No. 22-481

IN THE

Supreme Court of the United States

DAPHNE MOORE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether nonstop videorecording of a person's comings and goings from home for eight months with the purpose of gathering evidence against her is a "search" under the Fourth Amendment.

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

This case interests *amicus* because it involves core questions of individual liberty protected by the Constitution and presents an opportunity to improve the administration of the Fourth Amendment and maintain that provision's protections in the modern era.

SUMMARY OF ARGUMENT

Suspecting that Daphne Moore's daughter, Nia Moore-Bush, was using Moore's home "as the site for illegal firearms and narcotics transactions," the federal Bureau of Alcohol, Tobacco, Firearms and Explosives("ATF") began surveilling Moore's home. App. at 6a–7a. But knowing that the "location of the home made it difficult for law enforcement to undertake the physical surveillance of the home," ATF agents, without seeking a warrant, "surreptitiously installed a digital video camera near the top of a utility pole

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

across the street from the residence." *Id.* at 7a. ATF agents had access to both recorded and livestream video and could remotely "pan, tilt, and zoom the camera to better focus on individuals or objects of interest." *Id.* The video camera could magnify objects to a significant level, enough "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.* at 7a n.3. The ATF continued this warrantless surveillance without pause for approximately eight months. And eventually, Moore and her daughter were indicted for various illegal firearms and narcotics transactions.

In a 3-3 deadlock, the First Circuit sitting en banc was unable to definitively answer whether the ATF's investigation violated the Fourth Amendment. Pet Br. at 2. The two competing concurring opinions from the court attempted to faithfully apply current doctrine to the facts of Moore's case. Three judges thought this Court's doctrine forbade government agents from using months-long, round-the-clock video surveillance to record the activities of people in and around their homes without violating the Fourth Amendment. Three judges disagreed.

Both concurring opinions did a workmanlike job of applying current doctrine, but neither opinion applied the Fourth Amendment's explicit terms. They instead followed the "reasonable expectation of privacy" test. According to that test, as set out in Justice Harlan's concurring opinion in *Katz v. United States*, a search occurs when government action upsets a reasonable expectation of privacy. 389 U.S. 347, 360–62 (1967).

As many members of this Court and other scholars have recognized, however, the "reasonable expectation of privacy" test is fatally flawed. The test may seem congenial to justices and judges, who surely put care into their attempts to assess society's emergent views on privacy. But it necessarily requires judges to use their own views or best estimations about privacy, and the slipperiness of Justice Harlan's formulation is compounded by its essential circularity. Societal expectations may guide judicial rulings, but those rulings in turn guide societal expectations, and so on.

The fundamental question as to whether a Fourth Amendment search occurred should not be assessed in this way. Instead, this Court should hew more closely to the actual text of the Fourth Amendment in determining whether government action amounts to a constitutionally cognizable search, and if so, whether that search was permissible. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. Courts should therefore ask the following series of questions: Was there a search? A seizure? Was any search or seizure of "their persons, houses, papers, [or] effects"? Was any such search or seizure reasonable?

Courts can recognize searches using common, semantic understandings of the term. A search is looking over or through something with a purpose of finding something. And here, the highly directed and persistent observation of Moore at her home is a "search" for evidence against her in the natural sense of that term.

This literal, textual framework tees up the issue that is the central focus of the Fourth Amendment: the reasonableness of government agents in searching or seizing particular locations, persons, or items. And in this case, the ATF's search was almost certainly unreasonable. For months, the ATF intentionally and pervasively pried into the details of Moore's life at home without any judicial supervision and with no justification for failing to procure a warrant other than pure convenience.

To stabilize courts' application of the Fourth Amendment and better position them to assess "high-tech" cases, this Court should grant certiorari and decide this case using a framework that hews more faithfully to the language, meaning, and structure of the Fourth Amendment. The Court can thus give lower courts, law enforcement, the bar, and all citizens clearer signals and enable judges to address searches and seizures forthrightly, confidently assessing the reasonableness of government investigatory action.

