No. 22-481

# In the Supreme Court of the United States

DAPHNE MOORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
KENNETH A. POLITE, JR.
*Assistant Attorney General*
ROSS B. GOLDMAN
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by law-enforcement use of a video camera, placed on a utility pole on public property, which showed only views of petitioner's home exposed to public observation.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

# In the Supreme Court of the United States

No. 22-481

DAPHNE MOORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The amended en banc opinion of the court of appeals (Pet. App. 1a-112a) is reported at 36 F.4th 320. The panel opinion of the court of appeals (Pet. App. 137a-195a) is reported at 963 F.3d 29. The order of the district court granting petitioner's suppression motion (Pet. App. 113a-134a) is reported at 381 F. Supp. 3d 139. The amended memorandum and order of the district court denying reconsideration (Pet. App. 135a-136a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on May 27, 2022. A petition for rehearing was denied on June 23, 2022 (Pet. App. 200a-201a). On September 14, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

November 20, 2022, and the petition was filed on November 18, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

A grand jury in the United States District Court for the District of Massachusetts indicted petitioner for conspiring to distribute and possess with intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. 846; distributing and possessing with intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; conspiring to launder money, in violation of 18 U.S.C. 1956(h); laundering money, in violation of 18 U.S.C. 1956(a)(1) and (2); and making false statements in a federal matter, in violation of 18 U.S.C. 1001. Superseding Indictment 2-3, 5, 11-12, 15-16, 21. The district court granted petitioner's motion to suppress, Pet. App. 113a-134a, and denied the government's motion for reconsideration, *id.* at 135a-136a. The court of appeals reversed and remanded. *Id.* at 172a; see *id.* at 137a-195a. The court of appeals then granted a petition for rehearing en banc and again reversed the district court, remanding for further proceedings with instructions to deny the motion to suppress. *Id.* at 3a; see *id.* at 1a-112a, 198a.

1. Following a tip from a cooperating witness about illegal sales of unlicensed firearms and drug trafficking, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began investigating petitioner's daughter and future son-in-law, Nia Moore-Bush and Dinelson Dinzey. Pet. App. 4a, 6a-7a (Barron, C.J., Thompson, J., and Kayatta, J., concurring); *id.* at 87a, 141a (Lynch, Howard, and Gelpí, JJs., concurring). In February 2017, Moore-Bush and Dinzey moved in with petitioner. *Id.* at 87a. Investigators subsequently obtained

evidence—including a cooperating witness's recorded purchase of four firearms—that petitioner's residence was the site of illegal drug and firearm sales. *Id.* at 87a-88a, 141a.

In May 2017, ATF agents installed a camera on a utility pole on the other side of the public street from petitioner's residence. See Pet. App. 87a-89a, 95a n.37 (Lynch, Howard, and Gelpí, JJs., concurring); see also *id.* at 7a-8a (Barron, C.J., Thompson, J., and Kayatta, J., concurring). Consistent with the court of appeals' prior decision in *United States* v. *Bucci*, 582 F.3d 108 (1st Cir. 2009), which recognized that the long-term installation and operation of such a camera is not a search under the Fourth Amendment requiring a warrant, the agents did not seek a warrant before installing the camera here, see Pet. App. 11a-12a, 83a.

The camera, which did not record audio, "showed the right side of [petitioner's] house, including the attached garage, a side door and the driveway. When ATF agents viewed the camera's video in real time, they could pan, tilt, and zoom the camera. Pet. App. 89a (Lynch, Howard, and Gelpí, JJs., concurring). When zoomed, the camera permitted agents "on some occasions to read license plates and see individual's faces." *Ibid.* "The front door was not in the camera's view." *Ibid.* A tree "partially obstructed the camera's view when it had leaves." *Ibid.* And everything that the camera showed was "totally exposed to public observation." *Id.* at 86a.

From that public vantage point, the camera collected additional evidence of the co-defendants' illegal activities, for example footage of two individuals placing a bag in the engine compartment of a car, a known technique for concealing contraband. Pet. App. 90a (Lynch,

Howard, and Gelpí, JJs., concurring). The government used information gleaned from the pole camera in its applications for wiretaps and warrants relating to the investigation. *Ibid.* The camera remained in place for approximately eight months until shortly after petitioner, Moore-Bush, and Dinzey were indicted. *Id.* at 89a.

