2023 M. Gene Blackburn Award presented to Elizabeth Boyer

This annual cash award, funded by the Cedar Rapids, Iowa law firm of Simmons Perrine Moyer & Bergmann, is presented to the student who submits the best brief for the Supreme Court Celebration Moot Court Competition. The recipient is chosen on the basis of superior writing skills that communicate an issue position based upon an innovative, creative, and concise approach.

The award is named for M. Gene Blackburn, LW'55, in recognition of his dedication to the development of appellate advocacy while a professor at Drake Law School.

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Each year, outstanding advocates in the Law School compete in the Supreme Court Competition for the honor of presenting final arguments to the Iowa Supreme Court. The problem is based on a real case, using an actual record that was pending before an appellate court and involving an unresolved legal issue, thus giving competitors a realistic experience.

The competition is open to second- and third-year law students and consists of writing a brief and arguing in two preliminary rounds. The competition has been incorporated into an Appellate Advocacy skills course that provides students with an opportunity to develop their persuasive writing and oral advocacy talents. The brief-writing process has been supplemented with an ongoing, in-depth discussion of best practices in appellate briefing, and the preliminary rounds were preceded by a series of practice rounds that enabled students to sharpen their advocacy skills and prepare to give the very best version of their arguments. The top four advocates based upon the scores from the preliminary rounds advance to the final round before the Iowa Supreme Court. Each year, outstanding advocates in the Law School compete in the Supreme Court Competition for the honor of presenting final arguments to the Iowa Supreme Court. The problem is based on a real case, using an actual record that was pending before an appellate court and involving an unresolved legal issue, thus giving competitors a realistic experience.

2023 Supreme Court Competition Problem

Sam Craft lives in a small home on Birch Street in Eldora, Iowa. Craft owns the home and is its sole occupant. The back yard is surrounded by a fence. The front yard is unfenced. There are four other houses on Birch Street, which is a short dead-end side street. Birch Street connects onto Main Street, between a grocery store and a small church.

In early 2020, DCI Special Agent Trails suspected that there was some activity related to fentanyl trafficking at Craft's residence. She obtained permission from the city to install a small digital video camera on a telephone pole just across the street from Craft's residence.

Throughout 2021, the camera was active and pointed at the front of Craft's house. Agent Trails monitored the feed. She could also review footage, after the fact. She was able to zoom in to get enough detail to see license plate numbers or facial expressions. But most of the time, the camera was zoomed out to capture a wider shot of the exterior of Craft's home. No part of the interior of Craft's home is visible in any of the footage that Agent Trails used.

In March 2022, Special Agent Trails applied for a warrant to search Craft's home. In her search warrant application, she relied on that video footage to establish a pattern of what looked like mid-level drug distribution activity: regular visits by known users and low-level dealers, and bi-weekly visits from a subject with no other known connection to Eldora, who drove a different rental vehicle on each visit to Craft's residence.

A magistrate found probable cause to issue the search warrant. Agents found a large quantity of fentanyl in his home, and evidence that would help prove an ongoing intent to distribute it (including drug ledgers, scales, and packaging supplies). Craft was charged with possession of fentanyl with intent to deliver.

Craft moved to suppress all the evidence discovered during the search of his home. He argued that the search warrant was issued based on evidence that was obtained through a warrantless search that violated Craft's rights under the Fourth Amendment.

The State argued that warrantless visual surveillance of the area surrounding a home does not constitute a search. The State argued that any subjective expectation of privacy in activities that occur in public view—just outside of Craft's residence—would never be objectively reasonable. And if there's no expectation of privacy, the State is free to view and record that activity.

The District Court granted Craft's Motion to Suppress. It acknowledged that the unfenced front yard of Craft's home was open to public view. But it held that surreptitious, continuous surveillance of the front of a private home for an entire year is unreasonably invasive and violates a reasonable expectation of privacy—even if widespread availability of new technology makes it easy to do. So it ruled that using the pole camera

was a search that violated the Fourth Amendment, and it suppressed all of the evidence found through the search warrant.

The State appealed, and the Iowa Supreme Court retained the appeal. The State must convince the Justices that the district court was incorrect, and using this pole camera was not a search. Craft must convince the Justices that the district court got it right, and that this as a search. This is a novel, complex, and difficult issue—but our intrepid finalists are up to the task!

