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Arbitrary Government Intrusion of the Home: Warrantless Pole Camera Home Surveillance Survives *Katz* but Violates the Fourth Amendment

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ABSTRACT

The Fourth Amendment was adopted with a particular focus—to prevent arbitrary government intrusion. However, today most United States Circuit Courts permit arbitrary government intrusion via warrantless pole camera surveillance because the circuit courts apply the *Katz* test. As a result, government officials are almost entirely free to decide whether to install pole cameras anywhere on public property to continuously surveille a home for whatever duration the officials decide. Neither probable cause nor application for a warrant are required. The officials then not only surveil all visible home activities through the cameras, but the officials also record the surveillance and may introduce the footage as evidence. This warrantless pole camera home surveillance allows the government to arbitrarily invade the security of the home. This arbitrary government intrusion is contrary to the very object of the Fourth Amendment—to protect the right to be secure in one's home, person, papers, and effects against unreasonable searches. The background of the Fourth Amendment reveals that the essence of an unreasonable search is arbitrary government intrusion not confined by particularity or specific approval. These general and arbitrary intrusions were manifested in the form of general warrants and writs of assistance. Originally, the analysis for whether an unreasonable search occurred was anchored in property principles. While the Supreme Court has not abandoned the property trespass approach, it has added a test that may be utilized for non-trespassory intrusions, typically when technology is involved. This two-pronged test is the *Katz* test, which asks whether the person invaded had a subjective expectation of privacy and whether that

expectation is one that society would accept as reasonable. In recent cases, the Supreme Court recognized that comprehensive surveillance of the person is unconstitutional, particularly via tracking devices and access to cell phone location data. Like the person, the home is under enumerated Fourth Amendment protection. However, the test used to discern whether a search occurs in the context of non-trespassory technological intrusions, the *Katz* test, has led circuit courts to almost always conclude that the Fourth Amendment does not protect the home from warrantless pole camera surveillance. *United States v. Tuggle* illustrates a circuit court's application of the *Katz* test in the context of pole camera home surveillance. The result of applying this test is that, in this pole-camera context, the Fourth Amendment does not provide protection for the home. In light of the object of the Fourth Amendment—to ensure protection against arbitrary government intrusion—and the failure of the *Katz* test to ensure the Fourth Amendment's intended protection for the home, the Supreme Court should take up a pole camera home surveillance case and make two clarifications. First, the Court should declare that the *Katz* test is inapplicable in the context of pole camera home surveillance. Second, the Court should clarify that warrantless pole camera home surveillance constitutes an unreasonable search. While the Fourth Amendment was adopted to prevent the evil of arbitrary government intrusion, the current Fourth Amendment *Katz* test as applied to warrantless pole camera home surveillance permits the evil the Amendment was designed to prevent: arbitrary government intrusion. Therefore, it is critical for the Supreme Court to clarify that the Fourth Amendment does protect the home from the arbitrary government intrusion of warrantless pole camera home surveillance.

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in my endeavors. And thank you to the amazing professors and friends at Liberty University School of Law. *Soli Deo gloria*!

NOTE

ARBITRARY GOVERNMENT INTRUSION OF THE HOME: WARRANTLESS POLE CAMERA HOME SURVEILLANCE SURVIVES *KATZ* BUT VIOLATES THE FOURTH AMENDMENT

Hannah J. Eppling[†]

ABSTRACT

The Fourth Amendment was adopted with a particular focus—to prevent arbitrary government intrusion. However, today most United States Circuit Courts permit arbitrary government intrusion via warrantless pole camera surveillance because the circuit courts apply the Katz *test. As a result, government officials are almost entirely free to decide whether to install pole cameras anywhere on public property to continuously surveille a home for whatever duration the officials decide. Neither probable cause nor application for a warrant are required. The officials then not only surveil all visible home activities through the cameras, but the officials also record the surveillance and may introduce the footage as evidence. This warrantless pole camera home surveillance allows the government to arbitrarily invade the security of the home. This arbitrary government intrusion is contrary to the very object of the Fourth Amendment—to protect the right to be secure in one's home, person, papers, and effects against unreasonable searches. The background of the Fourth Amendment reveals that the essence of an unreasonable search is arbitrary government intrusion not confined by particularity or specific approval. These general and arbitrary intrusions were manifested in the form of general warrants and writs of assistance. Originally, the analysis for*

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whether an unreasonable search occurred was anchored in property principles. While the Supreme Court has not abandoned the property trespass approach, it has added a test that may be utilized for non-trespassory intrusions, typically when technology is involved. This two-pronged test is the Katz *test, which asks whether the person invaded had a subjective expectation of privacy and whether that expectation is one that society would accept as reasonable. In recent cases, the Supreme Court recognized that comprehensive surveillance of the person is unconstitutional, particularly via tracking devices and access to cell phone location data. Like the person, the home is under enumerated Fourth Amendment protection. However, the test used to discern whether a search occurs in the context of non-trespassory technological intrusions, the* Katz *test, has led circuit courts to almost always conclude that the Fourth Amendment does not protect the home from warrantless pole camera surveillance.* United States v. Tuggle *illustrates a circuit court's application of the* Katz *test in the context of pole camera home surveillance. The result of applying this test is that, in this pole-camera context, the Fourth Amendment does not provide protection for the home. In light of the object of the Fourth Amendment—to ensure protection against arbitrary government intrusion—and the failure of the* Katz *test to ensure the Fourth Amendment's intended protection for the home, the Supreme Court should take up a pole camera home surveillance case and make two clarifications. First, the Court should declare that the* Katz *test is inapplicable in the context of pole camera home surveillance. Second, the Court should clarify that warrantless pole camera home surveillance constitutes an unreasonable search. While the Fourth Amendment was adopted to prevent the evil of arbitrary government intrusion, the current Fourth Amendment* Katz *test as applied to warrantless pole camera home surveillance permits the evil the Amendment was designed to prevent: arbitrary government intrusion. Therefore, it is critical for the Supreme Court to clarify that the Fourth Amendment does protect the home from the arbitrary government intrusion of warrantless pole camera home surveillance.*

CONTENTS

I. INTRODUCTION 351

II. BACKGROUND 352
- A. *The Fourth Amendment and Arbitrary Government Intrusion* 353
- B. *Modern Search Warrant Requirements* 357
- C. *A "Search" May Be Found With or Without Physical Intrusion, Particularly in the Context of Technological Development* 359
  1. The Original Property Approach to Fourth Amendment Searches 360
  2. The Definition of a "Search" Shifted from a Property Focus to a Privacy Focus 362
  3. *Katz*'s Reasonable Expectation of Privacy as Applied by the Court to Technology and Comprehensive Surveillance of a Person 364
     a. The Supreme Court's application of the *Katz* test to surveillance technology 365
     b. The Supreme Court's approach to comprehensive surveillance of a person 367

III. THE *KATZ* TEST PERMITS ARBITRARY GOVERNMENT INTRUSION INTO THE SECURITY OF THE HOME 368
- A. *The Prevalence of the Problem of Arbitrary Government Intrusion Into the Security of the Home—Warrantless Pole Camera Home Surveillance* 369
  1. *United States v. Tuggle* 369
  2. The Seventh Circuit's Reasoning Illustrates the Failure of *Katz* in the Context of Pole Camera Home Surveillance ... 373
  3. Nearly Every Circuit Court's Application of *Katz* In This Context Yields the Same Result as *Tuggle* 378
- B. *Expounding on the Problem of Arbitrary Government Intrusion Into the Security of the Home—Insufficient Protection by the* Katz *Test Against Unreasonable Pole Camera Searches* 382
  1. Warrantless Pole Camera Home Surveillance Directly Contradicts the Object of the Fourth Amendment 383
  2. Comprehensive Surveillance Is Unconstitutional 385

IV. CLARIFICATION FROM THE SUPREME COURT IS NEEDED 389
A. The Supreme Court Should Declare That the Katz *Test is Inapplicable in the Context of Pole Camera Home Surveillance* 389
B. The Supreme Court Should Clarify that Government Use of Pole Cameras to Surveil the Home Constitutes an Unreasonable Search 392
1. Pole Camera Home Surveillance Constitutes a Search 392
a. The Fourth Amendment's text and purpose show that pole camera home surveillance is a search 393
b. Pole camera home surveillance constitutes a search despite not applying the *Katz* test and despite the absence of a physical trespass 393
c. The nature of pole camera home surveillance compels the finding of a search 395
2. Warrantless Pole Camera Home Surveillance Searches Are Unreasonable 398
V. CONCLUSION 399

I. INTRODUCTION

It's dark. No one can see law enforcement install three pole cameras on utility poles around a home. The officers make quick work of the installation and leave. For the next eighteen months the government watches and records every single movement, every activity that occurs at the home, compiling a permanent, comprehensive record of the resident's life. After collecting all of the information desired, the government uses the footage to indict and convict the resident. Further, the evidence cannot be suppressed because the court does not consider the eighteen-month surveillance to be a Fourth Amendment search that requires a warrant. This scenario is illustrative of what the *Katz* test allows in the context of warrantless pole camera home surveillance.[1] The test fails to provide the home with the protection the Fourth Amendment was intended to provide. The Supreme Court should take up a pole camera home surveillance case and make two clarifications about the Fourth Amendment's protection of the home from unreasonable searches: First, the Court should declare that the *Katz* test is inapplicable in the context of pole camera home surveillance; second, the Court should clarify that warrantless pole camera home surveillance constitutes an unreasonable search.[2] To explain why the Supreme Court should make these clarifications, this Casenote will first review the background of the Fourth Amendment in Part II, which gives vivid meaning and illumination to what the Fourth Amendment was adopted to prohibit.[3] Part III will discuss the central problem this Casenote addresses: In the context of warrantless pole camera home surveillance, the *Katz* test fails to provide the home with its intended Fourth Amendment protection because the surveillance permits arbitrary government intrusion into the security of the home.[4] To illustrate the failure of the *Katz* test in this context, the section discusses a recent Seventh Circuit case, *United States v.*

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[1] *See generally* United States v. Tuggle, 4 F.4th 505, 511–12 (7th Cir. 2021); United States v. Moore-Bush, 36 F.4th 320, 322–23 (1st Cir. 2022) (en banc); United States v. Houston, 813 F.3d 282, 288–90 (6th Cir. 2016).

[2] *See* discussion *infra* Part IV.

[3] *See* discussion *infra* Part II.

[4] *See* discussion *infra* Part III.

Tuggle, and how the court's application of the *Katz* test leads to a result not intended by the Constitution.[5] Part IV of the Casenote discusses the proposal: The Supreme Court should make the two clarifications to ensure Fourth Amendment protection for the home against arbitrary government intrusion.[6] This clarification is critical to protect the home from the evil that the Fourth Amendment was designed to prevent.[7]

II. BACKGROUND

The Fourth Amendment was designed to prevent the evil of arbitrary government intrusion.[8] Understanding the background of the Fourth Amendment is vital to understanding both the problem and solution of this Casenote. The background is organized into three subsections. First, it discusses the context of the Fourth Amendment's adoption. This discussion explains the people's motivation and identifies the Amendment's object, which is to prevent the problem that motivated the people to adopt the amendment. Second, the background reviews the present-day process for obtaining a search warrant. This review includes a specific codified example where protection is provided against warrantless tracking device surveillance to compare to the lack of protection against warrantless pole camera surveillance. Third, the background discusses how the Supreme Court developed its Fourth Amendment jurisprudence in three steps. The first step covers the Court's original property-based approaches to Fourth Amendment analysis. The second step covers the Court's transition from a property focus to a privacy focus and the Court's addition of the reasonable expectation of privacy test from *Katz v. United States*. The third step covers the Court's application of the *Katz* test to technology, particularly to home surveillance. This third step also covers how the Court has provided Fourth

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[5] *See* discussion *infra* Part III.

[6] *See* discussion *infra* Part IV.

[7] Stone v. Powell, 428 U.S. 465, 482 (1976) (citing Stanford v. Texas, 379 U.S. 476, 481–85 (1965)); *see* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990); Agnello v. United States, 290 F. 671, 676 (2d Cir. 1923).

[8] *Stone*, 428 U.S. at 482; *Verdugo-Urquidez*, 494 U.S. at 266; *Agnello*, 290 F. at 676; Frank v. Maryland, 359 U.S. 360, 362–63 (1959), *overruled by* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967).

Amendment protection against comprehensive surveillance of a person. The background of the Fourth Amendment is the foundation for understanding why today's jurisprudence as applied to pole camera home surveillance fails to ensure that the home is protected by the Fourth Amendment from arbitrary government intrusion.

A. The Fourth Amendment and Arbitrary Government Intrusion

The hallmarks of an unreasonable government search are arbitrary or "unchecked general authority" and intrusion upon the "sanctity of a man's home and the privacies of life."[9] Writs of assistance and general warrants epitomized such unreasonable searches and impelled the adoption of the Fourth Amendment—they were the problem the Fourth Amendment was meant to remedy.[10]

In both England and the American colonies, the British engaged in "a pattern of abuses" via the use of writs of assistance and general warrants.[11] Writs of assistance only required the authorities to identify the "object of the search" before "allowing them to search any place where the goods might be found."[12] The writs imposed no duration or location limitations but remained in effect throughout the British sovereign's life plus six months after the sovereign's death.[13] Officers of the Crown were granted "blanket authority to search where they pleased."[14] One way the British used these writs was to allow customs officials to inspect colonists' imported goods for possible "violation[s] of the British tax laws."[15] These hated

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[9] *See Stone*, 428 U.S. at 482 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 408–09 (1976)).