2. A grand jury in the District of Massachusetts charged petitioner with conspiring to distribute and possess with intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. 846; distributing and possessing with intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; conspiring to launder money, in violation of 18 U.S.C. 1956(h); laundering money, in violation of 18 U.S.C. 1956(a)(1) and (2); and making false statements in a federal matter, in violation of 18 U.S.C. 1001.

Petitioner and Moore-Bush each moved to suppress the pole-camera recordings and any resulting fruits. See Pet. App. 11a (Barron, C.J., Thompson, J., and Kayatta, J., concurring). The district court granted the motion to suppress and denied the government's motion for reconsideration. *Id.* at 113a-134a, 135a-136a; see *id.* at 12a-15a. In the court's view, the use of the camera violated petitioner's subjective and objectively reasonable expectation of privacy. *Id.* at 118a-134a. And the court refused to apply the good-faith exception to the exclusionary rule because it deemed the court of appeals' decision in *Bucci* was no longer binding in light of this Court's decision in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). See Pet. App. 118a-134a.

3. The court of appeals reversed and remanded. Pet. App. 137a-195a. The court explained that *Carpenter* did not abrogate *Bucci*; that *Bucci* therefore

remained binding precedent; and that under *Bucci*, petitioner's suppression motion should have been denied. *Id.* at 138a-141a. The court also observed that *Bucci* is "firmly rooted" in this Court's precedent and that an individual has no reasonable expectation of privacy in what he or she "knowingly exposes to public view." *Id.* at 139a-140a.

Judge Barron (later chief judge) concurred in the judgment. Pet. App. 172a-195a. He agreed that *Bucci* remained binding but expressed the view that *Bucci* should be "reconsider[ed]." *Id.* at 175a; see *id.* at 191a.

4. The court of appeals granted en banc review, withdrew the panel opinion, and vacated the panel's judgment. Pet. App. 198a; see *id.* at 16a (Barron, C.J., Thompson, J., and Kayatta, J., concurring). But after reconsidering the case en banc, the court again "unanimously reversed" the district court's order granting petitioner's motion to suppress. *Id.* at 3a. The court of appeals remanded for further proceedings. *Ibid.*

Chief Judge Barron and Judges Thompson and Kayatta wrote a concurring opinion. Pet. App. 3a-86a. In their view, use of the pole camera constituted a Fourth Amendment search that required a warrant and the court of appeals' prior decision in *Bucci* should be overruled. *Id.* at 4a-5a. They acknowledged that the "common-law trespassory test" did not apply because there was no physical intrusion by government agents onto petitioner's property, *id.* at 17a (citation omitted), and they did not dispute that the absence of privacy-protective measures like a fence meant that petitioner lacked a reasonable expectation of privacy from public observation of the activities at issue, *id.* at 22a-23a. But they took the view that petitioner had a subjective and an objectively reasonable expectation of privacy in the

totality, over a longer (unspecified) period of time, of those publicly exposed activities, *ibid.* They recognized, however, that "other courts that have considered the use of pole-camera surveillance—even over a long duration—have found no search to have occurred." *Id.* at 76a. And they supported reversal of the suppression order here, because the agents' use of a pole camera was "conducted in objectively reasonable reliance" on *Bucci*. *Id.* at 83a (quoting *Davis* v. *United States*, 564 U.S. 229, 232 (2011)).

Judges Lynch, Howard, and Gelpí also authored a concurring opinion. Pet. App. 86a-112a. They explained that *Bucci* had not been undermined by subsequent decisions of this Court and emphasized that the contrary view would "have unfortunate practical ramifications." *Id.* at 87a. They noted, as a threshold matter, that the evidence supporting installation of the camera here likely would have been enough to support probable cause, had circuit precedent required the government to demonstrate it. *Id.* at 90a. They observed that pole cameras, which "are routinely used by law enforcement" and have been used "for many years," are "plainly" a type of "conventional surveillance tool, *id.* at 92a-93a; that petitioner had made no effort to shield the relevant activities from observation "by neighbors or by passersby," *id.* at 97a; and that such an observer would often have "a more complete view of the entirety of the house's curtilage" than the camera had, *id.* at 107a. And they emphasized that the activities at issue "occur in one place where a person expects to encounter and be seen by people again and again." *Id.* at 100a-101a; see *id.* at 101a-105a. They also observed that overruling *Bucci*, would "have many negative consequences," including complication of Fourth Amendment doctrine

and "plac[ing] law enforcement at a disadvantage to the rest of the population," which includes "[m]illions of people" who have "equipped their front doors with cameras." *Id.* at 108a-110a.