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22–9000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SAM CRAFT.
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR HARDIN COUNTY
THE HONORABLE TERRY TWILLSTEEN, JUDGE

APPELLANT'S BRIEF

BRENNA BIRD
Attorney General of Iowa

ATTORNEY #785
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5164
atty785@ag.iowa.gov

ATTORNEY FOR PLAINTIFF-APPELLANT

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I. The Fourth Amendment prohibits warrantless searches which violate a defendant's reasonable expectation of privacy. A pole camera recorded video footage of Craft's house throughout 2021 in connection with a narcotics investigation. The footage captured the public street, sidewalk, and front exterior of Craft's house, but it could not see inside the house.

Does long-term visual observation of activity exposed to the public constitute a search in violation of the Fourth Amendment?

Authorities

California v. Ciraolo, 476 U.S. 207 (1986)
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Strategy Analytics, Business Wire, (2020) https://www.businesswire.com/news/home/20200213005824/en/

ROUTING STATEMENT

This case presents a constitutional challenge under the Fourth Amendment. Retention is proper to determine whether a mosaic theory of expectation of privacy in the aggregation of information is covered by the Fourth Amendment. This is an issue of first impression for this Court. *See* Iowa R. App. P. § 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

This is the State's direct appeal from the district court ruling which granted Sam Craft's motion to suppress. R. at 6–7. The State argues that the district court erred in finding Craft had a reasonable expectation of privacy in activities occurring in the front exterior of his house. R. at 3. Following a hearing on Craft's motion to suppress, the district court ruled that the pole camera surveillance, which formed the basis for the warrant to search Craft's house, constituted a warrantless search in violation of the Fourth Amendment. R. at 5.

Statement of Facts

Sam Craft was sitting on fentanyl. R. at 3. He had scales to weigh it, ledgers to account for it, and packaging supplies to ship it. R. at 3. He also had a network. Known drug users and low-level dealers made regular detours to Craft's house. R. at 2. These visitors

peppered the sidewalk on his dead-end street. R. at 1–2. They parked their vehicles on the curb. R. at 2. One individual drove a different rental car out to Eldora every other week just to visit Craft's house. R. at 2. Craft had four next-door neighbors on Birch Street. R. at 1. Where Birch Street connected to Main Street, a church and a grocery store sat on the corners. R. at 1.

Special Agent Trails of the DCI was tracking Craft's visitors. With search warrant authorization, she used a GPS tracker to follow the movements of a suspect who visited Craft's house in October 2020 from out of town with no other business in or connection to Eldora. R. at 1. The signs pointed to Craft's house as the hub of a mid-level drug trafficking operation. R. at 2. Seeking evidence, Special Agent Trails received permission from the City of Eldora in December 2020 to set up a pole camera. R. at 2. The camera was installed on Birch Street, directly across from Craft's house. R. at 2.

This was a digital video camera. R. at 2. It was stationary, secured at the top of a telephone pole on Birch Street. R. at 2. It was adjustable, able to pan or zoom by remote command. R. at 2. It was archival, recording raw footage that could be viewed in real time or retroactively. R. at 2. The widest shot captured the exterior of Craft's

house, the public sidewalk that ran in front of his residence, and the public street. R. at 2. Nothing inside the house was visible. R. at 2. Even if Craft held his front door wide open, the camera did not see the interior. R. at 2.

The camera collected footage throughout 2021. R. at 2. Special Agent Trails observed the pattern of visitors to Craft's house and compiled evidence to apply for a warrant to search the residence. R. at 2. The still photos and video clips taken from the footage were clear enough to make out license plates and facial expressions. R. at 2. Special Agent Trails relied on these to establish a pattern of drug trafficking activity. R. at 2. No part of the interior of Craft's house was used to support Special Agent Trails's warrant application. R. at 2.

In March 2022, a magistrate approved the application and DCI agents executed the search warrant at Craft's residence. R. at 2–3. They found a large quantity of fentanyl along with the scales, ledgers, and packaging supplies. R. at 3.

