reasons, I do not read Carpenter to have had law enforcement's use of video pole cameras like the one at issue here in mind when it expressly identified the categorical limit on its holding that my colleagues highlight. Insofar as there is any doubt on that score, moreover, it is entirely proper for us, as circuit judges, not to assume that the Court coyly made such a far-reaching and never-before-announced holding. And that is especially the case when, to do so, we would have to conclude that the Court made it implicitly and in passing in the course of an opinion that otherwise makes such a point of highlighting the constitutional concerns raised by law enforcement's ever-increasing capacity to engage in the perfect surveillance of activities that, in a lower-tech world, were clothed in practical anonymity. Thus, in my view, Carpenter's important caveat that its holding does not "call into question conventional surveillance techniques and tools, such as security cameras," 138 S. Ct. at 2220, has no bearing on the question before us.

III.

There does remain the fact that my colleagues find that Carpenter "leaves intact" the case law on which Bucci relied, Maj. Op. at 26, and I agree with them that this body of precedent does hold that, at

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any such expectation of privacy in even one's comings and goings to and from one's own home unreasonable, if such expectation is asserted to support a contention that the continuous surveillance of those activities by a government "security camera" constitutes a search. The reductio of this observation makes the point well enough. See, e.g., Paul Mozur & Aaron Krolik, A Surveillance Net Blankets China's Cities, Giving Police Vast Powers, N.Y. Times (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/technology/china-surveillance.html.

least ordinarily, a person has no reasonable expectation of privacy in the activities in which they knowingly engage in public view. Carpenter is a self-avowedly "narrow" ruling, 138 S. Ct. at 2220, and it is important that we not read it to be more disruptive than it inherently is.

But, that same body of precedent, which I agree Carpenter did not overturn, also contains -- quite expressly -- important strands that qualify the proposition on which Bucci relied on it for about the extent of our expectations of privacy in public. And, because Carpenter, in my view, is best read to draw out those very strands from those well-settled precedents, I do not read it to affirm Bucci simply because it does not call into question several of the key cases on which Bucci relied. Rather, I read Carpenter at least to raise the question whether Bucci read those cases -- which we continue to be bound to follow -- correctly in concluding that they afforded so little Fourth Amendment protection to the defendant in that case.

For example, Carpenter does reaffirm Katz, on which Bucci relied, just as my colleagues assert. Indeed, Bucci supports the conclusion that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public," 582 F.3d at 117, by quoting these two sentences from Katz: "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id. (alteration in original) (quoting Katz, 389 U.S. at 351).

But, immediately following those two sentences, Katz also includes a critical third sentence

that Bucci did not mention: "But 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. And, notably, it is this omitted third sentence from Katz that Carpenter relied on to conclude that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere," 138 S. Ct. at 2217, in the course of holding that law enforcement's use of technology to surveil a person can, even when that person is in public, invade a reasonable expectation of privacy, id.; see also id. (noting that a "majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements," even when those movements are in public (citing Jones, 565 U.S. at 430 (Alito, J., concurring in judgment); id. at 415 (Sotomayor, J., concurring))).

Bucci also cited, as my colleagues note, the portion of California v. Ciraolo, 476 U.S. 207 (1986), which, citing Katz, explained that the "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id. at 213; see Bucci, 582 F.3d at 117. And, as my colleagues note, Carpenter left Ciraolo no less intact than it left Katz.

But, here, too, it is hard to see how Carpenter could be thought thereby impliedly to have endorsed Bucci's sweeping notion that one lacks a reasonable expectation of privacy in places that one exposes to public view. Ciraolo held that a plane carrying law enforcement could conduct an aerial observation of a backyard at a height of 1000 feet, and thus it did not address unrelenting surveillance. 476 U.S. at 213.

Moreover, the opinion repeatedly states -- in passages that Bucci did not cite -- that it upheld only "naked-eye observation." Id. at 213; see also id. at 210, 212 n.1, 213, 215. For these reasons, I do not read Ciraolo to endorse the idea that the necessarily fleeting gaze of a single passerby -- even if aggregated with the similarly casual observations of other flaneurs -- somehow equates to electronic surveillance of the more systematic and unrelenting kind that Bucci confronted.