[10] *See id.*; Russell L. Weaver, *The Fourth Amendment: History, Purpose, and Remedies*, 52 TEX. TECH L. REV. 127, 128 (2019); *Agnello*, 290 F. at 675–76; *see also* Stanford v. Texas, 379 U.S. 476, 481 (1965) (explaining how general warrants and writs of assistance also motivated early Americans to seek independence from England).

[11] Weaver, *supra* note 10, at 128; *see Agnello*, 290 F. at 676; *Stanford*, 379 U.S. at 481–82.

[12] *See* Weaver, *supra* note 10, at 128.

[13] *See id.*; Payton v. New York, 445 U.S. 573, 608 (1980); S. DOC. NO. 112-9, at 1378 (2016).

[14] *Stanford*, 379 U.S. at 481.

[15] *Id.*

general searches drove the colonists to seek independence.[16] Such invasions were "the worst instrument of arbitrary power, the most destructive of . . . liberty[] and the fundamental principles of law."[17] Indeed, "[i]n years prior to the Revolution[,] leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods."[18] Not only did the writs drive the colonists to independence, the writs were "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of" the British Crown.[19] Arbitrary, invasive, and unredressed government action compelled the colonists to establish a new nation.[20]

"[W]hile the Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance, its roots go far deeper" to the common law prohibition of oppressive general warrants, which, as the name suggests, inherently sanctioned unbridled government authority.[21] Colonial authorities utilized general warrants in early America.[22] While writs of assistance only required officials to specify the

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[16] *See id.*; Chimel v. California, 395 U.S. 752, 761 (1969); Byrd v. United States, 138 S. Ct. 1518, 1526 (2018) (quoting *Chimel*, 395 U.S. at 761); 10 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR 247–48 (Charles Francis Adams ed., Bos., Little, Brown & Co. 1856).

[17] *Stanford*, 379 U.S. at 481 (quoting 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR 523 (Charles Francis Adams ed., Bos., Little, Brown & Co. 1850)).

[18] Frank v. Maryland, 359 U.S. 360, 363 (1959), *overruled by* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967).

[19] *Stanford*, 379 U.S. at 481; Boyd v. United States, 116 U.S. 616, 625 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 414 (1976); *see* Draper v. United States, 358 U.S. 307, 317 (1959).

[20] *See Stanford*, 379 U.S. at 481; Gilbert v. California, 388 U.S. 263, 286 (1967) ("And if the Fourth Amendment was aimed at any particular target it was aimed at [general searches] . . . . When we take that step, we resurrect one of the deepest-rooted complaints that gave rise to our Revolution.").

[21] *See Stanford*, 379 U.S. at 482; Virginia v. Moore, 553 U.S. 164, 169 (2008); Carpenter v. United States, 138 S. Ct. 2206, 2243 (2018) (Thomas, J., dissenting).

[22] *See* Weaver, *supra* note 10, at 128.

search's object, general warrants only required officials to identify an offense.[23] The general warrant-holder was then left to his own discretion to arrest anyone and search anywhere he pleased.[24] He could exercise his discretion unfettered and free from any "judicial check."[25] This arbitrary government intrusion was the evil that the Fourth Amendment was designed to protect against.[26] The American people, skeptical of government action, adopted the Fourth Amendment "to prohibit the general warrants and writs of assistance that English judges had employed against" them.[27] Justice Joseph Story noted that the Fourth Amendment "seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property."[28]

The Fourth Amendment affirmed what the common law had already established.[29] The "roots" of the amendment stretch deeply into the centuries-long English common law "struggle against oppression," generally in the context of "conflict between the Crown and the press."[30] The seminal case on the common law development of illegal searches and seizures is *Entick v. Carrington*.[31] In *Entick*, the English "finally judicially condemned" general warrants after the government executed a general warrant that

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[23] *Id.*; Steagald v. United States, 451 U.S. 204, 220 (1981).

[24] Weaver, *supra* note 10, at 128; *Steagald*, 451 U.S. at 220.

[25] *Steagald*, 451 U.S. at 220 (citing Stanford v. Texas, 379 U.S. 476, 481–85 (1965)).

[26] *See Steagald*, 451 U.S. at 220; Stone v. Powell, 428 U.S. 465, 482 (1976); S. DOC. NO. 112-9, at 1378 (2016).

[27] Virginia v. Moore, 553 U.S. 164, 168–69 (2008) (citing Boyd v. United States, 116 U.S. 616, 624–27 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 414 (1976); Payton v. New York, 445 U.S. 573, 583–84 (1980)).

[28] JOSEPH L. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895 (1833).

[29] *See Moore*, 553 U.S. at 169 (quoting STORY, *supra* note 28, at § 1895).

[30] *See* Stanford v. Texas, 379 U.S. 476, 482 (1965); Marcus v. Search Warrant of Prop., 367 U.S. 717, 728 (1961).

[31] *See* Entick v. Carrington, 19 Howell's State Trials 1029 (1765); *Marcus*, 367 U.S. at 728; *Boyd*, 116 U.S. at 626–27 (noting that *Entick v. Carrington* was a monumental English case that framed the early American understanding of searches and seizures).

permitted it to search and seize any of Entick's "books and papers."[32] Though the general warrant had a "long history," Lord Camden found that it was "contrary to the common law."[33] The court in *Entick* recognized that "[t]he great end, for which men entered into society, was to secure their property."[34] The right to be secure in one's property "is preserved sacred and incommunicable in all instances" unless modified by a valid law.[35] Therefore, the right to be secure in one's home against unreasonable searches and seizures preexisted the Fourth Amendment to the Constitution.[36]

The people adopted the Fourth Amendment in the Bill of Rights after they ratified the United States Constitution.[37] The Constitution did not originally contain "a provision like the Fourth Amendment, because [the Framers] believed the National Government lacked power to conduct searches and seizures."[38] As already noted, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was a common law right before it was included as a constitutional right.[39] The Fourth Amendment's immediate object "was to prohibit the general warrants and writs of assistance that English judges had

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[32] *Marcus*, 367 U.S. at 728; *Stanford*, 379 U.S. at 483–84; *Entick*, 19 Howell's State Trials at 1029.

[33] *Marcus*, 367 U.S. at 728.

[34] *Entick*, 19 Howell's State Trials at 1066; Warden v. Hayden, 387 U.S. 294, 303 (1967) (quoting *Entick*, 19 Howell's State Trials at 1066).

[35] *Entick*, 19 Howell's State Trials at 1066.

[36] Agnello v. United States, 290 F. 671, 675–76 (2d Cir. 1923); *see Entick*, 19 Howell's State Trials at 1029.

[37] *See* John M. Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A. J. 918, 918–19 (1964); S. DOC. NO. 112-9, at 1378–79 (2016).

[38] United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990). James Madison advocated for the adoption of the Fourth Amendment. *Id.* One of his concerns was that the government would attempt to use the Necessary and Proper Clause to label general warrants "necessary." *Id.*

[39] U.S. CONST. amend. IV; *Agnello*, 290 F. at 675.

employed against the colonists."[40] This prohibition "was intended to [expressly] protect the 'sanctity of a man's home and the privacies of life' from searches under unchecked general authority."[41] After experiencing the execution of invasive writs of assistance and general warrants, early Americans wanted the Fourth Amendment to provide express constitutional protection against "[s]earches for evidence of crime," even though general warrant searches were illegal under the common law.[42] Americans did not want to risk the government subjecting them to the evils of invasive and arbitrary searches.[43]

B. Modern Search Warrant Requirements

Unlike general warrants, which required virtually no particularity, constitutional search warrants require particularity about the location, object, and person to be searched upon probable cause and oath or affirmation.[44] These search warrant requirements are laid out in the text of the Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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[40] Virginia v. Moore, 553 U.S. 164, 168–69 (2008) (citing Boyd v. United States, 116 U.S. 616, 624–27 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 414 (1976); Payton v. New York, 445 U.S. 573, 583–84 (1980)).

[41] *See* Stone v. Powell, 428 U.S. 465, 482 (1976) (quoting *Boyd*, 116 U.S. at 630).

[42] *See* Abel v. United States, 362 U.S. 217, 237 (1960); Agnello v. United States, 290 F. 671, 675–76 (2d Cir. 1923).

[43] *See Stone*, 428 U.S. at 482; Payton v. New York, 445 U.S. 573, 582 n.17 (1980) ("Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry . . . ."); Marshall v. Barlow's Inc., 436 U.S. 307, 327 (1978) ("The Framers' familiarity with the abuses attending the issuance of such general warrants provided the principal stimulus for the restraints on arbitrary governmental intrusions embodied in the Fourth Amendment."); United States v. Watkins, No. 20-CR-365-MOC-DCK-1, 2021 U.S. Dist. LEXIS 225499, at *7 (W.D.N.C. Nov. 23, 2021) (quoting Carpenter v. United States, 138 S. Ct. 2206, 2213 (1967)); United States v. Beene, 818 F.3d 157, 166–67 (5th Cir. 2016); Lange v. California, 141 S. Ct. 2011, 2018 (2021).

[44] STORY, *supra* note 28, at § 1895; Weaver, *supra* note 10, at 128; U.S. CONST. amend. IV.

> 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.[45]

An officer must first demonstrate probable cause.[46] As currently understood, the probable cause requirement obligates an officer to show that the search is likely to produce evidence of a crime.[47] The officer must also satisfy the particularity requirement, which requires the officer to specifically describe where, who, and what he would like to search—the officer cannot obtain a warrant to search an unspecified place, person, or object.[48] Requiring particularity serves to prevent the "unbridled authority" that was characteristic of general warrants.[49] After the officer demonstrates these two requirements, a neutral judicial officer must evaluate the inferences to determine whether the officer's showing justifies issuing a warrant.[50] Rather than leave officers to interested, zealous discretion, the Fourth Amendment requires a disinterested, neutral judicial officer to weigh the inferences so that protection against unreasonable searches—arbitrary government intrusions—is ensured.[51] Currently, because officers are allowed to unilaterally decide whether to intrude upon a home's security via pole camera home surveillance, the Fourth Amendment's third-party determination requirement is the critical point of protection not afforded to the home.

To better understand the modern lack of Fourth Amendment protection against warrantless pole camera home surveillance, it is helpful to consider

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[45] U.S. CONST. amend. IV.

[46] *See id.*

[47] S. DOC. NO. 112-9, at 1448 (2016); *Search Warrant*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/search_warrant (last visited Oct. 6, 2023).

[48] *See* U.S. CONST. amend. IV; S. DOC. NO. 112-9, at 1404; *Search Warrant*, *supra* note 47.

[49] *See* Stanford v. Texas, 379 U.S. 476, 481 (1965).

[50] *See* S. DOC. NO. 112-9, at 1452; *Search Warrant*, *supra* note 47; Johnson v. United States, 333 U.S. 10, 13–14 (1948).

[51] *See Johnson*, 333 U.S. at 13–14.

the search warrant application process in the context of comparable surveillance technology: tracking devices. The Federal Rules of Criminal Procedure (Federal Rules), subject to state laws, provide additional regulation of searches and seizures.[52] While the Federal Rules do not regulate pole camera surveillance, they do regulate tracking device searches.[53] The Federal Rules increase the particularity requirement for tracking devices.[54] The officer must "specify a reasonable length of time that the device may be used," not exceeding forty-five days from issuance of the warrant.[55] The tracking device must be installed within ten days of the warrant's issuance and must be installed during the day unless authorized for good cause to install at another time.[56] Therefore, while Congress has enacted specific heightened protections from warrantless tracking device surveillance, there is no such heightened or basic protection established by Congress or the courts for homes from warrantless pole camera surveillance.[57]

C. A "Search" May Be Found With or Without Physical Intrusion, Particularly in the Context of Technological Development

The Supreme Court has varied its definition of what constitutes a "search."[58] Originally, searches and seizures were strictly tied to property concepts.[59] The first concept deals with who holds the superior property

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[52] FED. R. CRIM. P. 41(a)(1).

[53] *See id.* at 41(d)(1), (e)(2)(C), (f)(2).

[54] *See id.* at 41(e)(2)(C).

[55] *Id.*

[56] *Id.* at 41(e)(2)(C)(i)–(ii).

[57] *See* discussion *supra* Section II.B; discussion *infra* Sections II.C, III.A.3.

[58] Weaver, *supra* note 10, at 137; *see* Michael J. Zydney Mannheimer, *Decentralizing Fourth Amendment Search Doctrine*, 107 KY. L.J. 169, 174 (2018–2019).

[59] Mannheimer, *supra* note 58, at 174; Russell L. Weaver, *Article: The Fourth Amendment and Technologically Based Surveillance*, 48 TEX. TECH. L. REV. 231, 234–35 (2015); *see* Brief for Gun Owners of America, Inc. et al. as Amici Curiae Supporting Respondents at 3, United States v. Jones, 565 U.S. 400 (2012) (No. 10-1259).

interest in the property to be seized.[60] The second concept deals with a trespass inquiry to determine what constitutes a "search."[61] However, the Court added to the property-based concept by adopting an expectation of privacy approach in the face of advancing technology.[62] This additional approach was expressed in the *Katz* test adopted by the Court, which expanded the definition of a "search" to assist Fourth Amendment analysis, especially where technology is involved.[63] Therefore, a Fourth Amendment "search" may be found with or without a physical intrusion.[64]

1. The Original Property Approach to Fourth Amendment Searches

The Fourth Amendment is rooted in a property-based approach.[65] This approach has two concepts. First, the approach focuses on who holds the property interest of the object of the search.[66] Second, the approach considers whether the government physically trespassed to decide whether a "search" occurred.[67]

As to the first concept, until 1967, the "mere evidence rule" informed what searches were considered per se unreasonable.[68] Under the mere evidence rule, the government could not conduct searches merely to collect evidence.[69] Instead, the government was required to demonstrate that it had

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[60] Gouled v. United States, 255 U.S. 298, 309 (1921), *abrogated by* Warden v. Hayden, 387 U.S. 294, 303, 305–10 (1967).