**ARGUMENT**

Petitioner renews her contention (Pet. 25-34) that evidence against her should be suppressed because the agents violated her Fourth Amendment rights by placing a pole camera on public property that could provide video footage of the exterior of her home that was exposed to public view. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. In addition, this case would be an unsuitable vehicle for addressing the question presented because, as every judge on the court of appeals recognized, even if it were decided in petitioner's favor, the agents in this case were acting pursuant to indistinguishable circuit precedent, meaning that the good-faith exception to the exclusionary rule would nonetheless require reversal of the district court's suppression order. In addition, the interlocutory posture of this case makes any further review premature at this time. The Court has recently denied petitions for certiorari in cases presenting similar contentions, see *Tuggle* v. *United States*, 142 S. Ct. 1107 (2022) (No. 21-541); *May-Shaw* v. *United States*, 141 S. Ct. 2763 (2021) (No. 20-6905), and should follow the same course here.

1. a. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. Where, as here, action challenged under the Fourth Amendment does not involve a trespass or physical intrusion, see Pet. App. 17a (Barron, C.J., Thompson, J.,

and Kayatta, J., concurring), a search occurs only "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo* v. *United States*, 533 U.S. 27, 33 (2001); see *United States* v. *Jones*, 565 U.S. 400, 405-406 (2012); *Katz* v. *United States*, 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring).

The concurring opinion of Judges Lynch, Howard, and Gelpí correctly recognized both that petitioner, who did not take measures to shield these views of her home from observation by neighbors and passersby, did not exhibit a subjective expectation of privacy, and that the use of a video camera—which was placed on a utility pole on public property and captured only what was visible to an ordinary passerby on the street—did not intrude on any reasonable expectation of privacy. Pet. App. 91a-108a. This Court has repeatedly explained that activities that a person "knowingly exposes to the public" are "not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. The prohibition on unreasonable searches "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986). Instead, surveillance of activities that are "clearly visible" "from a public vantage point" does not violate any expectation of privacy "that society is prepared to honor" as "reasonable." *Id.* at 213-214.

Even as this Court has held that the use of other observation techniques, such as thermal imaging, may constitute a search, this Court has reaffirmed "the lawfulness of warrantless visual surveillance of a home." *Kyllo*, 533 U.S. at 32; see *Jones*, 565 U.S. at 412 ("This Court has to date not deviated from the understanding

that mere visual observation does not constitute a search."). In *Ciraolo*, for example, the Court held that a flyover from 1000 feet in the air to observe marijuana plants in a home's fenced-in backyard did not constitute a Fourth Amendment search because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S. at 213-214. The Court later applied *Ciraolo* to uphold the warrantless use of a helicopter flying at 400 feet to observe a partially covered greenhouse in a residential backyard. *Florida* v. *Riley*, 488 U.S. 445, 448-450 (1989) (plurality opinion); see *id.* at 453-455 (O'Connor, J., concurring in the judgment). And the Court has also upheld the warrantless use of an aerial mapping camera to photograph a company's 2000-acre manufacturing complex, even though that technology provided "more detailed information than naked-eye views." *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 238 (1986). In line with those decisions, the use of a pole camera to video record areas visible from a public street did not constitute a warrantless search prohibited by the Fourth Amendment. Pet. App. 86a-112a (Lynch, Howard, and Gelpí, JJs., concurring).

b. Petitioner errs in asserting (Pet. 25-34) that the use of the pole camera in this case contravenes this Court's decisions in *Jones*, *supra*, and *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). Pole-camera observation of publicly visible areas is meaningfully different—and less intrusive—than the technological monitoring at issue in *Jones* and *Carpenter*.

In *Jones*, this Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" based on the government's

"physical intrusion" into and "occup[ation of] private property for the purpose of obtaining information." 565 U.S. at 404 (footnote omitted). Four Justices would have deemed use of a GPS tracking device a Fourth Amendment search under the reasonable-expectation-of-privacy test. See *id.* at 418-431 (Alito, J., concurring in the judgment); see also *id.* at 430 (finding it significant that by using a GPS device, "law enforcement agents tracked every movement that [the defendant] made in the vehicle he was driving"). While raising (without resolving) questions regarding the degree of intrusion produced by GPS monitoring under that test, Justice Sotomayor noted "unique attributes of GPS surveillance," including its ability to "generate[] a precise, comprehensive record of a person's public movements." *Id.* at 415 (Sotomayor, J., concurring).