Finally, Bucci cited to the Supreme Court's decision in Kyllo v. United States, 533 U.S. 27 (2001), in explaining that the Court had "not[ed] [the] lawfulness of unenhanced visual surveillance of a home." 582 F.3d at 117. In doing so, Kyllo did emphasize, as my colleagues rightly note, that when the Fourth Amendment was adopted, "[v]isual surveillance was unquestionably lawful because 'the eye cannot by the laws of England be guilty of a trespass.'" 533 U.S. at 31-32 (quoting Boyd, 116 U.S. at 628). And, as my colleagues also rightly note, Carpenter itself invoked and affirmed Kyllo.

But, Bucci did not address Kyllo's admonitions to courts to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," 533 U.S. at 34, and not to leave privacy -- and particularly privacy of the home -- "at the mercy of advancing technology," id. at 35. Yet, Carpenter quoted and relied on this very portion of Kyllo, 138 S. Ct. at 2214, and went on to explain 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)). Thus, Bucci did not address the practical fact that Carpenter suggests, based in part on Kyllo, might well matter most in a case involving sustained surveillance over many months by a video pole camera -- that it would be highly unlikely that law enforcement officers could sit outside a home without being spotted and observe and catalog every activity that occurred over every moment of that period of time.

Nor, I should add, did Bucci address Kyllo's statement that, even if "the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." 533 U.S. at 36. Yet, Carpenter quoted and affirmed that precise instruction, 138 S. Ct. at 2218-19, which is particularly pertinent to this type of surveillance, given the pace of technological innovation when it comes to video, see Br. for The American Civil Liberties Union and The American Civil Liberties Union of Massachusetts at 19 (discussing a camera installed at Boston Logan International Airport around ten years ago that, from 150 meters away, can see any object as small as a centimeter-and-a-half wide); see also Br. for The Center for Democracy & Technology at 19-25 (explaining that camera technology that could be applied to pole cameras in the future allows law enforcement to clandestinely observe small details with great accuracy and that video analytic software enables the rapid and targeted search of volumes of information, as well as provides facial recognition capabilities).

Given the portions of Katz, Ciraolo, and Kyllo that Bucci did not address, and the light that Carpenter shines on those portions, there is reason to

question, then, whether Bucci was right to read those cases to support the conclusion that it reached rather than to require the opposite one. Thus, while my colleagues' discussion of stare decisis and the fact that Carpenter did not overrule Katz, Ciraolo, and Kyllo is indisputably correct, it is also, in my view, of no consequence to any question that we must answer. If Bucci is wrong, it is not because Carpenter rejects the Supreme Court precedents on which Bucci relied. If Bucci is wrong, it is because Carpenter confirms -- by making it even clearer in retrospect than it already was -- that Bucci misapplied those precedents from the get-go, by failing to give any apparent weight to those aspects of them that pointed against its conclusion.

To the extent that my colleagues' stare decisis concerns are instead meant to provide a reason for us not to reconsider Bucci en banc because it is precedent within this Circuit, I cannot agree. One of the functions of reconsidering our precedent en banc is to ensure that our Court's precedent accords with the understandings of the Supreme Court. See Fed. R. App. P. 35. We thus honor the doctrine of stare decisis -- rather than flout it -- when, as a Circuit, we reconsider our own panel opinions to ensure that they align with those of the Supreme Court, past and present.

IV.

I do not mean to suggest from this comparison of Carpenter's treatment of Katz, Ciraolo, and Kyllo to Bucci's treatment of them that Bucci has been stripped of its power to bind this panel by Carpenter's gloss on them. As I have already emphasized, Bucci focused on the lack of "fences, gates, or shrubbery"

protecting the defendant's home. 582 F.3d at 116. In doing so, it identified a factor that arguably bears on the reasonableness of the defendant's expectation of privacy from the surveillance that he faced that the surveillance of the defendant in Carpenter simply did not implicate. Thus, I do not see how our panel may read Carpenter to free us from adhering to that prior panel ruling, even if we have doubts about its reasoning.