ARGUMENT

The Fourth Amendment to the U.S. Constitution commands that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. Absent confusing doctrine, courts would analyze its elements as follows: Did the government search or seize anything? Was any search or seizure of a defendants' protected items—namely, of "persons," "houses," "papers," or "effects"? And finally, was any such search or seizure

unreasonable? When the answer to all three questions is "yes," then the claimant's right has been violated. *See* Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 254 (2019).

Here, the Court can employ that methodology. For months the ATF continuously surveilled "roughly half of the front structure of" of Moore's home with a video camera that the ATF "could remotely pan, tilt, and zoom" "to a significant level of magnification." Pet Br. at 4–6 (internal quotation marks omitted). Because the ATF recorded "the front curtilage of the residence," app. at 9a, the question of whether it was a protected item of Moore that was surveilled is easily disposed of. *See Florida v. Jardines*, 569 U.S. 1, 5–6 (2013). But the Court should take this case as an opportunity to hew more closely to the language and meaning of the Fourth Amendment than current doctrine permits in answering whether a search occurred and whether it was unreasonable. First, the Court should treat "search" as an ordinary term and conclude that for eight months the ATF searched Ms. Moore's home without seeking a warrant. Second, because the ATF had no justification for intruding for months without a warrant upon Moore's home—the "first among equals" in what the Fourth Amendment protects, *id.* at 6—the search was unreasonable.

I. THIS CASE GIVES THE COURT THE OPPORTUNITY TO TREAT "SEARCH" AS AN ORDINARY TERM.

Adopted since as Fourth Amendment doctrine, Justice Harlan's concurrence in *Katz* has made the word "search" a term of art, with difficult and unwieldy results. *See Carpenter v. United States*, 138 S.

Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting) (["W]e still don't even know what the 'reasonable expectation of privacy' test *is*.") But at the time of the framing, "search" was a word with common usage. "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (emphasis original) (citing N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprint 6th ed. 1989)).

The Court should return to treating "search" as ordinary term. Even when the claim is that some form of technology has been searched or used for searching, rather than looking for "reasonable expectations of privacy," courts should dig into whether the essence of searching is found in the behavior of government agents. That means examining whether government agents "s[ought] out that which [was] otherwise concealed from view." BLACK'S LAW DICTIONARY 1349 (6th ed. 1990). In this case, the ATF agents unquestionably were seeking to uncover information through their actions, and the evidence they acquired through their video camera was information that was not meaningfully exposed to the public.

A. The ATF's Videorecording Was Conducted with the Purpose of Finding Something.

The Court has often struggled to apply the Fourth Amendment in new technological environments. *See e.g., Olmstead v. United States*, 277 U.S. 438, 457, 464 (1928) (finding that wiretapping a telephone did not constitute an unreasonable search or seizure); *but see*

Katz, 389 U.S. at 353–59 (overruling *Olmstead*). To be sure, technology regularly creates new techniques for revealing evidence or fruits of crime, but the heart of the "search" concept remains the same. It is that focus that reflects a "purpose of finding something." It requires a "degree of conscious effort beyond the visual and audio scanning that typifies human consciousness." *Bellin*, supra, at 257. But at some point, ordinary observation of people and things crosses over to searching.

Courts often rely on some signal, often an associated seizure, to discern the line between mere observing and searching. Thus, in *Arizona v. Hicks*, the moving of stereo equipment was the contemporaneous signal of the fact that government agents were not just observing what was around them but searching for incriminating information. 480 U.S. 321, 324–25 (1987).

United States v. Jones, 565 U.S. 400 (2012) demonstrates how this same methodology can be employed even in "high-tech" cases. Government agents had attached a device to a car that was not theirs, making use of the car to transport their device, without a warrant. *Id.* at 404. There, although the Court referred to the totality of the disputed government action only as a "search," the precipitating physical invasion of the car was a seizure. *Id.* at 403; *see ACLU v. Clapper*, 785 F.3d 787, 823 (2d Cir. 2015) (referring to attachment of GPS device in Jones as "a technical trespass on the defendant's vehicle"). Though small, that seizure of Jones's car, in the form of "use," was a sufficient trigger of scrutiny for constitutional reasonableness. It facilitated a weeks-long, contemporaneous search for Jones's location and signaled the purpose of finding evidence.