In *Carpenter*, a decision that expressly declined to "call into question conventional surveillance techniques and tools, such as security cameras," the Court concluded that an individual has a "legitimate expectation of privacy in the record of his physical movements as captured through" cell-site location information, such that "accessing seven days of [such information] constitutes a Fourth Amendment search." 138 S. Ct. at 2217 & n.3, 2220. In reaching that conclusion, the Court emphasized "the unique nature of cell phone location records" and that cell-site location information is generated by "modern cell phones" in "increasingly vast amounts of [an] increasingly precise" nature, and can yield "a comprehensive chronicle of the user's past movements." *Id.* at 2211-2212, 2217.

The pole-camera used here is not analogous to the technologies this Court considered in *Jones* and *Carpenter*. Unlike GPS tracking or historical cell-site

location information, cameras affixed to stationary utility poles cannot track a person's location—or in any way capture a person's activities—outside the camera's field of vision. See Pet. App. 100a-101a (Lynch, Howard, and Gelpí, JJs., concurring) (emphasizing that "the pole camera only captured the defendants' and coconspirators' movements in one place in the public view and did not track their movements once they left the curtilage of" petitioner's home). Furthermore, the pole camera (which also did not record any audio) was not—and could not have been—used to peer into the unexposed interior of petitioner's home or otherwise uncover intimate details of her private life. Far from "generat[ing] a precise, comprehensive record of a person's public movements that reflects a wealth of detail" about places visited, *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring), or constructing "an all-encompassing record of [a cell-phone] holder's whereabouts" akin to "attach[ing] an ankle monitor to the phone's user," *Carpenter*, 138 S. Ct. at 2217-2218, the pole camera here recorded only areas outside of petitioner's home that were "totally exposed to public observation," and that petitioner did not take steps to protect, Pet. App. 86a.

Nor does the use of a camera installed on a public way that sees what is already in open view represent a "[d]ramatic technological change" that might violate reasonable expectations of privacy. *Jones*, 565 U.S. at 427 (Alito, J., concurring in the judgment). As Judges Lynch, Howard, and Gelpí observed, "[p]ole cameras are plainly a conventional surveillance tool." Pet. App. 92a; see *Carpenter*, 138 S. Ct. at 2220 (decision did not "call into question conventional surveillance techniques and tools, such as security cameras"); see also Pet. App. 92a-93a & n.36. Thus, as the courts of appeals have

correctly recognized for decades, "[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." *United States* v. *Jackson*, 213 F.3d 1269, 1280 (10th Cir.), judgment vacated and remanded on other grounds, 531 U.S. 1033 (2000), cert. denied, 531 U.S. 1038 (2000); see *United States* v. *Vankesteren*, 553 F.3d 286, 291 (4th Cir.), cert. denied, 556 U.S. 1269 (2009); *United States* v. *Taketa*, 923 F.2d 665, 677 (9th Cir. 1991). To the contrary, technological developments have only undermined the case for a reasonable expectation of privacy in such footage because "[m]illions of people" have now "equipped their front doors with cameras," Pet. App. 109a, which often capture neighbors' curtilage, meaning that the recording of curtilage by another's camera has itself become a routine occurrence.

2. Petitioner identifies no conflict in the lower courts that would warrant this Court's review.

a. As all of the judges on the court of appeals here recognized, every circuit to consider the question post-*Carpenter* has recognized that that the long-term use of a pole camera to record the curtilage of a home is not a Fourth Amendment search. See Pet. App. 76a-78a (Barron, C.J., Thompson, J., and Kayatta, J., concurring); *id.* at 111a-112a (Lynch, Howard, and Gelpí, JJs., concurring). Instead, both before and after *Carpenter*, "no federal circuit 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 home." *United States* v. *Tuggle*, 4 F.4th 505, 522 (7th Cir. 2021), cert. denied, 142 S. Ct. 1107 (2022).