[61] Weaver, *supra* note 59, at 234–35.

[62] *See* Weaver, *supra* note 10, at 130; *Jones*, 565 U.S. at 409.

[63] *See* Weaver, *supra* note 59, at 235–36; *Jones*, 565 U.S. at 409.

[64] *See Jones*, 565 U.S. at 409.

[65] *See* Herbert W. Titus & William J. Olson, United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment*, 3 CASE W. RES. UNIV. J. L. TECH. & INTERNET 243, 255 (2012).

[66] *See* Gouled v. United States, 255 U.S. 298, 309 (1921), *abrogated by* Warden v. Hayden, 387 U.S. 294, 303, 305–10 (1967).

[67] *See* Weaver, *supra* note 59, at 234.

[68] Titus & Olson, *supra* note 65, at 255.

[69] *See Gouled*, 255 U.S. at 309.

a superior property right in the thing to be seized.[70] Some searches could have been considered per se unreasonable even if a warrant had been secured.[71] The Court's understanding was that warrants were "not [to] be used as a means of gaining access to a man's house or office and papers solely for the purpose of making [a] search to secure evidence to be used against him in a criminal or penal proceeding."[72] Rather, such searches for evidence were permissible "only when [the government held] a primary right . . . in the property to be seized, or in the right to the possession of [the property], or when" the police power permitted the government to take property unlawfully possessed by the accused.[73] Therefore, the government could not search or seize merely to gather evidence unless the government held a superior interest in the property to be searched or seized.[74] Until 1863, neither English nor United States law authorized a search and seizure merely for obtaining evidence to use against the accused.[75] In *Boyd v. United States*, the Supreme Court noted that searches and seizures "made for the purpose of compelling a man to give evidence against himself" were mostly condemned as unreasonable by the Fourth Amendment.[76] Such compelled self-incrimination implicates the Fifth Amendment and demonstrates both the connection between the Fourth and Fifth Amendments and the importance of ensuring that searches are reasonable[77] so that arbitrary governmental intrusion is prevented.[78]

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[70] *See id.*

[71] Titus & Olson, *supra* note 65, at 255.

[72] *Gouled*, 255 U.S. at 309.

[73] *Id.*

[74] *See id.*

[75] Titus & Olson, *supra* note 65, at 256; Boyd v. United States, 116 U.S. 616, 622–23 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 408–09 (1976).

[76] *See* Titus & Olson, *supra* note 65, at 256; *Boyd*, 116 U.S. at 633.

[77] *See* Titus & Olson, *supra* note 65, at 256; *Boyd*, 116 U.S. at 633 ("[T]he 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.").

[78] *See* Blackford v. United States, 247 F.2d 745, 748 (9th Cir. 1957). Both the Fourth and Fifth Amendments are meant to prevent arbitrary government intrusion. *Id.*

As to the second concept, because the Fourth Amendment was adopted largely in reaction to governmental abuse through general warrants and writs of assistance, and because "technology was far less advanced in the eighteenth century," the early Americans' concern was about actual physical searches rather than technological intrusions.[79] As the court in *Entick* reasoned, because any physical intrusion constitutes a trespass if not permitted by law, a seizure that physically invaded property constituted a trespass unless it was shown that the invasion was permitted by law.[80] The Supreme Court, consistent with this physical-search concern, only found an unreasonable search where the government "actual[ly] intru[ded]" into a "constitutionally protected area."[81] Constitutionally protected areas at least included the protected areas the Fourth Amendment enumerates: "persons, houses, papers, and effects."[82] However, the physical intrusion criteria began to prove unworkable in the face of advancing technology.[83] Some Justices pointed out this unworkability in their dissents to decisions that adhered to the property-based view and that accordingly declined to find a search where there was no physical intrusion.[84]

2. The Definition of a "Search" Shifted from a Property Focus to a Privacy Focus

The Supreme Court eventually mitigated its adherence to both aspects of the property-based approach.[85] First, the Court abandoned the superior

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[79] Weaver, *supra* note 59, at 233–34.

[80] Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (1765).

[81] Weaver, *supra* note 59, at 234; *see* Silverman v. United States, 365 U.S. 505, 510, 512 (1961).

[82] U.S. CONST. amend. IV; *see Silverman*, 365 U.S. at 510, 512; Berger v. New York, 388 U.S. 41, 59 (1967). Note that the Court in *Katz v. United States* veered away from the concept of constitutionally protected areas, declaring that "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

[83] *See* Weaver, *supra* note 59, at 235–36.

[84] *Id.*

[85] *See* Warden v. Hayden, 387 U.S. 294, 304 (1967); *Katz*, 389 U.S. at 353; United States v. Jones, 565 U.S. 400, 409 (2012); Titus & Olson, *supra* note 65, at 257–58.

property interest concept in *Warden v. Hayden*.[86] Then, six months later, the Court provided an alternative to the physical trespass requirement in *Katz v. United States*.[87]

Warden v. Hayden represents a fundamental shift in Fourth Amendment jurisprudence from a property focus to a privacy focus.[88] The Court rejected the superior property interest inquiry and asserted that "the principal object of the Fourth Amendment is the protection of privacy rather than property."[89] The Court abandoned the notions that a superior property claim by the government is necessary for a lawful search and seizure and "that a search for 'mere evidence' [i]s *per se* 'unreasonable.'"[90] Justice Fortas concurred in the opinion, noting that abandoning the mere evidence rule opens the door to permit general searches, like writs of assistance, and it "needlessly destroys, root and branch, a basic part of liberty's heritage."[91] Justice Fortas was concerned about the "enormous and dangerous hole in the Fourth Amendment" caused by removing the mere evidence rule.[92]

Only months after *Warden*, in 1967, the Supreme Court addressed "the encroachment of modern technology" on individuals' privacy in *Katz v. United States*.[93] By introducing and applying the "reasonable expectation of privacy test," the Court found that a search occurred even though there had been no physical trespass.[94] Expressly per the Court, the focus of the Fourth Amendment analysis is no longer property—now the focus is privacy.[95] This shift "from places to persons" centered on whether the person claiming

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[86] *See Warden*, 387 U.S. at 304; Titus & Olson, *supra* note 65, at 258.

[87] *See Katz*, 389 U.S. at 353; Titus & Olson, *supra* note 65, at 257–58.

[88] *See Warden*, 387 U.S. at 304, 307, 309–10; Brief for Gun Owners of America, Inc. et al., *supra* note 59, at 14–15.

[89] *Warden*, 387 U.S. at 304.

[90] Titus & Olson, *supra* note 65, at 258; Warden v. Hayden, 387 U.S. 294, 303–06 (1967).

[91] *Warden*, 387 U.S. at 312 (Fortas, J., concurring); Titus & Olson, *supra* note 65, at 258–59.

[92] *Warden*, 387 U.S. at 312 (Fortas, J., concurring); Titus & Olson, *supra* note 65, at 258.

[93] Titus & Olson, *supra* note 65, at 257–58; *see* Weaver, *supra* note 10, at 130; Katz v. United States, 389 U.S. 347, 348–49 (1967).

[94] *See* Weaver, *supra* note 10, at 134–35; *Katz*, 389 U.S. at 348–49.

[95] *See* Weaver, *supra* note 10, at 134–35.

Fourth Amendment protection had a "reasonable expectation of privacy."[96] Justice Harlan added to the reasonable expectation of privacy test by advocating that not only the subjective expectation, but also an objective societal expectation, be considered.[97] Hence, the *Katz* test is a two-pronged test: (1) "a person [must] have exhibited an actual (subjective) expectation of privacy" and (2) "that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'"[98] Given the Court's recent decision in *Warden*, in *Katz*, the Court had no need to consider whether the officials sought property to which the government had a superior right.

3. *Katz*'s Reasonable Expectation of Privacy as Applied by the Court to Technology and Comprehensive Surveillance of a Person

While the new "*Katz* test *seemed* to provide the courts with a sound basis for dealing with the problem of advancing technology," its results have not provided the consistent protection the Fourth Amendment demands.[99] Instead, the test's "promise remains unfulfilled."[100] The *Katz* test has been largely unprotective,[101] especially in the context of pole camera home surveillance. While the Supreme Court has not addressed searches in the context of pole camera home surveillance, the Court has addressed technological surveillance and comprehensive surveillance of a person.[102]

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[96] *Id.*

[97] *See id.* at 135.

[98] *See* United States v. Jones, 565 U.S. 400, 409 (2012); *Katz*, 389 U.S. at 361 (Harlan, J., concurring); Weaver, *supra* note 10, at 130.

[99] Weaver, *supra* note 59, at 236–37; *see* Tracey Maclin, Katz*,* Kyllo*, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 72 (2002); Nicholas A. Kahn-Fogel, Katz*,* Carpenter*, and Classical Conservatism*, 29 CORNELL J. L. & PUB. POL'Y 95, 100–01 (2019).

[100] Weaver, *supra* note 59, at 237; *see* Daniel J. Polatsek, *Thermal Imaging and the Fourth Amendment: Pushing the* Katz *Test Towards Terminal Velocity*, 13 J. MARSHALL J. COMPUT. & INFO. L. 453, 463 (1995).

[101] *See* Weaver, *supra* note 59, at 237; Polatsek, *supra* note 100, at 463.

[102] *See* discussion *infra* Sections II.C.3.a–b.

The Court's handling of these issues instructs how circuit courts apply the Fourth Amendment to pole camera home surveillance.

a. The Supreme Court's application of the *Katz* test to surveillance technology

The Supreme Court wrestled with technological surveillance issues and shaped its approach to the attendant Fourth Amendment search analysis in several cases, and three are of particular significance.[103] In 1986, the Court applied the *Katz* test in *California v. Ciraolo*, a case where the government was investigating alleged illegal marijuana farming.[104] The Court found that an aerial photograph of a fenced-in backyard, or curtilage, from 1,000 feet above the property does not constitute an unreasonable search.[105] The government only photographed what a member of the public in navigable airspace could see.[106] The Court reasoned that "the home and its curtilage are not necessarily protected from inspection that involves no physical invasion."[107] "[N]aked-eye observation"—"observation[] from a public vantage point where [the government] has a right to be and which renders the activities [within the curtilage] clearly visible"—does not require the government to look away or to first obtain a warrant.[108]

The Court was presented with a fairly similar situation in *Dow Chemical Co. v. United States*.[109] There, the government employed a photographer to take aerial photographs of an industrial plant by using a mapping camera.[110] The Court reinforced the *Ciraolo* rule that naked-eye observation from a public location does not constitute a search and therefore does not necessitate a warrant.[111] However, the Court noted the "importan[ce of the

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[103] *See generally* California v. Ciraolo, 476 U.S. 207, 209 (1986); Dow Chem. Co. v. United States, 476 U.S. 227 (1986); Kyllo v. United States, 533 U.S. 27 (2001).

[104] *See Ciraolo*, 476 U.S. at 209–12, 214.

[105] *See id.* at 209, 215.

[106] *See id.* at 209, 213–14.

[107] Florida v. Riley, 488 U.S. 445, 449 (1989) (explaining *Ciraolo*).

[108] *See Ciraolo*, 476 U.S. at 213.

[109] *See* Dow Chem. Co. v. United States, 476 U.S. 227, 229 (1986).

[110] *Id.*

[111] *Id.* at 234–35, 237–39.

fact] that [the area observed was] not an area immediately adjacent to a private home, where privacy expectations are most heightened."[112] The Court decided *Dow Chemical* the same day it decided *Ciraolo* and again found that no search occurred.[113]

The Court, however, did find that a search occurred and that the *Katz* test provided protection in *Kyllo v. United States*.[114] While this case was not in the context of pole camera home surveillance, it was in the context of thermal imaging home surveillance.[115] In *Kyllo*, the government, while investigating alleged marijuana farming, used thermal imaging technology to capture video-camera-like images of the inside of Kyllo's home.[116] The government agent was on a public street and "engaged in more than naked-eye surveillance of a home."[117] The Court recognized the criticism of the *Katz* test's circularity and the "difficult[y] [of]refin[ing] *Katz*" in the context of "curtilage and uncovered portions of" the home.[118] While *Kyllo* involved the inside of the home, the Court still noted that "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[119] The Court found that using "sense-enhancing technology" that is "not in general public use" to obtain "information regarding the interior of the home that could not otherwise [be] obtained without physical[ly] intru[ding] into a constitutionally protected area constitutes a search."[120] Thus, the Court found that "the

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112 *Id.* at 237 n.4.

113 *Id.* at 234–35, 239; *see Ciraolo*, 476 U.S. at 213–15.

114 *See* Kyllo v. United States, 533 U.S. 27, 34–35 (2001).

115 *See id.* at 29–30.

116 *See id.*

117 *Id.* at 33.

118 *Id.* at 34.