Course of Proceedings

Craft was charged with possession of fentanyl with intent to deliver under Iowa Code § 124.401(1)(a)(8). Craft moved to suppress the evidence obtained as a result of the search of his house. He argued

that the search warrant was itself based on a warrantless search in violation of the Fourth Amendment. The district court ruled in favor of Craft and suppressed all evidence obtained from accessing the pole camera footage, including the fentanyl and paraphernalia obtained in the subsequent search of the house.

The State applied for discretionary review following the district court's ruling in November 2022. The Iowa Supreme Court retained the case.

SUMMARY OF THE ARGUMENT

The district court erred when it granted Sam Craft's motion to suppress. The Fourth Amendment protects people from unreasonable searches and seizures. That protection stems from an individual's reasonable expectation of privacy, both subjective and objective. What the Fourth Amendment does not protect is the ability of law enforcement to see what a defendant has knowingly exposed to the public.

Visual observation has always been permitted as constitutional. Historically, the Fourth Amendment barred physical trespass into a home. Curtilage of a home has likewise been considered a constitutionally-protected area. But the public-facing front of a house garners no such protection. The pole camera used by Special Agent Trails viewed the front exterior of Craft's house. At the widest scope, the frame captured the public street and sidewalk. But the inside of Craft's house was never visible. By default, a Fourth Amendment search did not occur here unless the Court finds Craft had a reasonable expectation of privacy.

A defendant's subjective expectation of privacy must be supported by an actual demonstration of that expectation. Craft's

front yard was unfenced. His visitors parked on the public street and used the public sidewalk. Their comings and goings were in public view of Craft's neighbors and the pedestrian traffic on Main Street. The pole camera captured only what was visible to everyone else on his block.

An expectation of privacy must also be one which society is prepared to accept as reasonable. This relative reasonableness standard evolves as society evolves, particularly in the area of technology used by law enforcement. The U.S. Supreme Court has found novel technologies that are not generally used by the public to be unreasonable for warrantless use by law enforcement. Here, video cameras are used in millions of homes across the U.S. and pole cameras have been used by police in drug trafficking investigations for decades. Video cameras are so commonly used in modern society, it is not reasonable for Craft to believe the activity in front of his house would not be captured by one.

Finally, this Court should not adopt mosaic theory as the district court did, because Craft does not have an expectation of privacy in the aggregate of his associations. Courts applying mosaic theory typically do so when tracking a defendant's movements over a

period of time. Each sliver of information gleaned by law enforcement—each meeting at each location on each date—can provide a bigger picture of the defendant's activities and associations than might otherwise be known. Mosaic theory posits that this aggregate of information violates a defendant's reasonable expectation of privacy. But here, the pole camera was used to monitor exclusively public-facing traffic in front of one location, offering no additional insight into Craft's life or movements. Because Craft cannot demonstrate any reasonable expectation of privacy which would protect him from observation, if long-term, through a traditional technique of law enforcement, this Court should reverse the district court's ruling on his motion to suppress and remand the case for further proceedings.

ARGUMENT

I. Visual observation of Craft's house does not infringe on Fourth Amendment protections, even when observation spans months, because the object of observation can be readily seen by the public.

Preservation of Error

Error is preserved because Craft raised the Fourth Amendment challenge in his motion to suppress and obtained a ruling upon it. R. at 3. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). The district court considered several recent opinions from other jurisdictions as persuasive authority in reaching its ruling. R. at 4—6. *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022); *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021); *People v. Tafoya*, 494 P.3d 613 (Colo. 2021); *Commonwealth v. Mora*, 150 N.E.3d 297 (Mass. 2020); *State v. Jones*, 903 N.W.2d 101, 104 (S.D. 2017); *People v. DeStefano*, 164 N.Y.S.3d 412, 419 (N.Y. Sup. Ct. 2022).

Standard of Review

The court reviews motions to suppress de novo when they concern the constitutional right to be free from unreasonable searches and seizures. *State v. Watts*, 801 N.W.2d 845, 850 (Iowa 2011). In conducting de novo review, the court makes an "independent evaluation of the totality of the circumstances as shown

by the entire record." *Id.* (citing *State v. Ochoa,* 792 N.W.2d 260, 264 (Iowa 2010)).

"The district court's findings of fact are binding on appeal if supported by substantial evidence. Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *State v. Smith*, 926 N.W.2d 760, 762 (Iowa 2019) (citation omitted).