But, as illustrated by *Kyllo v. United States*, 533 U.S. 27 (2001), there are also pure searches, unaccompanied by a seizure. In *Kyllo*, agents of the Department of the Interior aimed a thermal imager at the home of Danny Kyllo. The heat emanations from the house suggested a marijuana grow operation; the agents used that information, along with other evidence, to secure a search warrant that confirmed their suspicions and led to Kyllo's conviction. *Id.* at 29–30.

The Court reversed the conviction based on the search. "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' *Silverman v. United States*, 365 U.S. 505, 512 (1961), constitutes a search–at least where (as here) the technology in question is not in general public use." *Kyllo*, 533 U.S. at 34.

New technologies like thermal imaging are interesting and attractive, but they need not get special treatment under the Fourth Amendment. Just as the trespass in *Jones* signaled a purpose of finding evidence, thermal imaging in *Kyllo* showed (among other things) that the Interior Department's agents were intently focused on Danny Kyllo's house, a constitutionally protected item. They looked over the interior of the home—through it via inferences—with the purpose of finding evidence.

As this case demonstrates, it is possible for government agents to dedicate the same kind of focused effort by using more familiar technology such as video cameras. Here, ATF agents "surreptitiously installed a digital video camera near the top of a utility pole

across the public street from [Moore's] residence." App. at 7a. Without interruption, they recorded her every coming and going for eight months, as well as the effects she carried, every visitor she had, the time and duration of their visits, and more. The government retained the results to digest, analyze, and refer to at any time. This highly directed and persistent observation provided new facts about Moore's activities and associations and permitted inferences about her and her activities inside the home. The ATF looked over Moore and her house with a purpose of finding evidence—which made such activity a search.

B. The ATF's Videorecording Brought Information out of Concealment.

Individuals can conceal information from the general public through a wide variety of means. Some such means are physical—an individual can put up a fence, or, if they have sufficiently large enough property, offset their home far enough from the street to shield their activities in and around the home from public view. Others are more abstract, as individuals can also "rely heavily on the law" to conceal information, "such as when they share information with a fiduciary or service provider bound to confidentiality by contract or regulation." Jim Harper, *Escaping Fourth Amendment Doctrine after* Jones*: Physics, Law, and Privacy Protection*, 2011 CATO SUP. CT. REV. 219, 230–32 (2011–2012). And when government agents engage an examination for evidence that uncovers information not readily available to the public, a search has likely occurred. Bellin, *supra*, 255, 258–59 (quoting JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (1782)

(defining a "search" as "to seek after something lost, hid, or unknown").

Sometimes, as *Hicks* and *Kyllo* both evince, the degree to which an examination uncovers concealed information is immediately clear. In *Hicks*, the serial numbers of the stereo equipment were originally concealed from officers' view by the opacity of the equipment itself and the orientation of the serial numbers away from them. 480 U.S. at 325. Moving the stereo equipment brought information out of its natural concealment. *Id.* In a similar way, the thermal imager in *Kyllo* brought information out of concealment. The heat emanations of Danny Kyllo's walls did not appear in the human-visible spectrum; moving the emanations into the visible spectrum using a thermal imager brought them out of their natural concealment. 533 U.S. at 35–36.

But occasionally, a deeper review of the facts is needed to determine whether an examination uncovered information that was concealed from the public. For example, in *United States v. Knotts*, beeper surveillance technology allowed narcotics officers to track an automobile from St. Paul, Minnesota to Shell Lake, Wisconsin. 460 U.S. 276, 278 (1983). Writing for the majority, then-Justice Rehnquist held that such surveillance was not a "search" under the Fourth Amendment in part because "[v]isual surveillance from public places . . . would have sufficed to revealed all of these facts to the police." *Id.* at 282.

But the target of the officers' investigation had used evasive maneuvers on the road to successfully "foil the efforts of agents trying to follow his car by sight." Robert C. Power, *Technology and the Fourth*

Amendment: A Proposed Formulation for Visual Searches, 80 J. CRIM. L. & CRIMONOLOGY 1, 33 n. 112 (1989). Thus, while any member of the public might *theoretically* have been capable of acquiring the information that the police sought, the whereabouts of the police's target were, as a practical matter, only knowable through the use of the use of beeper technology.