119 *Id.* at 34, 37. Note that the Court made mention of the "intimate details" concept in *Dow Chem. Co. v. United States*, finding that the aerial photographs there did not reveal intimate details that would violate the Constitution. Dow Chem. Co. v. United States, 476 U.S. 227, 229, 238 (1986).

120 *Kyllo*, 533 U.S. at 34 (quotation marks omitted).

information obtained by the thermal imager . . . was the product of a search."[121]

b. The Supreme Court's approach to comprehensive surveillance of a person

Two subsequent Supreme Court decisions provide insight into the Court's understanding of whether a search occurs when the government comprehensively surveils a person's life.[122] In *United States v. Jones*, the government installed an electronic tracking device on the car in which Jones traveled, a "Jeep . . . registered to Jones's wife," to investigate alleged narcotic trafficking.[123] The government first surveilled Jones's nightclub by various means, one of which was the "installation of a camera focused on the front door of the club."[124] However, the issue before the Court in *Jones* was not about the camera surveillance; rather, it was about whether the warrantless installation of a tracking device on Jones's car constituted a search.[125] After surveilling Jones, the government obtained a warrant to place the electronic tracking device on Jones's wife's car, but the government did not install the device until after the warrant had expired.[126] The government then tracked the car for twenty-eight days.[127] The Court found that installing a tracking device and tracking a person's movements using that device constitutes a search and thus requires a warrant.[128] To reach this conclusion, the Court did not apply the *Katz* test but rather relied on a trespass approach.[129] Justice Scalia noted that "the *Katz* reasonable-

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121 *Id.* at 34–35.

122 *See generally* United States v. Jones, 565 U.S. 400 (2012); Carpenter v. United States, 138 S. Ct. 2206 (2018).

123 *See Jones*, 565 U.S. at 402–05.

124 *Id.* at 402.

125 *See id.* at 402–03.

126 *Id.*

127 *Id.* at 403.

128 *See id.* at 404.

129 United States v. Jones, 565 U.S. 400, 404–09 (2012).

expectation-of-privacy test . . . added to . . . the common-law trespassory test"; it did not substitute the trespassory test.[130]

In a more recent case, *Carpenter v. United States*, the Court found that government "chronicl[ing of] a person's past movements" using cell phone location records constitutes a search.[131] In *Carpenter*, the Court noted that the Fourth Amendment was intended to protect against arbitrary government intrusion, recognizing that writs of assistance and general warrants "helped spark the Revolution" and impelled the adoption of the Fourth Amendment.[132] Though the Court still applied the *Katz* test, the fact that technology, a "progress of science," made possible "government encroachment of the sort" the Fourth Amendment meant to prevent contributed to the Court's finding that a search occurred.[133] The Court has thus demonstrated that, at least in certain circumstances, warrantless comprehensive surveillance of a person is unconstitutional.

III. THE *KATZ* TEST PERMITS ARBITRARY GOVERNMENT INTRUSION INTO THE SECURITY OF THE HOME

The *Katz* test has failed to provide the intended Fourth Amendment protection in the context of pole camera home surveillance because it permits arbitrary government intrusion into the security of the home. To illustrate this problem, this section is divided into two subsections. The first subsection demonstrates the prevalence of the problem: Circuit courts almost unanimously find that the *Katz* test does not provide the home with Fourth Amendment protection from warrantless pole camera surveillance.[134] The Seventh Circuit's decision in *United States v. Tuggle* is used to exemplify the reasoning behind this result.[135] The subsection then provides an overview of how other circuits repeatedly decide against providing the home with protection from warrantless pole camera home

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130 *Id.* at 409.

131 Carpenter v. United States, 138 S. Ct. 2206, 2216–17 (2018).

132 *See id.* at 2213.

133 *See id.* at 2223; *id.* at 2236 (Thomas, J., dissenting).

134 *See* discussion *infra* Section III.A.

135 *See* discussion *infra* Sections III.A.1–2.

surveillance.[136] The second subsection expounds on the problem—by first discussing how warrantless pole camera home surveillance directly contradicts the object of the Fourth Amendment.[137] It then discusses how comprehensive surveillance is unconstitutional, especially in this context.[138] The Supreme Court has not addressed pole camera home surveillance specifically, and circuit courts' application of the *Katz* test almost always leaves the home unprotected from arbitrary government intrusion. This lack of protection is because the government's warrantless use of pole cameras to surveil the home, as permitted by *Katz*, intrudes upon the right to be secure in one's home.[139]

A. The Prevalence of the Problem of Arbitrary Government Intrusion Into the Security of the Home—Warrantless Pole Camera Home Surveillance

The problem of sanctioned, arbitrary government invasion into the security of the home is prevalent among United States Circuit Courts. *United States v. Tuggle* exemplifies the failure of the *Katz* test as applied to warrantless pole camera home surveillance to provide the home with protection against such arbitrary government intrusion.[140] The Seventh Circuit itself recognized that this result is unsettling.[141] Alarmingly, this result is not unique among circuit courts because they almost unanimously conclude that the *Katz* test does not provide Fourth Amendment protection for the home against warrantless pole camera surveillance.[142]

1. *United States v. Tuggle*

United States v. Tuggle exemplifies the arbitrary invasion of the home that the *Katz* test permits in the context of pole camera home surveillance.

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136 *See* discussion *infra* Section III.A.3.

137 *See* discussion *infra* Section III.B.1.

138 *See* discussion *infra* Section III.B.2.

139 *See* discussion *infra* Section III.A.3.; U.S. CONST. amend. IV.

140 *See* United States v. Tuggle, 4 F.4th 505 (7th Cir. 2021).

141 *See id.* at 527–29.

142 *See id.* at 511; discussion *infra* Section III.A.3.

Without obtaining or seeking a warrant, the government installed three cameras on public utility poles around Tuggle's home and, using these cameras, continuously surveilled and recorded footage of Tuggle's home for eighteen months.[143] Law enforcement's attention was directed at Tuggle's home due to an investigation of "a large methamphetamine distribution conspiracy."[144] The government decided to install three pole cameras directed at Tuggle's home as part of this investigation.[145] The first camera was installed in August of 2014 "on a pole in an alley next to" Tuggle's home.[146] This pole camera "viewed the front of Tuggle's home and an adjoining parking area."[147] After over a year—about thirteen months—of surveilling Tuggle's home through the single pole camera, the government installed a second camera on a pole that was a block away with a view of a co-conspirator, codefendant neighbor's shed and Tuggle's home.[148] Then, after *another* nearly three months of surveilling, now with the two cameras, the government installed a third camera on the same pole as the first with the same view of the front of Tuggle's home.[149] All three cameras were maintained for three *more* months, until March 2016.[150] Altogether, the government continuously operated three government-installed pole cameras for almost eighteen months, including "around the clock" recording so that the government also obtained eighteen-months-worth of continuous footage of Tuggle's home.[151]

The cameras themselves were also equipped with invasive technology.[152] While they "did not have infrared or audio capabilities," they had

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143 *See Tuggle*, 4 F.4th at 510–11.

144 *Id.* at 511.

145 *See id.*

146 *Id.*

147 *Id.*

148 *See id.*

149 *See* United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021).

150 *See id.*

151 *See id.*

152 *See id.*

"[r]udimentary lighting" and "zoom, pan, and tilt" technology.[153] Such technology enabled the government to remotely alter the view of the cameras to capture greater detail of anything within the cameras' path "and review the camera footage in real time."[154] The recorded footage, available for viewing by the government at any time, was saved in the Springfield, Illinois, FBI office.[155] The government took advantage of its installed pole cameras, "frequently monitor[ing] the live feed during business hours."[156] The Seventh Circuit noted that the "practical advantage" of the pole cameras was that they "enable[ed] the government to surveil Tuggle's home without conspicuously deploying agents to perform traditional visual or physical surveillance."[157] The government can, therefore, inconspicuously and without permission surveil all home activities within view of the pole camera—subject to the camera's technological capacity—for as long as the government chooses.

The footage obtained from the pole cameras was not only used for surveillance or to obtain a search warrant to conduct a physical search of Tuggle's home, but also the footage was introduced as "substantial video evidence" to secure Tuggle's indictment.[158] The surveillance and footage revealed more than 100 alleged "deliveries of methamphetamine to Tuggle's" home.[159] The footage also "showed Tuggle carrying items to [the neighbor's] shed."[160] The government concluded that more than twenty kilograms of methamphetamine were distributed in Tuggle's conspiracy.[161] Tuggle was indicted by a grand jury for two offenses.[162] The first was "a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) for conspiring to distribute,

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153 *See id.*

154 *See id.*

155 United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021).

156 *Id.*

157 *Id.*

158 *See id.* at 511–12.

159 *See id.* at 511.

160 *Id.* at 512.

161 United States v. Tuggle, 4 F.4th 505, 512 (7th Cir. 2021).

162 *Id.*

and possess with intent to distribute, at least 50 grams of methamphetamine and at least 500 grams of a mixture containing methamphetamine."[163] The second was "a violation of 21 U.S.C. § 856(a)(1) for maintaining a drug-involved premises."[164] Tuggle sought to exclude the pole camera footage from evidence before trial by moving to suppress it.[165] Tuggle "argu[ed] that the use of the cameras constituted a warrantless search in violation of the Fourth Amendment."[166] Tuggle's motion was denied by the district court, which concluded that the use of the pole cameras "did not constitute a search."[167] Tuggle urged "the district court to reconsider" twice, however, the district court refused.[168] Rather than go to trial without the evidence suppressed, "Tuggle entered a conditional guilty plea [for both offenses] but reserv[ed] his right to appeal the court's denials of his motions to suppress."[169] Tuggle was sentenced to a total of 600 months of imprisonment, and he appealed.[170]

Tuggle presented the Seventh Circuit Court of Appeals with an issue that, for it, was an issue of first impression: "whether the warrantless use of pole cameras to observe a home on either a short- or long-term basis amounts to a 'search' under the Fourth Amendment."[171] While the Seventh Circuit noted that there is disagreement among the circuit courts about the answer to this question, the court answered in line with the majority of circuits: warrantless pole camera surveillance does not constitute a search under the Fourth Amendment.[172] The appeals court, therefore, affirmed the district court's denial of Tuggle's motion to suppress the pole camera footage.[173]

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163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 United States v. Tuggle, 4 F.4th 505, 512 (7th Cir. 2021).

168 *Id.*

169 *See id.*

170 *Id.*

171 *Id.* at 510–11.

172 *Id.* at 511.

173 *See* United States v. Tuggle, 4 F.4th 505, 511–12 (7th Cir. 2021).

The expansive surveillance and footage obtained from the three government-installed pole cameras without a warrant at the sole, arbitrary discretion of the government, therefore, not only played a major role in the investigation and indictment of Tuggle, but also invaded the security of Tuggle's home without having to satisfy additional constitutional checks.

2. The Seventh Circuit's Reasoning Illustrates the Failure of *Katz* in the Context of Pole Camera Home Surveillance

The *Katz* test fails to provide the home with Fourth Amendment protection against arbitrary government intrusion, and the Seventh Circuit's reasoning illustrates this result. The court summarized its reasoning in the statement that "the government's use of a technology in public use, while occupying a place it [i]s lawfully entitled to be, to observe plainly visible happenings, d[oes] not run afoul of the Fourth Amendment."[174] In the context of warrantless pole camera home surveillance, the government uses pole cameras (a technology in public use)[175] installed on public property (a place the government is lawfully entitled to be) to surveil what is facially visible of the home.[176] This set of facts frequently fails the *Katz* test because there is no objective societal expectation of privacy for something in public view, often such as the home, which is allegedly "knowingly expose[d] to the public."[177]

The *Katz* test, other Supreme Court precedents, and the lack of relevant, limiting federal legislation compelled the Seventh Circuit to conclude that warrantless pole camera home surveillance does not constitute a search under the Fourth Amendment.[178] The court's reasoning was broken into

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[174] *Id.* at 511.

[175] *See id.* at 516.

[176] *See id.* at 511.

[177] *See* Katz v. United States, 389 U.S. 347, 351 (1967); *Tuggle*, 4 F.4th at 511, 516; California v. Ciraolo, 476 U.S. 207, 212–13 (1986). Shielding the home from such knowing exposure is very difficult. *See* Florida v. Riley, 488 U.S. 445, 454 (1989) (O'Connor, J., concurring). Justice O'Connor noted that "even individuals who have taken effective precautions . . . cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas." *Id.*

[178] *See Tuggle*, 4 F.4th at 511, 513–14.

two inquiries: the use of cameras in isolation[179] and the use of cameras for a prolonged and constant duration.[180] The latter inquiry included a discussion and application of the mosaic theory and a discussion about other courts' treatment of prolonged pole camera surveillance.[181]

To the first inquiry, the Seventh Circuit concluded that the isolated use of a pole camera to observe Tuggle's home was not a search.[182] The court confidently reached this conclusion per the *Katz* test.[183] Because the first, subjective prong of the test has become less significant in current Fourth Amendment analysis, the court spent the most time on the second, objective prong—discerning whether there were "privacy expectations society is willing to accept as reasonable."[184] Accordingly, there is no such reasonable expectation where "a person knowingly exposes [something] to the public, even in his own home or office."[185] Further, law enforcement is not "require[d] . . . to shield their eyes when passing by a home on public thoroughfares."[186] The Seventh Circuit also pointed out, based on *Kyllo v. United States* and *California v. Greenwood*, that visual observation made from public property is not a Fourth Amendment search.[187] From this precedent, the court found that Tuggle knowingly exposed his home to the

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[179] *Id.* at 513.