Merits

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. This protection hinges on reasonableness, founded on "a person's legitimate expectation of privacy." *State v. Breuer*, 577 N.W.2d 41, 45 (Iowa 1998); *see Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). Only when the government unreasonably intrudes on a defendant's legitimate expectation of privacy does the Fourth Amendment require a remedy. *Breuer*, 577 N.W.2d at 45; *State v. Cline*, 617 N.W.2d 277, 289 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

Craft argues that he had an expectation of privacy in the comings and goings of people from his house. R. at 3. By surveilling his residence from the pole camera across the street, the district court held that Special Agent Trails of the DCI violated Craft's constitutional rights. R. at 3. The camera recorded public-facing activity for a year months before law enforcement executed the search warrant on Craft's house. R. at 1–3. The State agrees that without the video footage, the warrant application to search Craft's house would not have established probable cause. R. at 3. But video surveillance of activity in public view is not a search under the Fourth Amendment.

A. The Fourth Amendment has always permitted warrantless visual observation of a house where no intimate details inside are exposed.

"Current Fourth Amendment jurisprudence is a mess." *State v. Wright*, 961 N.W.2d 396, 410 (Iowa 2021). After the Supreme Court's decision in *Carpenter v. United States*, courts have fractured the issues posed by digital surveillance, particularly where it may span a long and continuous period of time. *See* 138 S. Ct. 2206, 2223 (2018). *Carpenter* certainly altered the landscape in the area of mass data collection by third parties turned over for use by law enforcement. *Id.* When the government tracks the movements of suspects via third

party services, such as cell phone data carriers and user locations, private citizens may rightly expect that information to be private and use of such data to violate their rights. *Id.* But *Carpenter* did not alter the fundamental proposition of the Fourth Amendment—that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967); *see United States v. Moore-Bush*, 36 F.4th 320, 363 (1st Cir. 2022) (Lynch, J., concurring).

The Fourth Amendment's prohibitions were historically linked to physical trespass, not mere observation. *Kyllo v. United States*, 533 U.S. 27, 31 (2001). Visual surveillance of a home was considered "unquestionably lawful" because "'the eye cannot by the laws of England be guilty of a trespass.'" *Kyllo*, 533 U.S. at 31—32 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B.1765)). The Court reiterated the visual observation analysis in *United States v. Jones* to distinguish obviously protected law enforcement conduct from the "vexing problems" presented by monitoring a defendant's locations and movements: "mere visual observation does not constitute a search." 565 U.S. 400, 412 (2012) (citing *Kyllo*, 533 U.S. at 31–32).

Now, an originalist understanding of the term "search" could be broad enough to encompass remote observation via camera. *See Wright*, 961 N.W.2d at 413. At the time the Fourth Amendment was adopted, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book." *See Kyllo*, 533 U.S. at 32 n.1 (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)). Certainly Special Agent Trails was looking at the footage of Craft's house with the purpose of finding connections between Craft and the drug dealers visiting him. *See* R. at 2. But this broad definition does not square with the meaning of "search" in Fourth Amendment application, both under historical and modern frameworks. *See Wright*, 961 N.W.2d at 429 (Christensen, C.J., dissenting). If any exploration or inspection by law enforcement for the purpose of discovering something about the defendant now treads on that subject's constitutional rights, police action becomes strictly limited to mirror the permissions of any private actor. *Id.*

And while the Fourth Amendment protects people, not places, surveillance of house has still raised flags for courts. *See Katz*, 389 U.S. at 351; *Commonwealth v. Mora*, 150 N.E.3d 297, 302 (Mass.

2020). In *Kyllo*, the Court noted that the danger of police surveillance of the home, even if it was electronic, was the risk of exposing the "intimate details of a home." 533 U.S. at 36. These intimate details are, crucially, not exposed to the public. *See Katz*, 389 U.S. at 351. Here, the pole camera used by Special Agent Trails did not surveil the interior of Craft's home, just the public-facing exterior and the public street and sidewalk. R. at 2.

At the very least, the police are permitted to see what the public can see. Law enforcement is not required to turn their eyes away from even an individual's house when it is visible from the street. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). "A Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned" unless the defendant has exhibited an actual expectation of privacy that society is willing to accept as reasonable. *Kyllo*, 533 U.S. at 33. Craft exhibited no such expectation of privacy against visual observation. What Craft left for his neighbors to plainly see for themselves, the DCI should be able to see as well.