Nevertheless, I do want to emphasize that Bucci's treatment of that factor is itself concerning for reasons that are independent of those that I have already given. For, in highlighting the countermeasures that the defendant there failed to take, Bucci gave no apparent consideration to a variety of factors, including municipal zoning regulations and homeowner association rules, to say nothing of cost, that commonly disable a person from erecting barriers to protect against long-term surveillance of their residences entryways and garages, and not only in suburban settings. Thus, Bucci did not consider whether one should have an expectation of privacy -- from unrelenting, 24/7, perfect law enforcement surveillance -- in coming and going from one's home, even if for reasons of time, circumstance, local laws, or cash there are no hedgerows to protect against such surveillance.

Relatedly, Bucci failed to account adequately, in my view, for those precedents that were then in place -- and that still are -- that suggested a reason to be particularly concerned about the privacy interests that were threatened by the special nature of the pole camera's target -- the immediate area surrounding the home -- given the activities that take place there. See U.S. Const. amend. IV (protecting the "[t]he right of

the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); Oliver v. United States, 466 U.S. 170, 180 (1984) ("[T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life' and therefore has been considered part of home itself for Fourth Amendment purposes." (quoting Boyd, 116 U.S. at 630)). Indeed, in Ciraolo, which Bucci did rely on, the Court made a point of emphasizing the concerns raised by surveillance of that area, though Bucci did not discuss that portion of that opinion. See Ciraolo, 476 U.S. at 212-13 ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.").

These limitations in Bucci's analysis loom even larger than they otherwise might after Carpenter, notwithstanding the different kind of surveillance that it addressed. Carpenter made clear that it was concerned that the surveillance tool in that case gave law enforcement an "intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217 (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)). Yet, under Bucci, law enforcement's warrantless use of a hidden video camera, supplying a continuous live but also searchable feed to the station house, is permitted without any judicial oversight, seemingly even if such a camera is trained on every home in America. And that is so, notwithstanding that the "time-stamped data," Carpenter, 138 S. Ct. at 2217, that such constant recording creates may

include real-time images of our children playing outside in our yards, our friends coming to meet us where we live, and our guests arriving for gatherings of a religious or political nature, to mention only those of life's privacies around the home that are least likely to cause us embarrassment or even shame.

So, while I do not read Carpenter to permit us, as a panel, to disregard Bucci, I do, for these reasons, too, read Carpenter to underscore the need for us to reconsider Bucci as a Court. Nor do concerns about reliance interests -- which matter greatly in the stare decisis calculus -- provide a reason, in my view, for us to be so wary of shifting course from Bucci that we must stand by it even if it is wrong. It is never too late for a Circuit to ensure that its own precedents align with those of the Supreme Court, and the government's reliance interests in our own prior precedent here are not strong.

In the event that we were to overrule Bucci en banc, the good faith exception to the exclusionary rule, see Davis v. United States, 564 U.S. 229, 232 (2011); cf. United States v. Leon, 468 U.S. 897, 920-22 (1984) -- which the District Court happened to have found that the government waived in this case -- would likely provide all the protection that the government would need from challenges to its use of such video pole cameras during the period when Bucci was good law. There is thus no tidal wave of backward-looking litigation in the offing as there may be in some cases.

The reliance interest that the government has in the future use of such surveillance, moreover, is, as best I can tell, nonexistent. The government had decades of experience using eavesdropping technology without a warrant prior to the Supreme Court's

decision in Katz. See Goldman v. United States, 316 U.S. 129, 135 (1942) (upholding the warrantless use of a detectaphone); Olmstead v. United States, 277 U.S. 438, 470 (1928) (upholding warrantless wiretapping). But, that did not stop the Supreme Court from holding that such a practice violated the Fourth Amendment once it concluded that it did. See Katz, 389 U.S. at 359. That a means of surveillance might have provided useful evidence in the past cannot create a going-forward reliance interest that insulates its deployment from constitutional challenge in the future.