[180] *Id.* at 517.

[181] *Id.* at 517, 520, 523.

[182] United States v. Tuggle, 4 F.4th 505, 513 (7th Cir. 2021).

[183] *See id.* at 513–14 (finding that the Fourth Amendment clearly did not preclude the government from isolated warrantless pole camera surveillance of Tuggle's home from public property).

[184] *Id.* at 514 (citing Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 113 (2015)).

[185] Katz v. United States, 389 U.S. 347, 351 (1967) (citing Lewis v. United States, 385 U.S. 206, 210 (1966)); *Tuggle*, 4 F.4th at 514 (quoting States v. Thompson, 811 F.3d 944, 949 (7th Cir. 2016)).

[186] California v. Ciraolo, 476 U.S. 207, 213 (1986); *Tuggle*, 4 F.4th at 514 (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)).

[187] *Tuggle*, 4 F.4th at 514 (citing Kyllo v. United States, 533 U.S. 27, 32 (2001); California v. Greenwood, 486 U.S. 35, 41 (1988)). The Seventh Circuit also cited to a couple of its own cases, noting that the Seventh Circuit does not recognize a reasonable expectation of privacy in one's driveway. *Id.*

public and law enforcement was free to observe the home from public property.[188] The use of cameras did not alter the Fourth Amendment's protection, per the Seventh Circuit's understanding.[189] Pulling from Supreme Court cases, the Seventh Circuit noted that the technological enhancement of human senses is permissible,[190] as is technology in public use employed by law enforcement from a public place not to ascertain intimate details.[191]

Reviewing its own precedent, the Seventh Circuit noted that it had not yet decided whether camera use by the government is constitutional, but it found, in accord with other circuits, that it is.[192] The court found this to be in line with *Kyllo*, *Dow Chemical*, and *Carpenter*, even though the cameras used in the first two cases were used for aerial photography, not for "ground-level video [recording] of an unobstructed home from a public vantage point."[193] Pole cameras are not "highly sophisticated surveillance equipment not generally available to the public,"[194] and pole cameras neither penetrate walls nor obtain information only available by physical intrusion.[195] "In sum," per the Seventh Circuit, "the government used a commonplace technology, located where officers were lawfully entitled to be, and captured events observable to any ordinary passerby."[196]

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[188] *See* United States v. Tuggle, 4 F.4th 505, 514 (7th Cir. 2021) ("the outside of his house and his driveway were plainly visible to the public").

[189] *Id.* at 514–16.

[190] United States v. Knotts, 460 U.S. 276, 282 (1983); *Tuggle*, 4 F.4th at 514–15.

[191] *Tuggle*, 4 F.4th at 515; *see Kyllo*, 533 U.S. at 40; Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986); *Ciraolo*, 476 U.S. at 213–14.

[192] *Tuggle*, 4 F.4th at 515–16.

[193] *Id.* at 516.

[194] United States v. Tuggle, 4 F.4th 505, 516 (7th Cir. 2021) (quoting *Dow Chem.*, 476 U.S. at 238).

[195] *Id.* (quoting *Dow Chem.*, 476 U.S. at 239; Kyllo v. United States, 533 U.S. 27, 40 (2001)).

[196] *Id.*

To the second inquiry, the court concluded that the prolonged and constant use of pole cameras was not a search.[197] The Seventh Circuit began this discussion with an overview of the mosaic theory.[198] This theory "attempts to capture the idea that the 'government can learn more from a given slice of information if it can put that information in the context of a broader pattern, a mosaic.'"[199] Thus, information considered together is considered more significant than information considered in isolation.[200] However, definition and recognition of this theory are not universal.[201] The Supreme Court declined to adopt this theory, relied on by the D.C. Circuit, when it affirmed the lower court in *United States v. Jones*.[202] While some argue the Court essentially adopted the mosaic theory in *Carpenter v. United States*, "the theory has not received the Court's full and affirmative adoption," which leaves lower courts to their discretion on whether to apply it.[203]

Looking at other courts, the Seventh Circuit noted that "no federal circuit court has found a Fourth Amendment search based on long-term use of pole cameras on public property to view plainly visible areas of a person's

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[197] *Id.* at 517 ("The more challenging question is Tuggle's second theory of a Fourth Amendment violation: that the prolonged and uninterrupted use of those cameras constituted a search.").

[198] *Id.*

[199] *Id.* (quoting Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 205 (2015)).

[200] *See* United States v. Tuggle, 4 F.4th 505, 517 (7th Cir. 2021) (quoting Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 205 (2015)).

[201] *Id.*

[202] *Id.* at 517–18. The D.C. Circuit held that "the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone [would] observe all those movements is essentially nil." United States v. Maynard, 615 F.3d 544, 558 (D.C. Cir. 2010) (emphasis omitted). The Seventh Circuit asserted that Justice Alito's concurrence in *Jones* "endorsed the mosaic theory's logic." *Tuggle*, 4 F.4th at 518.

[203] *Tuggle*, 4 F.4th at 519–20. There is disagreement among courts and scholars on whether the mosaic theory should be adopted. *Id.* at 520.

home."[204] The court also noted that federal district courts and state courts disagree on whether pole camera surveillance is a Fourth Amendment search.[205] The Seventh Circuit then considered Tuggle's case and found, per "current Supreme Court precedent," that there was not the comprehensive surveillance or "exhaustive picture of [Tuggle's] every movement that the Supreme Court has frowned upon."[206] Rather than cataloging travel details and the "whole of his physical movements," the government only cataloged the lack thereof, including stationary time at home.[207] The court then attempted to make a distinction between prospective and retrospective use of cataloged information—while cell phone location data compiles detailed information about a person's past movements, pole camera home surveillance like that of Tuggle's home does not trace as many past movements.[208] The conclusion that no search occurred left the Seventh Circuit uneasy—where and how could a non-arbitrary line be drawn for "[h]ow much pole camera surveillance is too much?"[209] What's more is that this holding challenges an object of the Fourth Amendment itself: security in the home from arbitrary government intrusion.[210]

Even though the Seventh Circuit found that there was no search, and thus no Fourth Amendment protection,[211] the court began its decision with a dystopian picture of a foreseeable "surveillance society" and ended its decision with caution about how society will arrive there.[212] This society would be the result of "a constellation of ubiquitous public and private

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204 *Id.* at 522.

205 *Id.* at 522–23.

206 United States v. Tuggle, 4 F.4th 505, 524 (7th Cir. 2021).

207 *See id.* (quoting Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018)).

208 *See id.* at 525. This argument is not strong for either cell phone location information or pole camera home surveillance can be viewed retrospectively and prospectively, the view taken depends not on the type of cataloged information but on the timing of investigation and the technology in place. Either investigation avenue allows law enforcement to travel back in time.

209 *See id.* at 526.

210 *See id.*

211 *Id.* at 511.

212 *See* United States v. Tuggle, 4 F.4th 505, 509–10, 527–28 (7th Cir. 2021).

cameras accessible to the government that catalog the movements and activities of all Americans."[213] The Seventh Circuit was wary of this future society because, under the *Katz* test, pervasive technology and the corresponding "reasonable expectations of privacy" prevent courts from finding that the Fourth Amendment protects against non-trespassory government intrusion.[214] As technology permeates society and as the government gets access to that technology, society's expectation of privacy from that technology diminishes correspondingly.[215] As the Seventh Circuit noted, Tuggle's case is "a harbinger of the challenge to apply Fourth Amendment protections to accommodate forthcoming technological changes."[216]

3. Nearly Every Circuit Court's Application of *Katz* In This Context Yields the Same Result as *Tuggle*

United States circuit courts' application of the *Katz* test to pole camera home surveillance almost unanimously leads to the conclusion that such surveillance does not constitute a search.[217] In *United States v. Tuggle*, the Seventh Circuit noted that most circuits "uniformly decline[] to find Fourth Amendment searches" in the context of long-term pole camera surveillance of the home.[218] Only one circuit court of appeals decision, from the Fifth Circuit, found that a search occurred in the context of pole camera home surveillance.[219]

The First[220] and Sixth[221] Circuits have declined to find that pole camera home surveillance is a search. In 2012, the Sixth Circuit admitted

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[213] *Id.* at 509. It is interesting to note that this cataloging seems similar to the retrospective cataloging capability of cell phone location data that the court attempted to distinguish from pole camera catalogs of the home. *See id.* at 525.

[214] *See id.* at 527.

[215] *See id.* at 527–28; Polatsek, *supra* note 100, at 463.

[216] *Tuggle*, 4 F.4th at 510.

[217] *Id.* at 511.

[218] *See id.* at 521.

[219] *See id.* at 521–22; United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987).

[220] *See* United States v. Moore-Bush, 36 F.4th 320, 320 (1st Cir. 2022) (en banc) (per curiam).

"misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant."[222] Contrary to finding no reasonable expectation of privacy, the court proffered that "[f]ew people, it seems, would expect that the government can constantly film their backyard . . . using a secret camera that can pan and zoom and stream a live image to government agents."[223] However, the Sixth Circuit declined to decide the issue then.[224] It was four years later, in *United States v. Houston*, that the Sixth Circuit decided the issue.[225] The court found that ten weeks of home surveillance via a pole camera installed by the government did not constitute a search.[226] Like the Seventh Circuit in *Tuggle*, the Sixth Circuit concluded that there is no reasonable expectation of privacy for areas viewable from a public place.[227] Because law enforcement "only observed what Houston made public to any person traveling on the roads surrounding the farm," there was no Fourth Amendment violation, even though this information was obtained and recorded by a government-installed pole camera in view of Houston's home and curtilage.[228]

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[221] United States v. Houston, 813 F.3d 282, 285, 287–88 (6th Cir. 2016); United States v. D-6, No. 16-cr-20677-06, 2017 U.S. Dist. LEXIS 84471, at *12–14 (E.D. Mich. June 2, 2017); United States v. Houston, 965 F. Supp. 2d 855, 869–71 (E.D. Tenn. 2013); United States v. Anderson-Bagshaw, No. 11-CR-257, 2011 U.S. Dist. LEXIS 100000, at *7–8 (N.D. Ohio Sept. 6, 2011).

[222] United States v. Anderson-Bagshaw, 509 Fed. Appx. 396, 405 (6th Cir. 2012).

[223] *Id.*

[224] *Id.* ("Ultimately, since we hold that any possible Fourth Amendment violation here would be harmless, we decline to decide whether long-term video surveillance of curtilage requires a warrant.").

[225] *See Houston*, 813 F.3d at 286–88; United States v. Tuggle, 4 F.4th 505, 521 (7th Cir. 2021).

[226] *See Houston*, 813 F.3d at 286–88.

[227] United States v. Houston, 813 F.3d 282, 285, 287–88 (6th Cir. 2016) ("There is no Fourth Amendment violation, because Houston 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."); *Tuggle*, 4 F.4th at 514.

[228] *See Houston*, 813 F.3d at 287–88.

The First Circuit Court of Appeals decided the issue sooner.[229] In 2009, it decided *United States v. Bucci* and held that eight months of pole camera home surveillance was not a search.[230] Very recently, in 2022, the First Circuit was presented with an opportunity to change course in *United States v. Moore-Bush*; however, it did not.[231] The court provided no analysis for its decision, presumably adhering to the *Bucci* precedent.[232] While the case was decided unanimously, three concurring judges concluded that the surveillance was a search under the *Katz* test.[233] Yet, *Bucci* remains controlling in the First Circuit.[234]

Almost unanimously, the remaining circuit courts have also declined to find that pole camera home surveillance is a search. Though the Second Circuit Court of Appeals has not addressed this issue, the district courts in the circuit that have addressed it uniformly find that no search occurred.[235] Likewise, the Third Circuit has only addressed this issue at the district court level, also uniformly finding that no search occurs.[236] Like the Second and Third Circuits, the Fourth,[237] Eleventh,[238] and Tenth[239] Circuits find that

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[229] *See* United States v. Bucci, 582 F.3d 108, 116–17 (1st Cir. 2009).

[230] *Id.*

[231] *See* United States v. Moore-Bush, 36 F.4th 320, 320 (1st Cir. 2022) (en banc) (per curiam); United States v. Tuggle, 4 F.4th 505, 521 n.6 (7th Cir. 2021).

[232] *See Moore-Bush*, 36 F.4th at 320; *Id.* at 321 (Barron, C.J., concurring).

[233] *Id.* at 321–22 (Barron, C.J., concurring) (concurring because Fourth Amendment "good faith" exception applied).

[234] *See id.* at 321.

[235] *See* United States v. Mazzara, No. 16 Cr. 576, 2017 U.S. Dist. LEXIS 178575, at *26, *35 (S.D.N.Y. Oct. 27, 2017); United States v. Bailey, No. 15-CR-6082G, 2016 U.S. Dist. LEXIS 165162, at *106–07, *109–10 (W.D.N.Y. Nov. 29, 2016); United States v. Baltes, No. 11-cr-282, 2013 U.S. Dist. LEXIS 190420, at *20–21 (N.D.N.Y. Apr. 22, 2013).

[236] *See* United States v. Mims, No. 19-cr-00811, 2022 U.S. Dist. LEXIS 72333, at *20–21 (D.N.J. Apr. 20, 2022); United States v. Gilliam, No. 13-cr-235, 2015 U.S. Dist. LEXIS 118511, at *23–25 (W.D. Pa. Sept. 4, 2015).