B. Craft has no reasonable expectation of privacy in public-facing activity recorded by common technology.

Justice Harlan's concurrence in *Katz* realigned the reasonableness clause of Fourth Amendment to account for both a subjective and objective "reasonable expectation of privacy." 389 U.S. at 361. The subjective prong of this analysis determines whether a defendant actually exhibited an expectation of privacy; the objective prong considers whether that expectation is "one that society is prepared to recognize as 'reasonable.'" *Id.* Following the Supreme Court's decisions in *Jones* and *Carpenter*, several courts have reassessed the constitutionality of pole camera surveillance. *Mora*, 150 N.E.3d at 304–05; *see People v. Tafoya*, 494 P.3d 613, 615 (Colo. 2021); *State v. Jones*, 903 N.W.2d 101, 103–04 (S.D. 2017).

The district court found that Craft had a subjective expectation of privacy in the activity in the immediate exterior of his home and that this expectation was objectively reasonable. R. at 5. The court additionally applied mosaic theory to find that the aggregate totality of individual moments observed constituted a search for the same reasons. R. at 5. In order to address the relationship between the "mosaic" of surveillance and Fourth Amendment protections, it is

necessary to first break down the subjective and objective expectations of privacy Craft claims were violated by the pole camera. Because Craft knowingly exposed the activities in the front of his house to the public and because camera surveillance is a traditional method of law enforcement investigation, Craft cannot demonstrate a reasonable expectation of privacy.

1. Craft manifested no actual expectation of privacy in the observation of his associations.

A subjective expectation of privacy is not demonstrated solely by a defendant's objection after a search; for an alleged expectation to be considered "actual" by the court, the defendant must have exhibited it in some way. *See People v. DeStefano*, 164 N.Y.S.3d 412, 419 (N.Y. Sup. Ct. 2022). In *Katz*, law enforcement listened in on the defendant's conversation in a public phone booth by placing an electronic listening and recording device on the outside of the structure. 389 U.S. at 348. Justice Harlan held that the defendant's expectation was manifest in that he closed the door to the booth behind him. *Id.* at 361 (Harlan, J., concurring). While the booth may have been for public use by anyone, it became a private space once occupied with the door closed. *Id.*

Craft too took advantage of a door to manifest his sense of privacy—the front door to his house. But the pole camera did not capture any part of the interior of Craft's home. R. at 2. If Special Agent Trails had placed a listening device on the outside of Craft's house, Craft's subjective expectation of privacy would have been violated because he demonstrated a desire for privacy by retreating into his home and closing the door. *Katz*, 389 U.S. at 361.

Where Craft exhibited no expectation of privacy was in the activity in his front yard. Without exhibiting that he in some way "feared the wandering eye or camera lens on the street," Craft's assertion of actual expectation will fail. *DeStefano*, 164 N.Y.S.3d at 419. In *DeStefano*, the court pointed to the lack of fencing in the front yard in finding that the defendant showed no actual expectation of privacy in the exterior of his house. *Id*. The activity observed by law enforcement was plain and knowable to the public without any attempt by the defendant to make it private. *Id*. The pole camera in *DeStefano* "did not penetrate walls or windows of defendant's house so as to hear and record confidential information, nor did they explore details of defendant's house that would previously have been unknowable without physical intrusion." *Id*. Nor did the pole camera

installed by Special Agent Trails uncover intimate or otherwise unknowable details from inside Craft's house. R. at 2.

Instead, when known drug traffickers and users arrived to Craft's home in Eldora, they parked their cars on the street. R. at 2. DCI agents could view them coming and going with the ease of a neighbor on Craft's block. R. at 2. Craft did not disguise their arrivals; he did not have them park a block away or come in through the backyard. Craft could not expect that these visitors would be unobserved and that people would not draw conclusions based on observation of his associations.