Here, the video camera uncovered the activities of Moore and her guests. To be sure, when viewed as singular acts, many of Moore's recorded activities in theory could have been perceived by any person walking by her home. But the natural concealment of time and the impossibility of personally watching and remembering every act taken around her house hid the totality of this information from the public. *Cf. Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring) (noting how "'limited police resources'" constrains the ability of law enforcement to observe the activities of suspects). Days, weeks, and months of observation could be collapsed into minutes spent by agents interpreting and drawing inferences from Moore's movements and the objects she carried. The ATF used this technology and persistent surveillance to acquire information that was otherwise unavailable to law enforcement, the public, or even nosey neighbors.

II. THE ATF'S SEARCH OF MOORE'S HOME WAS UNREASONABLE.

After using a textual approach to the Fourth Amendment to conclude that the ATF searched Moore's home, the Court should then find that the search was unreasonable. The ATF had no justification for failing to get a warrant apart from convenience. Nor is this an example of merely observing

what is in plain view. Sometimes it may be reasonable for police officer to observe and surveil what is apparent to any nosy person walking by a home. *See generally Minnesota v. Carter*, 525 U.S. 83 (1998). But that is not this case. This case involves acquiring a near-perfect picture of Moore's comings and goings from her home, as well as her guests, and more. That is nothing like officers merely paying attention as they pass by a home.

A. There Was No Reason for the ATF to Search Moore's Home Without a Warrant.

"The ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). But "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932). As such, "reasonableness generally requires" law enforcement officers to obtain a judicial warrant to search protected items for evidence of criminal activity. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

The requirement for judicial warrants is especially crucial when law enforcement officers are searching an individual's home. As already noted, the Fourth Amendment protects many things from unreasonable searches: persons, houses, papers, and effects. But, as the Court has repeatedly emphasized, "the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home

and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 6. This includes "the area immediately surrounding and associated with the home—what [the Court's] cases call the curtilage—as part of the home itself for Fourth Amendment purposes." *Id.* (internal quotation marks omitted).

Thus, warrantless searches of the home and the area immediately surrounding it are generally unreasonable without a "compelling need for official action and no time to secure a warrant." *See Michigan v. Tyler*, 436 U.S. 499, 509 (1978). The "exigencies of the situation [must] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City*, 547 U.S. at 403. Otherwise, the Fourth Amendment "would [be] reduce[d] to a nullity, and leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

The sort of exigencies that are sufficient to justify warrantless searches are frequently grounded in the "'need to protect or preserve life or avoid serious injury.'" *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). And so, police officers may make "warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Id.* They may also enter the home if in "hot pursuit" of an armed and fleeing suspect. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967). Similarly, a "burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'" *Michigan*, 436 U.S. at 509. And at the outer bounds of this justification, the Court has recognized

the need for "prompt inspections" of, for example, unwholesome foods "in emergency situations." *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 539 (1967) (citing *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908)).

The imminent destruction of evidence in some cases might also be a sufficiently exigent circumstance. *Ker v. California*, 374 U.S. 23, 40 (1963). As such, in a search incident to an arrest, law enforcement may conduct a limited search of arrestees and the physical objects found on them. *United States v. Robinson*, 414 U.S. 218, 236 (1973). But law enforcement may not search the digital data contained in a cell phone found on an arrestee without a warrant. *Riley v. California*, 573 U.S. 373, 386–401 (2014).

Here, the facts of this case present essentially the opposite circumstances from compelling exigencies that might make a warrantless search "objectively reasonable." The ATF conducted its search of Moore's home for eight months. Pet Br. at 2. There was nothing hindering the agents from obtaining a warrant. And the agents' failure to procure a warrant had nothing to do with safety or the need to preserve evidence at imminent risk of destruction. The ATF refused to get a warrant out of pure convenience. But if administrative convenience allows law enforcement to scour an individual's home, then the Fourth Amendment has truly been reduced to a nullity. *See Johnson*, 333 U.S. at 14.