[237] United States v. Adams, No. 08-CR-77, 2011 U.S. Dist. LEXIS 165580, at *15–17 (N.D. W. Va. Feb. 23, 2011); *cf. In re* Application of the U.S. For An Ord. Authorizing Small Unmanned Aircraft Sys. Surveillance of Priv. Prop., 637 F. Supp. 3d 343, 353 (E.D.N.C. 2022) ("But when no physical trespass occurs—such as when law enforcement places a pole camera on a nearby utility post to observe a home's curtilage—courts typically find no

pole camera home surveillance is not a search. The Eighth Circuit has yet to definitively come to a decision on this issue; [240] however, the Iowa Southern District Court recently deferred to the Seventh Circuit's *Tuggle* decision and the First Circuit's *Moore-Bush* decision, given the absence of Supreme Court guidance or binding precedent.[241] Generally, the Ninth Circuit declines to find a search.[242] Exceptionally, one Ninth Circuit court, the Washington Eastern District Court, found that pole camera surveillance of a home in a rural area did constitute a search.[243] However, the vast majority of federal courts, almost a unanimity, find that warrantless pole camera home surveillance is not a search under the *Katz* reasonable expectation of privacy test.

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constitutional violation."); United States v. Vankesteren, 553 F.3d 286, 288, 290–91 (4th Cir. 2009) (finding that a motion-activated camera that ran during daylight hours viewing an open field did not constitute a search).

238 United States v. Nowka, No. 11-cr-00474-VEH, 2012 U.S. Dist. LEXIS 96096, at *12 (N.D. Ala. May 14, 2012); United States v. Bronner, No. 19-cr-109-J-34, 2020 U.S. Dist. LEXIS 113076, at *61–63 (M.D. Fla. May 18, 2020).

239 United States v. Jackson, 213 F.3d 1269, 1280–81 (10th Cir. 2000), *vacated*, 531 U.S. 1033 (2000) (vacating on other grounds); United States v. Cantu, 684 Fed. Appx. 703, 704–06 (10th Cir. 2017); United States v. Hay, 601 F. Supp. 3d 943, 947, 951–953 (D. Kan. 2022) (finding that neither pole camera surveillance itself nor pole camera surveillance under the mosaic theory constituted a search). In *United States v. Lewis*, the pole cameras were utilized outside of the residence to investigate whether the resident was feigning blindness to fraudulently obtain veteran benefits. *See* United States v. Lewis, No. 18-10106, 2020 U.S. Dist. LEXIS 182862, at *2–4, *11 (D. Kan. Oct. 2, 2020).

240 *See* United States v. Stefanyuk, 944 F.3d 761, 762–63 (8th Cir. 2019).

241 *See* United States v. Mayo, 615 F. Supp. 3d 914, 922–23 (S.D. Iowa 2022).

242 Panagacos v. Towery, 692 Fed. Appx. 330, 333 (9th Cir. 2017); United States v. Birrueta, No. 13-CR-2134, 2014 U.S. Dist. LEXIS 185887, at *20, *24–25 (E.D. Wash. Mar. 21, 2014); United States v. Root, No. 14-CR-0001-TOR-2, 2014 U.S. Dist. LEXIS 132914, at *11, *13–15 (E.D. Wash. Sept. 22, 2014) (finding that pole camera surveillance of the public alley behind the home was not a search).

243 United States v. Vargas, No. CR-13-6025, 2014 U.S. Dist. LEXIS 184672, at *34–37 (E.D. Wash. Dec. 15, 2014).

The only circuit to find otherwise is the Fifth Circuit in *United States v. Cuevas-Sanchez*.[244] The Fifth Circuit reached this decision in 1987, twenty-five years before *Jones* and thirty-one years before *Carpenter*.[245] Because Cuevas expressed a subjective expectation of privacy by erecting a fence to enclose his backyard, and because his expectation was one that society would accept as reasonable, the pole camera surveillance constituted a search.[246] Because the government obtained a sufficient order prior to conducting the pole camera search, however, the court found no Fourth Amendment violation.[247] Therefore, besides the Fifth Circuit under specific circumstances[248] and one Ninth Circuit district court case,[249] federal courts routinely find that the *Katz* test fails to provide the home with Fourth Amendment protection from pole camera surveillance.[250]

B. Expounding on the Problem of Arbitrary Government Intrusion Into the Security of the Home—Insufficient Protection by the Katz *Test Against Unreasonable Pole Camera Searches*

The current application of the *Katz* test to warrantless pole camera home surveillance presents a grave problem: The Fourth Amendment is not providing its intended protection of the security of the home from arbitrary government intrusion. This problem, perpetuated by the decisions of almost every federal circuit court,[251] directly contradicts the object of the

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[244] United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987); *see also* United States v. Yanez, No. C-11-935, 2012 U.S. Dist. LEXIS 38981, at *7–8 (S.D. Tex. Mar. 22, 2012) (following *Cuevas-Sanchez* and finding that pole camera surveillance of a fenced-in backyard constitutes a search).

[245] *See Cuevas-Sanchez*, 821 F.2d at 251; United States v. Jones, 565 U.S. 400 (2012); Carpenter v. United States, 138 S. Ct. 2206 (2018).

[246] *Cuevas-Sanchez*, 821 F.2d at 251.

[247] *See id.* at 252.

[248] The specific circumstances are where the government uses a pole camera to view into a fenced-in backyard. *See Cuevas-Sanchez*, 821 F.2d at 251.

[249] United States v. Vargas, No. CR-13-6025, 2014 U.S. Dist. LEXIS 184672, at *34–37 (E.D. Wash. Dec. 15, 2014) (finding that six-week pole camera surveillance of a rural home invaded a reasonable expectation of privacy and constituted an unreasonable search).

[250] *See Cuevas-Sanchez*, 821 F.2d at 251.

[251] *See* discussion *supra* Section III.A.3.

Fourth Amendment.[252] This section will first discuss how warrantless pole camera home surveillance contradicts the Fourth Amendment's object. Next, it will discuss how comprehensive surveillance is unconstitutional and especially inappropriate in the context of the home.

1. Warrantless Pole Camera Home Surveillance Directly Contradicts the Object of the Fourth Amendment

The text of the Fourth Amendment demands that "[t]he right of the people to be secure in their . . . *houses* . . . against unreasonable searches and seizures, shall not be violated."[253] The home is expressly protected from unreasonable searches to ensure the security of the home. It is when this security is jeopardized that an unreasonable search occurs.[254] Home security was jeopardized by the use of general warrants and writs of assistance in early America—these unreasonable searches are the reason the Fourth Amendment was adopted; therefore, warrantless searches permitted today that resemble those general warrants and writs frustrate the object of the Fourth Amendment.[255] Given the text and purpose of the Fourth Amendment, warrantless pole camera home surveillance is such a permitted search and thus directly contradicts the object of the Fourth Amendment.

As the Supreme Court recognized, "[t]he immediate object of the Fourth Amendment [i]s to prohibit the general warrants and writs of assistance that English judges had employed against the colonists."[256] Though early common law focused on physical trespass and on property,[257] that common law was developed in societies that did not have the technology that

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[252] *See* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967).

[253] U.S. CONST. amend. IV (emphasis added).

[254] *See* Marshall v. Barlow's Inc., 436 U.S. 307, 327 (1978) (Stevens, J., dissenting); Gilbert v. California, 388 U.S. 263, 286 (1967) (Douglas, J., dissenting); Lange v. California, 141 S. Ct. 2011, 2018 (2021).

[255] *See* discussion *supra* Section II.A.

[256] Virginia v. Moore, 553 U.S. 164, 168–69 (2008) (citing Boyd v. United States, 116 U.S. 616, 624–27 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 414 (1976); Payton v. New York, 445 U.S. 573, 583–84 (1980)).

[257] *See* Entick v. Carrington, 19 Howell's State Trials 1029 (1795).

permeates American society today.[258] This technology invites arbitrary government intrusion of the same nature as that sanctioned by the oppressive general warrants and writs of assistance. The essential nature of the intrusion permitted by the warrants and writs was unchecked government authority that invaded the "sanctity of a man's home."[259] In the same way, today's warrantless pole camera home surveillance permits unchecked government authority to invade the "sanctity of a man's home."[260] Government officials can decide whether, when, where, and how long to install pole cameras to surveil a home.[261] Unlike the warrants and writs, there is no requirement to identify an object or offense before installing or utilizing pole cameras to obtain information from the home.[262] Rather than obtain any warrant or writ prior to invading the sanctity of the home, officials are free to exercise their unfettered discretion without any judicial checks and without any limitations on particularity, location, or time.[263] In *Tuggle*, the government installed *three* pole cameras and then used those cameras to watch and record Tuggle's home for *eighteen months*.[264] The result: about *eighty-two weeks* of continuous footage of Tuggle's home.[265] And this surveillance was accomplished absent judicial oversight.[266]

Early Americans wanted to ensure limits on the government's ability to "[s]earch[] for evidence of crime."[267] This "situation[] demand[s] the greatest . . . restraint upon the Government's intrusion" into the security of

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[258] *See* Weaver, *supra* note 59, at 234–35; Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1133–35 (2011).

[259] Stone v. Powell, 428 U.S. 465, 482 (1976) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886) (*abrogated by* Fisher v. United States, 425 U.S. 391, 408–09 (1976))).

[260] *Id.*

[261] *See* United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021).

[262] *See* Weaver, *supra* note 10, at 128; Steagald v. United States, 451 U.S. 204, 220 (1981).

[263] *See Steagald*, 451 U.S. at 220; STORY, *supra* note 28, at § 1895; Weaver, *supra* note 10, at 128.

[264] *Tuggle*, 4 F.4th at 511.

[265] *See id.*

[266] *See id.* at 510–11.

[267] Abel v. United States, 362 U.S. 217, 237 (1960).

"individuals and their property."[268] Pole camera home surveillance is literally a search for information or evidence of a crime as shown through home activities.[269] The surveillance generally produces tangible footage that may be used to indict and convict.[270] Pole camera home surveillance should require the greatest protection against the government, not only because it is a search for a crime,[271] but also because it intrudes into the security of the home. Even the Seventh Circuit recognized that "the status quo in which the government may freely observe citizens outside their homes for eighteen months challenges the Fourth Amendment's stated purpose of preserving people's right to 'be secure in their persons, houses, papers, and effects.'"[272] Because government intrusion via pole camera home surveillance is of the same nature as that which the Fourth Amendment was designed to prohibit, the object of Fourth Amendment protection is directly contradicted.

2. Comprehensive Surveillance Is Unconstitutional

The Supreme Court in *Jones* and *Carpenter* demonstrated that comprehensive surveillance is unconstitutional under a *Katz* analysis.[273] Even more, comprehensive surveillance in the context of warrantless pole camera home surveillance is unconstitutional according to the text and purpose of the Fourth Amendment.[274] Pole camera home surveillance, though it fails to survive the *Katz* test as applied by federal courts,[275] is just as invasive as the comprehensive surveillance condemned by the Supreme Court, and it encompasses a location under enumerated constitutional

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[268] *Id.*

[269] *See, e.g.*, *Tuggle*, 4 F.4th at 510–12.

[270] *See, e.g.*, *id.* at 512; United States v. Moore-Bush, 381 F. Supp. 3d 139, 140–41 (D. Mass. 2019), *rev'd*, 36 F.4th 320 (1st Cir. 2022) (en banc); United States v. Houston, 813 F.3d 282, 285 (6th Cir. 2016).

[271] *See Abel*, 362 U.S. at 237.

[272] *Tuggle*, 4 F.4th at 526 (quoting U.S. CONST. amend. IV).

[273] *See* United States v. Jones, 565 U.S. 400, 430 (2012) (Alito, J., concurring); Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

[274] *See* discussion *supra* Section III.B.1.

[275] *See* discussion *supra* Section III.A.

protection—the home.[276] This demonstrates the problem: the *Katz* test fails to provide protection where protection is constitutionally demanded, particularly in the context of pole camera home surveillance.

From *Jones*, the Court "has . . . recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements."[277] In *Carpenter*, the Court noted that "[m]uch like GPS tracking of a vehicle [as took place in *Jones*], cell phone location information is detailed, encyclopedic, and effortlessly compiled."[278] This shows the Court's distaste for such "detailed, encyclopedic, and effortlessly compiled" information about a person.[279] In the same way, pole camera home surveillance effortlessly records and complies detailed information about home activities, forming an encyclopedia of this information about an unsuspecting person.

Further, both GPS and cell phone location data "provide[] 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.'"[280] In the same way, pole camera home surveillance of any duration provides an intimate view into a person's life as "pole cameras [can] present a highly invasive means of surveillance, capable of observing [intimate details such as] a person's facial features and bodily movements as they navigate their habitual environs."[281] The fact that the government, without being physically present, can arbitrarily and inconspicuously watch and record the activities—even facial expressions—that occur at the home is alarming. Such extensive government monitoring "provokes an immediate negative visceral reaction . . . [and] raises the spectre of the Orwellian

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276 *See* U.S. CONST. amend. IV.

277 *Carpenter*, 138 S. Ct. at 2217 (citing United States v. Jones, 565 U.S. 400, 415 (2012)).

278 *Id.* at 2216.

279 *See id.*

280 *Id.* at 2217 (quoting United States v. Jones, 565 U.S. 400, 415 (2012)).