That the pole camera here was facing the unfenced, street-facing front of Craft's house is significant. This is the key difference between this case and *People v. Tafoya*, 494 P.3d 613 (Colo. 2021). In *Tafoya*, police installed a pole camera and monitored the defendant continuously for over three months in a drug trafficking investigation. *Id.* at 615. But the camera surveilled the defendant's activities in his backyard, over a fence. *Id.* That fencing distinction—that the curtilage of the home is a traditionally protected area—was the cinching factor for the court. *Id.* at 616. The court noted that under *United States v. Bucci*, video surveillance of a home using a pole camera for eight

months was not a search where the home did not have a fence, gates, or shrubbery obscuring the view of the curtilage." *Id.* (citing *Bucci*, 582 F.3d 108, 116–17 (1st Cir. 2009)).

This is further illustrated in *United States v. Tuggle*, 4 F.4th 505, 514 (7th Cir. 2021). In that case, the government conducted continuous video surveillance of the defendant's property from three utility poles for a period of eighteen months in a drug trafficking investigation. *Id.* at 510. The defendant's entire property was exposed to public view. *Id.* at 514. Without a backyard fence to act as curtilage, the court found he did not have a reasonable expectation of privacy because he "knowingly exposed the areas captured by the three cameras." *Id.* In *Tafoya*, the defendant had reason to believe that not even his neighbors would be peering through the slats of his fence to see him moving bags of drugs from his car to his garage, let alone the police. *Tafoya*, 494 P.3d at 616. Here, by contrast, Craft had reason to believe that his neighbors, nearby churchgoers, and everyone in town who stopped by the grocery store on the corner could know who was parked at this door. R. at 1–2; *see Tuggle*, 4 F.4th at 514.

2. Round-the-clock video surveillance in residential neighborhoods is commonplace, which erodes any expectation of privacy in the street view of a house.

Even if Craft could demonstrate a subjective expectation of privacy in his activities in public view, such an expectation would be objectively unreasonable because society accepts constant and continuous video surveillance of houses. Unlike cases concerned with novel technology, pole camera surveillance is not a new phenomenon, but rather a conventional surveillance technique. *See Carpenter*, 138 S. Ct. at 2216, 2220. Pole cameras have been the subject of Fourth Amendment cases since 1987. See *United States v. Cuevas-Sanchez*, 821 F.2d 248, 249 (5th Cir. 1987). They remain an ordinary tool for law enforcement investigations. *Moore-Bush*, 36 F.4th at 371–72 (Lynch, J., concurring); *but see Mora*, 150 N.E.3d at 307 (distinguishing targeted surveillance from "traditional nontargeted use of video cameras."). Video cameras are ubiquitous in modern society, and particularly for law enforcement, where many police agencies now require officers wear body cameras in their investigations. *Id.* at 372 (citing M.D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 901 (2017)).

This contrasts sharply with the analogy Justice Kagan put forth in *Florida v. Jardines* to explain the relative nature of an objective expectation of privacy:

> A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.

569 U.S. 1, 12 (Kagan, J., concurring) (internal citations omitted). It would be reasonable, Justice Kagan holds, to expect privacy from specialized, high-powered technology, when used either by a neighbor or a police officer. *Id.* But here, the tools are standard and ordinary, and used commonly both by neighbors and by law enforcement. *Moore-Bush*, 36 F.4th at 372 (Lynch, J., concurring).

Cameras are in general public use. *See Kyllo*, 533 U.S. at 40 (holding the thermal imaging device used by the government was "not

in general public use.") In 2020, sixteen percent of U.S. homes used video doorbell technology like Amazon's Ring. *Strategy Analytics*, BUSINESS WIRE, (2020) https://www.businesswire.com/news/home/20200213005824/en/. At least 70 million security cameras are used in the U.S. to deter crime. Stanislava Ilic-Godfrey, *Artificial intelligence: Taking on a Bigger Role in our Future Security*, U.S. Bureau of Labor Statistics, (2021) https://www.bls.gov/opub/btn/volume-10/investigation-and-security-services.htm.

The pole camera installed by Special Agent Trails has common features: the ability to pan, zoom, and enhance an image. R. at 2; *see Tuggle*, 4 F.4th at 511; *Tafoya*, 494 P.3d at 616. The camera recorded continuously, with the ability to rewind and fast forward through footage. R. at 2. In many ways, this technology yields better evidence than if a police officer were stationed outside of Craft's home himself. Although cameras "undoubtedly" provide law enforcement with more detailed information than might be captured by the naked eye of an officer sitting atop the utility pole, "[t]he mere fact that human vision is enhanced somewhat" by the camera "does not give rise to constitutional problems." *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986).