B. Moore Did not Meaningfully Expose the Information Gleaned from the Video Camera to the ATF.

The Fourth Amendment was designed "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). To effectuate that design, the Court must "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (cleaned up). And so, while ATF agents might not be expected to "shield their eyes when passing by a home on public thoroughfares," *California v. Ciraolo*, 476 U.S. 207, 213 (1986), they can be expected to procure a judicial warrant to monitor with modern technology an individual's life at home continuously for months. *See Carpenter*, 138 S. Ct. at 2217–18 (concluding that "near perfect surveillance" of an individual's activities even in public is categorically different from merely observing a single activity in public); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring in the judgement) (arguing that the length of time under which law enforcement surveil an individual matters under the Fourth Amendment); *Florida v. Riley*, 488 U.S. 445, 453 (1989) (O'Connor, J., concurring in the judgement) (stating that law enforcement may only use methods that are a "routine part of modern life" to surveil the curtilage without a warrant).

To be sure, in *Ciraolo* and *Riley*, the Court sanctioned the use of sophisticated technology to search the curtilages of individuals' homes under the theory

that individuals have no Fourth Amendment protection in what they "knowingly expose[] to the public." *Ciraolo*, 476 U.S. at 213–15; *Riley*, 488 U.S. at 455. But those cases should not govern here. As a threshold matter, the Court's application of the principle of exposing information to the public was questionable in the first place. But regardless, the searches and the information gathered in those cases are categorically different from what occurred in this case.

1. The Searches in *Ciraolo* and *Riley* were Unreasonable

As noted, the Court has assumed that what "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Thus when "a thing is visible (or otherwise perceivable) by authorities acting within law and custom," the Court has typically held that "a person cannot make a Fourth Amendment claim against [law enforcement] observing it and acting on the knowledge of it." Jim Harper, *Reforming Fourth Amendment Privacy Doctrine*, 57 AM. U. L. REV. 1381, 1389–90 (2008). In *Ciraolo* and *Riley*, the Court purported to apply this principle to the use of intentional ariel surveillance of the curtilage. But the Court's application of the principle to the facts was flawed and should not be extended to this case.

In *Ciraolo,* Dante Ciraolo's suburban residential yard was surrounded by a ten-foot-tall fence. *Ciraolo*, 476 U.S. at 209. Police received an anonymous tip that Ciraolo was growing marijuana in his backyard, but law enforcement could not catch a glimpse of it behind the fence. Police secured a private plane six

days later, and a trained marijuana expert took photos and made visual observation of Ciraolo's backyard. *Id.* at 209–10. The Court upheld this search because in theory any "member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.* at 213.

Riley presented a similar, although not identical situation. There, Michael Riley lived in a mobile home on five acres of rural property, with a greenhouse positioned ten to twenty feet behind his home. The property was surrounded by a wire fence and posted with a "DO NOT ENTER" sign. *Riley*, 488 U.S. at 448. Riley's greenhouse—the subject of the search—was not visible from a nearby road. A police officer secured a helicopter, hovered 400 feet above the property, and observed the interior of the greenhouse through a hole in its roof. *Id.* at 448. Because law enforcement had not violated any positive law, a plurality of the Court upheld the search on the theory Riley "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter." *Id.* at 450–52.

The Court's reasoning in both *Ciraolo* and *Riley* was flawed. The Court could not base its holding on the idea that the public was actually observing Ciraolo's or Riley's backyards. That would be fanciful. *Ciraolo*, 476 U.S. at 223–24 (Powell, J., dissenting). Instead, the Court's reasoning had to assume that, no matter how unlikely, whenever "a single member of the public [could have] *conceivably*" made the same observations that law enforcement did, individuals have assumed the risk of their private activities being observed. *Riley*, 488 U.S. 445 at 457 (Brennan, J., dissenting). But quite apart from assuring "preservation

of that degree of privacy against government that existed when the Fourth Amendment was adopted," *Carpenter*, 138 S. Ct. at 2214, that approach puts the privacy of individuals' at their homes at the mercy of evolving technology.