281 Leaders of a Beautiful Struggle v. Balt. Police Dep't, 456 F. Supp. 3d 699, 714 (D.M.D. 2020), *rev'd*, 2 F.4th 330, 333, 340, 348 (4th Cir. 2021) (en banc).

state."[282] A free society does not need to be consciously aware of what facial expressions one reveals, especially around the home.[283]

The fact that pole camera home surveillance provides an intimate view into one's life is especially apparent in longer-term surveillance because "[s]urely, in most cases, . . . [comprehensive] video surveillance of one's house could reveal considerable knowledge of one's comings and goings for professional and religious reasons, not to mention possible receptions of others for these and possibly political purposes."[284] Day after day and night after night, the government can catalog when a resident leaves, ascertain the license plate number from the vehicle the resident enters, track where the resident goes, and note how long the resident is gone.[285] Not only are the resident's movements to, from, and around his house both ascertainable and permanently recorded, but his "familial, political, professional, religious, and sexual associations" can be deduced by what he wears, what he carries, what he does outside, and who visits his home.[286]

The home must be afforded protection from arbitrary government intrusion, not only because it is specifically enumerated in the Fourth

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[282] United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987). As an esteemed professor of mine would say, it "might make us feel icky."

[283] *See* GEORGE ORWELL, 1984, at 6 (Houghton Mifflin Harcourt Publ'g Co., 1949).

> It was terribly dangerous to let your thoughts wander when you were in any public place or within range of a telescreen. The smallest thing could give you away. A nervous tic, an unconscious look of anxiety, a habit of muttering to yourself—anything that carried with it the suggestion of abnormality, of having something to hide.

Id. at 59.

[284] United States v. Houston, 813 F.3d 282, 296 (6th Cir. 2016) (Rose, J., concurring) ("Also, I find unconvincing the claim that, because this case involves a camera focused on Defendant's house, and not a monitor affixed to a car, the Government cannot gather 'a wealth of detail about [defendant's] familial, political, professional, religious, and sexual associations.'" (quoting *Jones*, 565 U.S. at 415.))

[285] *See Leaders of a Beautiful Struggle*, 456 F. Supp. 3d at 714.

[286] *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (quoting United States v. Jones, 565 U.S. 400, 415 (2012)).

Amendment,[287] but also because "no officer of the government of the United States can violate" the constitutional principle that "every man's house is his castle."[288] Indeed, the home and curtilage are "where privacy expectations are most heightened."[289] Pole camera home surveillance entails remotely watching and recording the activities of the home—often those that take place in the home's curtilage.[290] Curtilage is "the land immediately surrounding and associated with the home."[291] Under the common law, this area was distinguished from "open fields,"[292] an area that receives less protection.[293] Curtilage, however, is "intimately linked to the home, both physically and psychologically" and "enjoys protection as part of the home itself."[294] This Fourth Amendment protection is for "families and personal privacy."[295] Every man must be secure in his home, safe from arbitrary government intrusion. This specially protected area of the home and its curtilage must be afforded great Fourth Amendment protection. If the Court finds that objects and locations not enumerated in the Fourth Amendment receive its protection,[296] objects enumerated in the Fourth Amendment should unequivocally receive its protection.

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287 U.S. CONST. amend. IV.

288 Agnello v. United States, 290 F. 671, 678 (2d Cir. 1923).

289 *See* California v. Ciraolo, 476 U.S. 207, 212–13 (1986).

290 *See, e.g.*, United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021); United States v. Houston, 813 F.3d 282, 285–86, 288 (6th Cir. 2016); United States v. Moore-Bush, 381 F. Supp. 3d 139, 141, 149 (D. Mass. 2019), *rev'd*, 36 F.4th 320 (1st Cir. 2022) (en banc); United States v. Jackson, 213 F.3d 1269, 1276, 1280–81 (10th Cir. 2000), *vacated*, 531 U.S. 1033 (2000).

291 Oliver v. United States, 466 U.S. 170, 180 (1984).

292 *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *225).

293 *Id.*

294 *Ciraolo*, 476 U.S. at 212–13; Florida v. Jardines, 569 U.S. 1, 5–7 (2013).

295 *Ciraolo*, 476 U.S. at 213.

296 *See* United States v. Jones, 565 U.S. 400, 430 (2012) (Alito, J., concurring); Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

IV. CLARIFICATION FROM THE SUPREME COURT IS NEEDED

The *Katz* test fails to provide the home with the protection from arbitrary government intrusion that the Fourth Amendment was intended to provide. To remedy this failure, the Supreme Court should, when the opportunity presents itself, grant certiorari in a pole camera home surveillance case and recognize two things. First, the Court should declare that the *Katz* test is inapplicable to pole camera home surveillance.[297] Second, the Court should clarify that warrantless pole camera surveillance of the home constitutes an unreasonable search.[298] To explain why warrantless pole camera home surveillance constitutes an unreasonable search, it must first be explained that pole camera home surveillance is itself a search. Such surveillance is a search without application of the *Katz* test and without a physical intrusion because it directly contradicts the text and object of the Fourth Amendment. Second, after establishing that pole camera home surveillance is a search, it must be established that the surveillance is unreasonable. This clarification is needed from the Court, as even the Seventh Circuit would not provide greater protection to the home given the "risk[] [of] violating Supreme Court precedent."[299]

A. The Supreme Court Should Declare That the Katz *Test is Inapplicable in the Context of Pole Camera Home Surveillance*

The Supreme Court should declare that the *Katz* test is inapplicable in the context of pole camera home surveillance. The Court has found that under *Katz* there is no reasonable expectation of privacy against things exposed to public view or against technology available to the public.[300] As a result, the home is left virtually unprotected by the Fourth Amendment from warrantless pole camera home surveillance.[301] As Justice Thomas

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297 *See* discussion *infra* Section IV.A.

298 *See* discussion *infra* Section IV.B.

299 *See* United States v. Tuggle, 4 F.4th 505, 526 (7th Cir. 2021).

300 Katz v. United States, 389 U.S. 347, 351 (1967); *see* Kyllo v. United States, 533 U.S. 27, 34, 40 (2001); *Ciraolo*, 476 U.S. at 211, 213.

301 *See* discussion *supra* Section III.A.3.

noted in general, "the *Katz* test . . . has proved unworkable in practice."[302] This is particularly true in the context of pole camera home surveillance.

As a second avenue to finding a search, in light of non-trespassory technological intrusions, the Court "expanded [its] conception of the [Fourth] Amendment" by establishing the *Katz* test.[303] This expanded conception is not absolute. It was built off of a synthesized understanding of what the Fourth Amendment protects.[304] Justice Harlan noted that his "understanding of the rule that has emerged from prior decisions is that there is a twofold requirement" that centers around expectations of privacy: subjective and objective.[305] However, the Court need not rely on expectations of privacy in the context of the home. While the *Katz* test lacks a "plausible foundation in the text of the Fourth Amendment," the protection of the home has not only a plausible, but also an explicit foundation in the text of the Fourth Amendment.[306] The home is second on the Fourth Amendment's list of items that demand security from arbitrary government action.[307] This establishes that security, or privacy, *must* be afforded to the home—*independent of perceived societal expectations*.

The Court should now refine its conception by declaring that the *Katz* test does not apply to pole camera home surveillance. As the Court "decline[d] to extend *Smith* and *Miller* to the collection of CSLI" in *Carpenter*, so should the Court decline to extend *Katz* to pole camera surveillance of the home.[308] Given the express, textual protection provided to the home under the Fourth Amendment and the purpose for which the

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[302] Carpenter v. United States, 138 S. Ct. 2206, 2244 (2018) (Thomas, J., dissenting).

[303] *See id.* at 2213.

[304] *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[305] *Id.* Further, "Justice Harlan did not cite anything for this 'expectation of privacy' test." *Carpenter*, 138 S. Ct. at 2237 (2018) (Thomas, J., dissenting). The test appears to have originated from "a recent law-school graduate" who, at oral argument for *Katz*, proposed a Fourth Amendment reasonableness test similar to the reasonable person test applied in torts. *Id.*

[306] *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (internal quotations omitted) (quoting Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

[307] *See* U.S. CONST. amend. IV.

[308] *Carpenter*, 138 S. Ct. at 2220.

amendment was adopted, arbitrary government intrusion should be curbed by requiring law enforcement to obtain a warrant in this context. The Court may use language as it did in *Carpenter* to note that it is not "call[ing] into question conventional surveillance techniques and tools, such as security cameras," but that the use of pole cameras to surveil in the context of the home *does* require "a warrant supported by probable cause."[309] The Court should "decline to grant the state unrestricted access to" intrude upon the security of the home via pole camera surveillance.[310]

The Court should make this recognition to ensure that an enumerated object of the Fourth Amendment, the home, is made secure against arbitrary government intrusion—intrusion that is currently permitted by nearly all circuit courts at the expense of home security.[311] This result will continue absent clarification from the Court. Judge Flaum of the Seventh Circuit noted that whether the Fourth Amendment search analysis "needs clarifying, tweaking, or an overhaul in light of technologies employed by law enforcement, that additional guidance should come from the Supreme Court."[312] In *Tuggle*, the Seventh Circuit avoided drawing its own "arbitrary line" for "[h]ow much pole camera surveillance is too much."[313] The court did not want to "risk[] violating Supreme Court precedent" or engage in "policy-making."[314] Indeed, the Supreme Court should likewise avoid making policy decisions, which correspond to *Katz* analyses, when it comes to Fourth Amendment questions and instead defer to what the law already provides—security for the home against arbitrary government intrusion.[315]

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309 *Id.* at 2220–21.

310 *See id.* at 2223.

311 *See* U.S. CONST. amend. IV; discussion *supra* Section III.A.3.

312 United States v. Tuggle, 4 F.4th 505, 528 (7th Cir. 2021) (quoting United States v. Cuevas-Perez, 640 F.3d 272, 276 (7th Cir. 2011), *vacated by* Cuevas-Perez v. United States, No. 11-93, 2012 U.S. LEXIS 1667 (U.S. Feb. 21, 2012)).

313 *Id.* at 526.

314 *Id.*

315 *See Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting) ("The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law."); U.S. CONST. amend. IV; Stone v. Powell, 428 U.S. 465, 482 (1976)

B. The Supreme Court Should Clarify that Government Use of Pole Cameras to Surveil the Home Constitutes an Unreasonable Search

The Supreme Court should clarify that pole camera home surveillance constitutes an unreasonable search. To establish this, the Court must first clarify that pole camera home surveillance constitutes a search. Because warrantless pole camera home surveillance directly contradicts the object of the Fourth Amendment in light of the Amendment's historical context and purpose, such surveillance is a search. Neither *Katz* nor the absence of a physical trespass precludes the Court from making this clarification. Further, the nature of pole camera home surveillance itself compels the conclusion that it is a search. However, before a warrant can be required, the Court must establish that warrantless pole camera home surveillance constitutes an unreasonable search.

1. Pole Camera Home Surveillance Constitutes a Search

Pole camera home surveillance constitutes a search irrespective of duration, even though, under the *Katz* test, nearly every federal court concludes that pole camera home surveillance is not a search.[316] Such surveillance permits arbitrary government intrusion into the security of the home, contrary to the text and purpose of the Fourth Amendment. When the invasiveness of pole camera home surveillance is considered in light of the historical context and purpose of the Amendment, it is clear that pole camera home surveillance constitutes a search.[317] Further, the Court is not bound by the *Katz* test or physical intrusion to find that a Fourth Amendment search occurred.[318] The very nature of pole camera home surveillance itself compels the conclusion that it constitutes a search subject to Fourth Amendment requirements.

(quoting Boyd v. United States, 116 U.S. 616, 630 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 408–09 (1976)).

316 *See* discussion *supra* Section III.A.3.

317 *See* discussion *infra* Section IV.B.1.a.

318 *See* discussion *infra* Section IV.B.1.b.

a. The Fourth Amendment's text and purpose show that pole camera home surveillance is a search

Rather than speculate and presume societal expectations in a way that protects the home from warrantless pole camera surveillance,[319] the Court should look to the constitutional text and historical purpose of the Fourth Amendment[320] to discern whether the government action here is a search subject to Fourth Amendment requirements. Here, the government action is pole camera home surveillance. Pole camera home surveillance constitutes a search because it directly contradicts, or frustrates, the object of the Fourth Amendment.[321] The home is expressly listed as something that must be secure—protected from unreasonable searches.[322] Early Americans suffered under general warrants and writs of assistance.[323] Government action that is similar to the general warrants and writs of assistance constitutes the same type of government intrusion contemplated by the Fourth Amendment and should thus be considered an unreasonable search. Therefore, the Court should declare that because pole camera home surveillance frustrates the textual and purposeful design of the Fourth Amendment, pole camera home surveillance constitutes a search subject to Fourth Amendment requirements.

b. Pole camera home surveillance constitutes a search despite not applying the *Katz* test and despite the absence of a physical trespass

Pole camera home surveillance constitutes a search even though the *Katz* test does not apply and no physical trespass occurs. The Court is not bound

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[319] *See* United States v. Jones, 565 U.S. 400, 416–17 (2012) (Sotomayor, J., concurring). Justice Sotomayor "ask[ed] whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." *Id.* at 416.

[320] *See* Jeffrey C. Tuomala, The Casebook Companion pt. 1, ch. 5, at 14–15 (Aug. 8, 2020) (unpublished manuscript) (on file with author).

[321] *See* discussion *supra* Section III.B.1.