The Seventh Circuit recently upheld the warrantless use of three pole cameras capturing 18 months of footage, because that footage "did not paint the type of

exhaustive picture of [the defendant's] every movement that the Supreme Court has frowned upon." *Tuggle*, 4 F.4th at 524. The court observed that "[i]f the facts and concurrences of *Jones* and *Carpenter* set the benchmarks," then pole-camera surveillance "pales in comparison." *Ibid.* The Sixth Circuit reached the same result. See *United States* v. *May-Shaw*, 955 F.3d 563 (2020), cert. denied, 141 S. Ct. 2763 (2021). The court explained that "the cameras observed only what 'was possible for any member of the public to have observed during the surveillance period.'" *Id.* at 568-569 (ellipsis omitted) (quoting *United States* v. *Houston*, 813 F.3d 282, 290 (6th Cir.), cert. denied, 137 S. Ct. 567 (2016)); see *United States* v. *Trice*, 966 F.3d 506, 509-510 (6th Cir. 2020), cert. denied, 141 S. Ct. 1395 (2021) (applying similar principles to find no Fourth Amendment violation resulting from the warrantless use of a camera installed in a common hallway in an unlocked apartment building).

The Tenth Circuit has likewise rejected a Fourth Amendment challenge to the warrantless use of pole cameras overlooking a residence, recognizing that the "use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." *Jackson*, 213 F.3d at 1280. And several other circuits' analyses of similar issues accord with this understanding. See *Tuggle*, 4 F.4th at 520-523 (discussing cases). The Ninth Circuit has explained that "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy" and that "the police may record what they normally may view with the naked eye." *United States* v. *Gonzalez*, 328 F.3d 543, 548 (2003) (quoting *Taketa*, 923 F.2d at 677) (brackets in original). It has accordingly applied that principle to

reject a defendant's assertion of "a temporary zone of privacy" within a "quasi-public mailroom at a public hospital," where the court concluded that "the defendant had no objectively reasonable expectation of privacy that would preclude video surveillance of activities already visible to the public." *Id.* at 547-548; see *Vankesteren*, 553 F.3d at 292 (rejecting claim that camera surveillance of open-field property was Fourth Amendment search).

b. Petitioner errs in asserting (Pet. 15-16) that the Fifth Circuit's decades-old decision in *United States* v. *Cuevas-Sanchez*, 821 F.2d 248 (1987), conflicts with the decision below. In that case, the Fifth Circuit rejected a Fourth Amendment challenge to the government's use of a pole camera, concluding that "the government followed the proper procedures in obtaining a court order for video surveillance." *Id.* at 252. Although the court stated that the use of the camera qualified as a search, the defendant in *Cuevas-Sanchez* had erected a ten-foot-high fence around his backyard, which "screen[ed] the activity within from views of casual observers." *Id.* at 251. In petitioner's case, by contrast, the pole camera only had views that were "totally exposed to public observation." Pet. App. 86a (Lynch, Howard, and Gelpí, JJs., concurring); see *Tuggle*, 4 F.4th at 513 (explaining that *Cuevas-Sanchez* presented "the more challenging situation in which the government intentionally places cameras to see *over* a fence to observe a private residence in a manner unavailable to a ground-level passerby"). And the Fifth Circuit recently rejected, on plain error review, a defendant's reliance on *Cuevas-Sanchez* to argue that pole-camera surveillance was a search under the Fourth Amendment where—as here—"the cameras captured

what was open to public view from the street." *United States* v. *Dennis*, 41 F.4th 732, 740-741 (2022), petition for cert. pending, No. 22-6473 (filed Dec. 29, 2022).

Petitioner also cites (*e.g.*, Pet. 17-18) *People* v. *Tafoya*, 494 P.3d 613, 615 (2021) (en banc), in which the Colorado Supreme Court determined that the government's use of a pole camera to record activity inside a defendant's fenced-in backyard was a search. There, however, the court found that the defendant had a subjective and reasonable expectation of privacy in his backyard, which was surrounded by a "six-foot-high privacy fence" and not visible to "a person standing on the street." *Id.* at 622; see *id.* at 623 (finding that any public exposure of the backyard due to gaps in the fence or neighboring properties was "limited" and "fleeting"). The pole camera's "elevated position" allowed it to view over the fence and record three months of activities inside the "fenced-in," backyard curtilage "not usually visible to members of the public." *Id.* at 615 & n.2. Based on those "specific facts," the Colorado Supreme Court found that the pole-camera recording qualified as a search under the Fourth Amendment. *Id.* at 623. And it specifically distinguished "the facts in" the Seventh Circuit's recent decision, *Tafoya*, 494 P.3d at 621 n.6, which as in this case, viewed only areas that "were totally exposed to public observation," Pet. App. 86a (Lynch, Howard, and Gelpí, JJs., concurring).