V.

I close with one final observation. Our Circuit, not so long ago, confronted a question as to whether to adopt an approach to the Fourth Amendment that would be attuned to the threats to privacy posed by new technological realities despite the absence of precedent compelling us to do so. See United States v. Wurie, 728 F.3d 1 (2013) (considering whether the search-incident-to-arrest exception to the warrant requirement allowed officers to search a seized cell phone following the defendant's arrest). We opted then to adopt that privacy-protective approach, as we were concerned that any other one would "create 'a serious and recurring threat to the privacy of countless individuals.'" Id. at 14 (quoting Arizona v. Gant, 565 U.S. 332, 345 (2009)).

The following year, the Supreme Court upheld our decision. See Riley v. California, 573 U.S. 373 (2014) (declining to extend the search-incident-to-arrest doctrine to allow law enforcement to conduct warrantless searches of modern cell phones). It did so in the course of emphasizing once again the threats

that technological advances pose to Fourth Amendment rights. See id. at 393-95.

The questions that this case raises strike me as similar in kind. Practical limitations of law enforcement budgets may constrain the circumstances in which ever-present video surveillance of our homes' entryways by hidden pole cameras zooming in on us will occur. So, too, might democratic objection. But, at present, Congress has placed no legislative limits on law enforcement's use of such cameras to investigate crime, even though there is no reason to believe that the lack of such legislation is a consequence of popular approval of the practice. We thus have no such legislative judgment to grant deference.

Especially after Carpenter, and what it retrospectively confirms about how a prior panel of ours may have misread some of the key Supreme Court decisions in this area, we should not approve this degree of unchecked law enforcement surveillance based on only the more-than-decade-old paragraph of analysis that Bucci provides. The sense of privacy that we take for granted -- even when in public -- is, as Carpenter confirms, important to protect. But, it bears emphasizing, the decisions that even lower courts make about whether to protect it do more than affect the evidence that may be used in particular criminal cases against particular defendants who have been secretly recorded. They shape -- collectively -- the society in which we live by helping to frame the expectations of privacy of even those who are not surveilled about the freedom that they enjoy under the Constitution.

The awareness that such surveillance is permitted -- and that we should all expect that it is -- may do as much to constrain our sense of what we are free to do as any actual surveillance. It is thus the expectations of privacy that society is prepared to accept as legitimate, more than the exclusion of evidence that courts order in response to them, that ultimately make it possible for people to go about their lives in ways that reflect that our society is in practice -- and not just in name -- a free one.

Accordingly, although I concur in the result that the majority reaches, I think it is important to make it clear that I do not share the view that it is one that the Supreme Court has already approved. Rather, in my view, the proper course for our Court is to use this case to give Bucci fresh consideration en banc, so that we may determine for ourselves whether the result that it requires is one that the Supreme Court's decisions, from Katz to Carpenter, prohibit.[18]

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[18] There is an issue about how a court could implement this expectation of privacy if it depends for its existence on the duration of the surveillance. But, courts often confront durational issues in the context of the Fourth Amendment, see Carpenter, 138 S. Ct. at 2217 n.3 (finding that "accessing seven days of [cell-site location information] constitutes a Fourth Amendment search"); United States v. Knotts, 460 U.S. 276, 283-85 (1983) (upholding law enforcement's use of a device to track a vehicle for a single car trip but cautioning that "different constitutional principles may be applicable" if technology allowed for "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision"); cf. United States v. Sharpe, 470 U.S. 675, 685 (1985) (explaining that, in considering an investigative stop under Terry v. Ohio, 392 U.S. 1 (1968), there is "no rigid time limitation" and there may be "difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest"), so that difficulty does not strike me as a dispositive one.