[322] *See* U.S. CONST. amend. IV.

[323] *See* Stanford v. Texas, 379 U.S. 476, 482 (1965); Agnello v. United States, 290 F. 671, 676 (2d Cir. 1923); Weaver, *supra* note 10, at 128.

to restrict the definition of a "search" to occasions where there was a supposed societal expectation of privacy or a physical trespass.[324] The development of technology has presented the government with opportunities to arbitrarily invade the security of the home that did not exist at the time of the Fourth Amendment's adoption.[325] This development has raised questions as to what is included under Fourth Amendment protection, particularly as to "[w]hat constitutes a search in a digital society [where] technology empowers near-perfect surveillance without" any physical invasion.[326] While the traditional physical trespass requirement is not abolished, there are circumstances where a search may occur absent such an invasion.[327] The *Katz* test was adopted as an aid or addition to the Fourth Amendment search inquiry and demonstrates that physical trespass is not required for a Fourth Amendment search to occur.[328] Though it is the current test applied when courts are faced with non-trespassory technological invasions,[329] it does not have to be the only one the Court may use.[330]

Though, as *Entick* noted, "the eye cannot . . . be guilty of a trespass,"[331] the remote observation and collection of permanent, reviewable footage of the activities that occur within view of the home gravely invade the security of the home. In *Entick*, the court noted that "[p]apers are the owner's goods and chattels" that he may keep secure from government intrusion.[332] In a similar but more significant way, home activities are the residents' private

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[324] Given that the Court essentially created the Expectations of Privacy Test indicates that (1) it can create a test for determining what the Fourth Amendment protects, and (2) it does not bind itself to the occurrence of a physical invasion to find a Fourth Amendment search. *See* Carpenter v. United States, 138 S. Ct. 2206, 2237 (2018) (Thomas, J., dissenting).

[325] *See* United States v. Tuggle, 4 F.4th 505, 510 (7th Cir. 2021); Weaver, *supra* note 258, at 1133–35.

[326] *Tuggle*, 4 F.4th at 510.

[327] *See* United States v. Jones, 565 U.S. 400, 409 (2012).

[328] *See id.*

[329] *See Tuggle*, 4 F.4th at 511.

[330] *See* discussion *supra* Section IV.A.

[331] Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (1795).

[332] *Id.*

information that they have a right to keep secure and away from government cataloging.[333] The *Katz* test is fashioned around privacy expectations, but, as this Casenote has demonstrated, that test has failed to provide the Fourth Amendment's intended protection.[334] The Court should reexamine the historical purpose of the Fourth Amendment and assess that the *Katz* remedy for finding a search in technological contexts has failed to provide the intended protection against arbitrary government intrusion by allowing arbitrary pole camera home surveillance searches.

c. The nature of pole camera home surveillance compels the finding of a search

The very nature of pole camera surveillance facilitates arbitrary government intrusion and compels the conclusion that it constitutes a search. Pole camera home surveillance does not involve mere observation or even mere surveillance.[335] Rather, a permanent visual record of intimate home activities is secured and stored, unbeknownst to the suspect.[336] Every move he or anyone makes around his home within view of the camera is recorded. He cannot come or go from his home; walk his dog; look out his window; take out the trash; mow his lawn; wash his car; play with his children; associate with neighbors; and engage in any other life activity without the government watching—and not only watching but also recording so that the evidence may be used against him.[337] While the Supreme Court asserted that technology that enhances the senses is not prohibited,[338] the technology here does not merely enhance law

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[333] *See* U.S. CONST. amend. IV.

[334] *See* discussion *supra* Section III.

[335] *See, e.g.*, United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021). For eighteen months the government recorded home activities "around the clock" and stored the resulting footage with the FBI. *See id.*

[336] *See, e.g.*, *id.*

[337] *See id.* at 511–12.

[338] United States v. Knotts, 460 U.S. 276, 282 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."); *see also* Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986) ("The mere fact

enforcement's vision or memory. It makes possible both what would be essentially impossible and what is impossible without the technology: (1) non-stop surveillance of a home for eighteen months *and* (2) a permanent, tangible record of home activities during the surveillance duration.[339] It would take immense resources to pull off the surveillance in *Tuggle* absent pole camera technology.[340] Such surveillance could probably only have lasted for a few days.[341] Law enforcement is unlikely to have the infrastructure, staff, or money to conduct an eighteen-month, non-stop surveillance of a home.[342] Physically, it is impossible absent enough officers—officers who also must have enough time.

Further, human senses are not merely enhanced by pole camera home surveillance.[343] Pole cameras do more than simply enhance vision as binoculars do.[344] The impossible is made possible.[345] There is no human

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that human vision is enhanced somewhat, at least to the degree here [aerial photographs of a facility], does not give rise to constitutional problems.").

339 *See Tuggle*, 4 F.4th at 511.

340 *See id.* at 526; United States v. Jones, 565 U.S. 400, 429 (2012) (Alito, J., concurring).

341 *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 Tuggle's home for eighteen months defies the reasonable limits of human nature and finite resources.").

342 *See Jones*, 565 U.S. at 429 (Alito, J., concurring).

343 Senses can perceive what is in public view; however,

> [o]fficers were able 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, all of his cars, all of their cars, and all of the types of packages or bags he carried and when.

Tuggle, 4 F.4th at 524 (original alterations omitted) (quoting United States v. Garcia-Gonzalez, No. 14-10296, 2015 U.S. Dist. LEXIS 116312, at *5 (D. Mass. Sept. 1, 2015)).

344 *Compare Tuggle*, 4 F.4th at 526 (considering pole camera home surveillance) *with* United States v. Lace, 669 F.2d 46, 49–50 (2d Cir. 1982) (considering binocular home surveillance).

345 *See* California v. Ciraolo, 476 U.S. 207, 215 n.3 (1986) ("The State acknowledges that '[aerial] observation of curtilage may become invasive . . . through modern technology which discloses to the senses those intimate associations, objects or activities otherwise

sense that creates a tangible record. People are limited to explanation to communicate one's perceived sense. Pole cameras, on the other hand, create a tangible record that need only be shown to another to be communicated. This tangible record intrudes upon the security of the home and may be searched and seized.[346] What's more is that the tangible, unmanipulated record will have fewer risks and flaws—no errors in memory or risks of dishonesty, which are present in recollection by a human being. Like the CSLI data obtained in *Carpenter*, pole camera footage is "not your typical witness[]."[347] Pole camera footage, "[u]nlike the nosy neighbor who keeps an eye on comings and goings, [is] ever alert, and [its] memory is nearly infallible."[348] The Court in *United States v. Knotts*, which was considering the use of a beeper, used an example of a "searchlight" as an example of technology that permissibly enhanced senses.[349] A pole camera is categorically different than a "searchlight" or a beeper for it has visual and permanent components that jeopardize the security of the home it surveils.[350] Contrary to the Seventh Circuit's reasoning,[351] both CSLI and pole camera home surveillance enable retrospective, detailed review of past movements.[352] The Court in *Jones* was right in noting that "[i]t may be that achieving the same result [of comprehensive surveillance] through

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imperceptible to police or fellow citizens.'"). People cannot by their senses create tangible, transferrable records of what they see.

346 Pole camera footage is tangible, unlike "[a] conversation overheard by eavesdropping, whether by plain snooping or wiretapping." Katz v. United States, 389 U.S. 347, 365 (1967) (Black, J., dissenting).

347 *See* Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018).

348 *Id.*

349 United States v. Knotts, 460 U.S. 276, 283 (1983) (citing United States v. Lee, 274 U.S. 559, 563 (1927)).

350 *See id.* Further, if a pole camera is equipped with audio recording capabilities, the government may use the recorded statements as evidence.

351 United States v. Tuggle, 4 F.4th 505, 525 (7th Cir. 2021).

352 *See id.*; *supra* note 208 and accompanying text.

electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy."[353]

Though the Court reiterated that the privacy expectations inquiry under *Katz* "is informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted,'"[354] courts have not recognized the resemblance of the general warrants and writs to warrantless pole camera surveillance. However, per the Court, two historical guideposts are: (1) "secur[ing] 'the privacies of life' against 'arbitrary power'"[355] and (2) "'plac[ing] obstacles in the way of a too permeating police surveillance.'"[356] While the guideposts appear to support protection against arbitrary government intrusion, they have not prevented this result in the context of pole camera home surveillance. Instead, given the very nature of pole camera home surveillance and the arbitrary government intrusion permitted by *Katz*, this warned that a "'too permeating police surveillance'"[357] is here and jeopardizes the security of the home, contrary to the Fourth Amendment's intended protection.

2. Warrantless Pole Camera Home Surveillance Searches Are Unreasonable

Warrantless pole camera surveillance constitutes an unreasonable search. The text of the Fourth Amendment requires that the security of the home be protected against unreasonable searches.[358] An unreasonable search is a

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[353] United States v. Jones, 565 U.S. 400, 412 (2012). Tuggle cited *Jones* and made the argument that the technology used impacted "the reasonableness of the expectation of privacy." *Tuggle*, 4 F.4th at 514 (quotation marks omitted).

[354] Carpenter v. United States, 138 S. Ct. 2206, 2213–14 (2018) (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

[355] *Id.* at 2214 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391, 408–09 (1976)).

[356] *Id.* (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

[357] *Tuggle*, 4 F.4th at 510 (quoting *Di Re*, 332 U.S. at 595). Indeed, "the [Framers], after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." *Di Re*, 332 U.S. at 595.

[358] U.S. CONST. amend. IV; *see Tuggle*, 4 F.4th at 510 (quoting *Di Re*, 332 U.S. at 595).

search that is conducted absent a warrant supported by particularity and probable cause.[359] The warrant must be issued by a neutral magistrate.[360] The Supreme Court has recognized that warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions."[361] Because pole camera home surveillance constitutes a search irrespective of the length of surveillance,[362] and because no exception applies,[363] such surveillance constitutes an unreasonable search absent a valid warrant. A valid warrant must be supported by probable cause and particularity[364] and must be issued by a neutral magistrate.[365] Given the electronic processes available today, the government may be able to obtain such a valid warrant quickly.[366] Accordingly, though the government must obtain a valid warrant before conducting pole camera home surveillance, the government may utilize pole cameras without a warrant in other contexts. The home, however, must be afforded its promised Fourth Amendment protection.[367] Therefore, the Court should clarify that warrantless pole camera home surveillance constitutes an unreasonable search absent a valid warrant.

V. CONCLUSION

It's still dark—Fourth Amendment protection against arbitrary government intrusion into the security of the home within the context of pole camera home surveillance is dim. Though, per the Constitution's text

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359 *See* U.S. CONST. amend. IV; discussion *supra* II.B.

360 *See* S. DOC. NO. 112-9, at 1392 (2014); Johnson v. United States, 333 U.S. 10, 13–14 (1948); *Search Warrant*, *supra* note 47.

361 Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted)).

362 *See* discussion *supra* Section IV.B.1.

363 *See Tuggle*, 4 F.4th at 511–12.

364 U.S. CONST. amend. IV; S. DOC. NO. 112-9, at 1396–97 (2014).

365 *See* S. DOC. NO. 112-9, at 1392 (2014).

366 *See* Missouri v. McNeely, 569 U.S. 141, 154 (2013); FED. R. CRIM. P. 4.1 (permitting the neutral magistrate to evaluate and issue a warrant electronically).

367 *See* U.S. CONST. amend. IV; Virginia v. Moore, 553 U.S. 164, 168–69 (2008); discussion *supra* Section III.B.1.

and historical context, the Amendment must ensure people's security "in their persons, houses, papers, and effects" from arbitrary government intrusion.[368] Affirming what the common law condemned, the Fourth Amendment was meant to protect against intrusive general warrants and writs of assistance.[369] Warrantless pole camera home surveillance results in the same sort of arbitrary government intrusions that were characteristic of the use of general warrants and writs of assistance. Pole camera home surveillance should therefore be subject to Fourth Amendment warrant requirements; however, the application of *Katz* has led nearly every federal court to decide it is not.[370] Rather than ensure home security, the *Katz* test ensures home insecurity by repeatedly permitting warrantless pole camera home surveillance.[371]

Though the Fourth Amendment "reflects a choice that our society should be one in which citizens 'dwell in reasonable security and freedom from surveillance,'"[372] surveillance technology today has "created Orwellian possibilities for snooping."[373] These possibilities are only compounded when no constitutional check is required of the government before it chooses to record home activities with "unblinking eyes"[374] via pole camera surveillance. The security of the home is thus jeopardized and at the mercy of arbitrary government intrusion. In order to ensure the Fourth Amendment provides the protection it was designed to provide, the Supreme Court should declare that the *Katz* test is inapplicable in the context of pole camera home surveillance and clarify that the government's warrantless use of pole cameras to surveil a home constitutes an unreasonable search.

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368 *See* U.S. CONST. amend. IV.

369 *See Moore*, 553 U.S. at 168–69 (quoting STORY, *supra* note 28, at §§ 1894–95).

370 *See* discussion *supra* Section III.A.3.

371 *See* U.S. CONST. amend. IV; Stone v. Powell, 428 U.S. 465, 482 (1976); United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990); Agnello v. United States, 290 F. 671, 676 (2d Cir. 1923).

372 California v. Ciraolo, 476 U.S. 207, 217 (1986) (Powell, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

373 Weaver, *supra* note 258, at 1135.

374 United States v. Tuggle, 4 F.4th 505, 509 (7th Cir. 2021).