Petitioner's reliance (Pet. 16) on *State* v. *Jones*, 903 N.W.2d 101 (S.D. 2017), cert. denied, 138 S. Ct. 1011 (2018), is likewise misplaced. There, a bare majority of the South Dakota Supreme Court took the view that the "amassed nature of [the] surveillance" of the defendant's activities violated his subjective and reasonable expectation of privacy, *id.* at 111, but nevertheless

affirmed the denial of the defendant's suppression motion based on the good-faith exception to the exclusionary rule, *id.* at 115. To the extent that its analysis was based on this Court's 2012 decision in *United States* v. *Jones*, *supra*, see *State* v. *Jones*, 903 N.W.2d at 107, it lacked the benefit of this Court's subsequent opinion in *Carpenter*, which made clear that the Court was *not* "call[ing] into question conventional surveillance techniques and tools, such as security cameras," 138 S. Ct. at 2220. Any distinction between a surveillance camera and a security camera—which might likewise be placed, without someone's knowledge, somewhere with an open view into his property—is tenuous at best. And, at a minimum, any review of this Court would be premature in the absence of a more up-to-date decision that, unlike the one cited by petitioner, actually suppresses evidence.

Finally, petitioner's reference (*e.g.*, Pet. 15 n.5) to *Commonwealth* v. *Mora*, 150 N.E.3d 297 (Mass. 2020), shows no conflict because, as petitioner acknowledges, the Court there rested its decision on the Massachusetts State Constitution rather than the federal Constitution. *Id.* at 305.

3. In any event, this case would be an unsuitable vehicle for this Court's review of the question presented for two separate reasons.

First, petitioner could not prevail even if this Court were to decide the question presented in her favor because—as the unanimous judgment of the en banc court of appeals necessarily reflects—even if the use of the pole camera violated petitioner's Fourth Amendment rights, her motion to suppress would still be denied under the good-faith exception to the exclusionary rule.

The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted). To justify suppression, a case must involve police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing evidence. *Herring* v. *United States*, 555 U.S. 135, 144 (2009). Suppression may be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." *Davis* v. *United States*, 564 U.S. 229, 238 (2011) (citation omitted). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, * * * the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Ibid.* (citations and internal quotation marks omitted).

Here, as every judge on the court of appeals has already recognized, binding circuit precedent instructed the agents conducting this investigation that no warrant was required for the pole camera surveillance. See Pet. App. 83a & n.33 (Barron, C.J., Thompson, J., and Kayatta, J., concurring); see also *id.* at 110a (Lynch, Howard, and Gelpí, JJs., concurring) (explaining that *Bucci* presents "indistinguishable facts"). For that reason, even if a Fourth Amendment violation occurred, "there is no basis for applying the exclusionary sanction here." *Id.* at 83a. Accordingly, the outcome of petitioner's case would be unaffected regardless of how this Court might decide the question presented. See *id.* at 3a. And because the en banc court of appeals has *already* considered the good-faith question—with half of

the judges finding no Fourth Amendment violation to begin with and the other half explicitly recognizing that the good-faith exception applies—reviewing the Fourth Amendment issue in the context of this case would result in an opinion that would necessarily be advisory.

Second, this case is an interlocutory posture. The en banc court reversed the district court's order granting a pretrial motion to suppress and remanded to the district court for further proceedings. Pet. App. 3a. The district court has set a tentative trial date of September 11, 2023. See Docket entry No. 809 (Oct. 25, 2022); Docket entry No. 817 (Nov. 2, 2022). And the interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to district court "is not yet ripe for review"); see also *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

In particular, this Court routinely denies petitions for writs of certiorari filed by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if the defendant is convicted and his conviction and sentence ultimately are affirmed on appeal. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-55 n.72 (11th ed. 2019). That approach promotes judicial efficiency because the issues raised in the petition may be rendered moot by further proceedings on remand. If the suppression issue presented by petitioner remains live following further proceedings on remand (and setting

aside the futility of a suppression argument in light of the obvious applicability of the good-faith exception, see pp. 16-18, *supra*), petitioner could raise that issue, along with any other issues, in a single petition following the entry of final judgment. See *Hamilton-Brown Shoe*, 240 U.S. at 258. Petitioner identifies no sound reason to depart from this Court's usual practice of awaiting final judgment.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
KENNETH A. POLITE, JR.
*Assistant Attorney General*
ROSS B. GOLDMAN
*Attorney*

APRIL 2023