Similarly, there is an issue whether there may be limitations short of the requirement to obtain a warrant or to show probable cause that would ensure that the use of a pole camera like this one is not "unreasonable." U.S. Const. amend. IV (protecting the "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); cf. Commonwealth v. McCarthy, 142 N.E.3d 1090, 1110 (Mass. 2020) (Gants, C.J., concurring) (addressing the standards for permitting law enforcement's use of a searchable database of license plates). But, that question only arises if Bucci's no-search holding no longer binds.

APPENDIX E

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,

Defendant, Appellee.

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant, Appellee.

ERRATA SHEET

The opinion of this Court, issued on June 16, 2020, is amended as follows:

On page 25, footnote 11, line 32, replace "Transit" with "Transportation".

On page 39, line 13, replace "[would]" with "[would not]".

APPENDIX F

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,

Defendant, Appellee.

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant, Appellee.

Before

Howard, Chief Judge,

Lynch, Thompson, Kayatta, and Barron, Circuit Judges.

ORDER OF COURT

Entered: December 9, 2020

A majority of the active judges who are not disqualified have voted to hear this case en banc. Accordingly, the petition for rehearing en banc is granted. In accordance with customary practice, the panel opinion and the concurrence released on June 16, 2020 are withdrawn, and the judgment entered the same date is vacated. See 1st Cir. I.O.P. X(D).

The en banc court will have copies of the parties' previously filed briefs. The parties may file supplemental briefs addressing any questions the parties may wish to address.

Any supplemental briefs should be filed simultaneously on, or before, January 25, 2021, and shall comply with applicable rules concerning format, service, and other requirements. Amici are welcome to submit amicus briefs no later than 7 days after the principal supplemental briefs are filed. Any reply supplemental briefs must be filed no later than 30 days after the amicus brief deadline. Seventeen paper copies of all briefs filed should be provided to the Clerk's Office no later than one business day after the electronic brief is filed.

The en banc hearing will be scheduled for March 23, 2021, at 10:00 am.

By the Court:

Maria R. Hamilton, Clerk

cc: Hon. William G. Young, Robert Farrell, Clerk, United States District Court for the District of Massachusetts, Donald Campbell Lockhart, Randall Ernest Kromm, Amy Harman Burkart, Katharine Ann Wagner, Judith H. Mizner, Joshua Robert Hanye, Alexander A. Berengaut, Trisha Beth Anderson, Matthew R Segal, Jessie J. Rossman, Nathan Wessler, Brett Max Kaufman, Kristin Marie Mulvey, Linda J. Thompson, John M. Thompson

APPENDIX G

United States Court of Appeals
For the First Circuit

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant - Appellee.

Before

Barron, Chief Judge,

Lynch, Howard, Thompson,
Kayatta, and Gelpí, Circuit Judges.

ORDER OF COURT

Entered: June 23, 2022

Construing the petition before us as a petition for panel rehearing under Fed. R. App. P. 40, see Hitchcock v. Wainwright, 777 F.2d 628 (11th Cir.1985), the petition is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Donald Campbell Lockhart
Randall Ernest Kromm
Amy Harman Burkart
Katharine Ann Wagner
Linda J. Thompson
John M. Thompson
Samir Jain
Andrew Gellis Crocker
Alexander A. Berengaut
Trisha Beth Anderson
Matthew R Segal
Jessie J. Rossman
Nathan Wessler
Brett Max Kaufman
Kristin Marie Mulvey
Bruce D. Brown

APPENDIX H

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,

Defendant, Appellee.

JUDGMENT

Entered: May 27, 2022

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's order granting the motion to suppress is reversed, and the matter is remanded with instructions to deny the motion to suppress.

By the Court:

Maria R. Hamilton, Clerk

cc: Hon. William G. Young, Robert Farrell, Clerk, United States District Court for the District of Massachusetts Donald Campbell Lockhart, Randall Ernest Kromm, Amy Harman Burkart, Katharine Ann Wagner, Judith H. Mizner, Joshua Robert Hanye, Samir Jain, Alexander A. Berengaut, Trisha Beth Anderson, Matthew R Segal, Jessie J. Rossman, Nathan Wessler, Brett Max Kaufman, Kristin Marie Mulvey, Bruce D. Brown, Andrew Gellis Crocker

APPENDIX I

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,

Defendant, Appellee.