Individuals can reasonably be expected to make some efforts to conceal information and activities that they wish to keep private. But individuals should not need to assume great financial or practical cost to secure their privacy against "the advance of technology." *Kyllo*, 533 U.S. at 34. Individuals should not be expected to "disconnect[ ] the[ir] phone from the network" to avoid providing the government with "a trail of location data" amounting to "a comprehensive dossier of" one's "physical movements." *See Carpenter*, 138 S. Ct. at 2220. And individuals should not be expected to build a ceiling over the curtilage of their home when they have already built a fence to secure their privacy.

Similarly, here, for Moore to have avoided police observation entirely would have been unduly burdensome in terms of cost and practicality. She would have had to limit the recreational use of her own front yard. She would have needed to be ever cautious in the handling of packages and the invitation of guests into her home. She may have needed to forgo the invitation of guests at all. And she would need to install security fences of a sort atypical for her area at cost to herself.

2. *Ciraolo* and *Riley* are Distinguishable from this Case

Whatever the merits of *Ciraolo* and *Riley* in principle, this case is very different. The intrusion into the home was much greater here, and the information

gathered was of a "qualitatively different category" of information. *Cf. Carpenter*, 138 S. at 2216. *Ciraolo* and *Riley* should therefore not govern the outcome of this case, even assuming they were rightly decided in the first place.

First, unlike in *Ciraolo* and *Riley*, the extensive video surveillance at issue here would allow the ATF to draw detailed inferences regarding what occurred *within* the home. *Cf. Kyllo*, 533 U.S. at 36 (reasoning that the use of technology to draw detailed inferences about activity inside the home is problematic under the Fourth Amendment); *United States v. Karo*, 468 U.S. 705, 716–19 (1984) (same); *Jardines*, 569 U.S. at 17–24 (Kagan, J., concurring) (same).

There is no possibility of drawing inferences regarding what occurred within the home from quick visual surveillance of the curtilage. But here, prolonged video surveillance of the curtilage could expose "familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). And the ATF's 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. at 8a. A camera which can read license plate numbers can plausibly read package slips. App. at 150. Such observation exposes a citizen's "spiritual nature," "feelings," "intellect," "beliefs," "thoughts," "emotions," and "sensations." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting *Olmstead v. United States*, 277 U.S. 438, 277 U.S. 478 (1928) (Brandeis, J., dissenting).

Second, ATF's 24-hour-a-day, eight-month long surveillance inevitably captured the movements of

uninvolved third parties. ATF's pole camera captured "the license plate of every car that stopped by" and "the face of every visitor." App. at 84. Searches of such "a long and continuous duration" have been held unconstitutional even with judicial authorization. *Berger v. New York*, 388 U.S. 41, 59 (1967) (invalidating a New York wiretapping statute authorizing 24-hour surveillance over a two-month period with judicial authorization). Where "the conversations of any and all persons coming into the area covered by the device" may be "seized indiscriminately and without regard to their connection with the crime under investigation," even a warranted search lacks sufficient particularity if it lacks adequate judicial supervision. *Id.* at 59. What was true of the capturing of conversations in *Burger* is true of the capturing of identities and movements as well.

Third, this protracted surveillance constitutes "a too permeating police surveillance." *Di Re*, 332 U. S. at 595. The Court has yet to establish a bright-line cutoff as for when continuous subject observation using electronic devices is too long. But the Court has nevertheless found much shorter periods of two months, *Berger*, 388 U.S. at 59, twenty-eight days, *Jones*, 565 U.S. at 430 (Alito, J., concurring), and even seven days, *Carpenter*, 138 S. Ct. at 2226, to be too pervasive under the circumstances of the respective cases. Government agents staring directly at the front door of a person's home without pause for two-thirds of the year stands clearly on the wrong side of this Court's rough temporal line for continuous technological surveillance under the Fourth Amendment's reasonableness requirement.

CONCLUSION

For the foregoing reasons, we urge the Court to grant the petition for certiorari, adhere to the framework that the text of the Fourth Amendment demands, and find that the ATF conducted an unreasonable search of Moore's home for eight months.

Respectfully submitted,

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