Surveillance by third parties is nigh unavoidable. Matthew Tokson, *Inescapable Surveillance*, 106 CORNELL L. REV. 409, 438 (2021). And they collect all the information Craft seeks to now suppress: which cars are parked on the residential street, whose houses do they approach, what pattern of visitors can be gleaned. If ever there were a right to privacy from government observation in the unobstructed front yard of one's home, that right has surely evolved alongside digital monitoring technology.

C. The Court should reject mosaic theory because aggregates in stationary position do not tell a story in violation of an expectation of privacy.

Mosaic theory was promulgated by the D.C. Circuit in *United States v. Maynard* when the court applied a routine government argument in national security investigations to the idea of reasonableness under the Fourth Amendment. 615 F.3d 544, 562–63 (D.C. Cir. 2010). The court highlighted the difference in conclusion law enforcement is able to draw from multiple points of observation as opposed to a single instance. *Id.* at 562. In *Maynard*, it came down to the picture the disparate pieces created when placed together: what image an officer might glean from a single moment can be different from the larger mosaic resulting from any combination of a person's

activities. *Id.* "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups." *Id.*

And the key here is "travels." *Id.* Piecing together separate images of a subject in front of their home does not illustrate the inner workings of their life as the *Maynard* court suggests. Instead of a mosaic, the DCI has a lengthy, largely empty flipbook. They can only see one frame: the front of Craft's house. And they can only see one type of moment: a person parking on the curb and walking up to Craft's door. What does this reveal about Craft's life? Nothing the Fourth Amendment would seek to protect.

Justice Sotomayor's concerns in *Jones* are present in this idea, that tracking a suspect's whereabouts gives law enforcement too much insight into their personal life and associations in violation of their subjective expectation of privacy. *Jones*, 565 U.S. at 415. But where the GPS tracker used in *Jones* created a record of the defendant's travels, this pole camera could only capture the narrow sliver of activity in front of Craft's house. As the court in *Maynard*

discussed, "[t]hat the police tracked [defendant's] movements in his Jeep rather than in his home is certainly relevant to the reasonableness of his expectation of privacy." *Maynard*, 615 F.3d at 563.

While mosaic theory seeks to bar government trespass upon a subject's movements, some courts have reasoned against adopting mosaic theory to preclude investigation of a stationary target. *United States v. Moore-Bush*, 36 F.4th 320, 368 (1st Cir. 2022) (Lynch, J., concurring); *DeStefano*, 164 N.Y.S.3d at 419. The court in *DeStefano* found pole camera observation of a subject's residence did not constitute a search under mosaic theory because of the stationary nature of the pole camera. 164 N.Y.S.3d at 419. DeStefano was the subject of a fourteen-day pole camera investigation, entirely focused on his literal presence in a house. 164 N.Y.S.3d at 414. That he stayed at the house at all was grounds for the underlying charge, violation of the requirement to report his residence on the sex offender registry. *Id.* There was nothing else to be drawn from the surveillance.

This contrasts with Craft's case, but the reasoning still remains. Craft's case arises from his alleged connections to known drug dealers and users who visit him at his house. *See* 164 N.Y.S.3d at 419; R. at 2.

The actual "papers[] and effects" in Craft's residence were unknown and unknowable to DCI from the pole camera footage. Nor were the conversations between him and the other subjects overheard by the listening ears of law enforcement. *See Katz*, 389 U.S. at 348.

It matters that here the camera was stationary, observing only Craft's house and the visitors to it. R. at 2. In *DeStefano*, the court distinguished stationary observation from that of a travelling subject. 164 N.Y.S.3d at 419. "Here, cameras exposed no details about where defendant traveled, what businesses he frequented, with whom he interacted in public, or whose homes he visited, among many other intimate details of his life." *Id.* This pole camera only captured who made visits to Craft.

The observation in *Moore-Bush* more closely aligns with Craft's case. *See* 36 F.4th at 368 (Lynch, J., concurring). In *Moore-Bush*, law enforcement agents surveilled the defendants' residence for eight months using a security camera attached to the top of a utility pole across the street from the house. 36 F.4th at 321—22 (Barron, C.J., concurring). The First Circuit sitting en banc reversed suppression of the video footage but were evenly divided on the analysis, with competing concurrences authored by Chief Judge Barron and Judge

Lynch. *Id.* at 321, 361. Their disagreement stems from their interpretations of *Carpenter*.