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant, Appellee.

Before

Barron, Chief Judge,

Lynch, Howard, Thompson, Kayatta, and Gelpí,
Circuit Judges.

ORDER OF COURT

Entered: June 09, 2020

On May 27, 2022, this court issued the opinion in the above-captioned matter under temporary seal and asked the parties to file a response as to whether redactions were necessary. Upon consideration of the responses, we now decide as follows. The full opinion previously filed in this case will remain under seal until further order of this court; an amended version of the opinion will be released forthwith for publication.

Appellee Daphne Moore's June 6, 2022 petition for rehearing asks that the opinion remain under seal pending resolution of the instant petition. That request is denied. The petition for rehearing will be decided in due course.

By the Court:

Maria R. Hamilton, Clerk

cc: Hon. William G. Young, Robert Farrell, Clerk, United States District Court for the District of Massachusetts, Donald Campbell Lockhart, Randall Ernest Kromm, Amy Harman Burkart, Katharine Ann Wagner, Judith H. Mizner, Joshua Robert Hanye, Samir Jain, Alexander A. Berengaut, Trisha Beth Anderson, Matthew R Segal, Jessie J. Rossman, Nathan Wessler, Brett Max Kaufman, Kristin Marie Mulvey, Bruce D. Brown, Andrew Gellis Crocker, Linda J. Thompson, John M. Thompson

APPENDIX J

United States Court of Appeals
For the First Circuit

Nos. 19-1582
19-1625

UNITED STATES,

Appellant,

v.

NIA MOORE-BUSH, a/k/a Nia Dinzey,

Defendant, Appellee.

Nos. 19-1583
19-1626

UNITED STATES,

Appellant,

v.

DAPHNE MOORE,

Defendant, Appellee.

Before

Barron, Chief Judge,

Lynch, Howard, Thompson, Kayatta, and Gelpí,
Circuit Judges.

ORDER OF COURT

Entered: May 27, 2022

The court's opinion in these cases is filed today under temporary seal. It is being made available at this time only to counsel for the parties and the district judge, as portions of the record and appellate pleadings have been sealed. The court has tentatively concluded that public release of the opinion would not impermissibly infringe upon confidentiality interests.

In an abundance of caution, however, the court will unseal and release the opinion in accordance with the following schedule:

> Counsel for the parties may advise the Clerk in writing on, or before, **June 6, 2022,** if either of them objects to the public issuance of the opinion as presently framed. If any objection is registered, the objecting party must identify (by page and line number) the language that the objecting party wishes redacted before the opinion is released publicly, together with any alternative language that might be inserted in the published opinion to replace the redacted language. The objecting party should also include a statement of the reasons why disclosure would be inappropriate. Any objection shall be filed under seal and served on opposing counsel.
>
> Objections should be made only if a party believes in good faith that highly confidential information will otherwise be divulged, and any objection shall be

accompanied by a certificate of counsel to that effect.

If one or more objections are filed within the prescribed time period, this court will make any revisions in the opinion that it, in its sole discretion, deems appropriate and will thereafter release the opinion from seal.

The failure to file an objection on, or before, **June 6, 2022**, will be deemed a waiver of any objection to the publication of the opinion as is, and the existing opinion will be publicly released immediately after the expiration of the stated period.

By the Court:

Maria R. Hamilton, Clerk

cc: Hon. William G. Young, Robert Farrell, Clerk, United States District Court for the District of Massachusetts, Donald Campbell Lockhart, Randall Ernest Kromm, Amy Harman Burkart, Katharine Ann Wagner, Judith H. Mizner, Joshua Robert Hanye, Samir Jain, Alexander A. Berengaut, Trisha Beth Anderson, Matthew R Segal, Jessie J. Rossman, Nathan Wessler, Brett Max Kaufman, Kristin Marie Mulvey, Bruce D. Brown, Andrew Gellis Crocker, Linda J. Thompson, John M. Thompson