Chief Judge Barron's concurrence found a distinction in *Carpenter* between long-term and short-term surveillance. *Moore-Bush*, 36 F.4th at 357–58 (Barron, C.J., concurring). He concluded that the "retrospective quality" of the CSLI surveillance in *Carpenter* translated to an application of mosaic theory to the pole camera surveillance at issue. *Moore-Bush*, 36 F.4th at 358 (Barron, C.J., concurring) (quoting *Carpenter*, 138 S. Ct. at 2218). And both halves of the court agreed that mosaic theory in general is only relevant insomuch as it implicates a reasonable expectation of privacy. *Moore-Bush*, 36 F.4th at 358 (Barron, C.J., concurring) and *Moore-Bush*, 36 F.4th at 367 (Lynch, J. concurring).

The Court in *United States v. Knotts* left open the question of how twenty-four hour surveillance interplays with the Fourth Amendment. 460 U.S. 276, 283—84 (1983). But *Knotts* was concerned with a government tracking the movements of citizens. 460 U.S. at 281. The Court held that a person in an automobile had no reasonable expectation of privacy on public streets, though that

analysis could change if the surveillance on those streets was stationary.

The district court relied on Chief Judge Barron's reasoning to find that the surveillance of Craft's house was a search. *See Moore-Bush*, 36 F.4th at 360 (Barron, C.J., concurring); R. at 4. But the logic of Barron's does not square with the Supreme Court's Fourth Amendment precedent, nor even *Carpenter*. Barron's concurrence "attempts to justify its result by arguing that one has a reasonable expectation of privacy in the whole of their movements occurring in the curtilage of their home." *Moore-Bush*, 36 F.4th at 367 (Lynch, J. concurring). Judge Lynch identified just how exposed a defendant's activity is to the public when it's all in the open:

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

Moore-Bush, 36 F.4th at 368 (Lynch, J. concurring). For Craft to demonstrate an expectation of privacy in the front of his home, he would have to spend the majority of his time and conduct the majority of his business in the curtilage of the house itself. *See id.* at 370 (Lynch, J., concurring). But no one behaves in such a manner, let alone Craft. Stationary cameras may capture an "important sliver" of Craft's life, but they do not "paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon." *Tuggle*, 4. F.4th at 524.

Even the retrospective concerns in *Carpenter* are not quite present here. *See Carpenter*, 138 S. Ct. at 2218. The Court notes that prior to GPS technology, "attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection." *Id.* In contrast, the comings and goings of visitors to one's home could be catalogued by observation from the public sidewalk, commented on by neighbors. The DCI was not concerned with Craft's whereabouts, rather the pattern of visits by known drug traffickers and users to his residence. *See* R. at 1—2.

Ultimately, long-term surveillance may be the only way to uncover drug trafficking operations. Justice Scalia pointed to this

specifically in *Jones*. 565 U.S. at 412. In response to Justice Alito's concerns about the length of the GPS monitoring, he wrote: "it remains unexplained why a 4–week investigation is 'surely' too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an 'extraordinary offens[e]' which may permit longer observation." *Id.* (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring)). The State of Iowa has a substantial interest in intercepting the trafficking of drugs across the state. Pole camera observation is a traditional law enforcement technique, not novel or high-powered. It does not paint a picture of the defendant's inner life like the GPS tracking in *Jones* or the cell phone location information in *Carpenter*. Because the year-long surveillance of Craft's house recorded activity knowingly exposed to the public and nothing more, it is not a search under the Fourth Amendment.

CONCLUSION

For the reasons set forth above, the State respectfully requests this Court reverse the district court's decision granting Craft's motion to suppress and remand the case for further proceedings to determine Craft's violation of Iowa Code § 124.401(1)(a)(8).

REQUEST FOR ORAL ARGUMENT

The State respectfully requests oral argument before this Court. Iowa R. App. P. 6.908(3).

Respectfully submitted,

/s/#785

ATTORNEY #785
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5164
atty785@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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/s/#785

ATTORNEY #785
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5164
atty785@ag.iowa.gov