No. 21-541

In The

Supreme Court of the United States

TRAVIS TUGGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AND RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether nonstop videorecording of a person's comings and goings from home for 18 months with the purpose of gathering evidence against him is a "search" under the Fourth Amendment.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The Rutherford Institute is a nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened and educates the public about constitutional and human rights issues affecting their freedoms. The Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Having placed his home under constant video surveillance for 18 months, the government charged Travis Tuggle with conspiring to distribute and possessing with intent to distribute methamphetamine and with maintaining a drug-involved premises. Unable to persuade the district court that the extended video surveillance of him and his home was an unconstitutional warrantless search, Mr. Tuggle entered a conditional guilty plea, reserving his right to appeal the district court's rulings against his motions to suppress the video surveillance evidence.

The courts below did a workmanlike job of applying current doctrine to the facts of Mr. Tuggle's case. They concluded—with evident regret in the case of the Seventh Circuit—that government agents may use months-long, round-the-clock video surveillance to record the activities of Americans around their homes without violating the Fourth Amendment. They found that unceasing video surveillance of people outside their homes is reasonable.

But those courts did not apply the Fourth Amendment's explicit terms. They instead followed the illogic of the "reasonable expectation of privacy" test. According to that test, a search occurs when government action upsets a reasonable expectation of privacy. People are routinely seen outside their houses, so a person cannot expect privacy in their comings and goings. If one cannot expect privacy in any given minute, multiplying that zero privacy expectation by 18 months still means zero privacy expectations.

Thus, video-recording a person's every home entry and exit is not a search even though it gathers the times of their movements, the outward appearance of the effects they carry, the identities of their visitors, the number of them, the frequency of visits, and more.

The question whether there was a search should not be reached in so convoluted away. Nor should the existence or non-existence of a search rely on what the "reasonable expectation of privacy" test demands: drawing lines about what people expect for the duration of video surveillance, the extent of it across suspects or non-suspects, the detail of it, or the amount of time that surveillance records are stored. The reasonable expectation of privacy test puts courts in the position of surmising about broad sociological questions or making episodic judgments about technology and society in a rapidly changing technology environment. These are not strengths of law courts.

Instead, this Court should examine more straightforwardly whether government action amounts to searching. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Absent doctrine, courts would analyze the elements of this language as follows: Was there a search? A seizure? Was any search or seizure of "their persons, houses, papers, [or] effects"? Was any such search or seizure reasonable?

Courts use this methodology in cases involving familiar physical objects. They easily recognize seizures and searches, which are not always, comingled. This case, like *Kyllo v. United States*, 533 U.S. 27 (2001), is

a pure search case. A search is looking over or through something with a purpose of finding something. The highly directed and persistent observation of Mr. Tuggle at his home is quite arguably a "search" for evidence against him in the natural sense of that term.

Consistent with deep precedent and this Court's recent cases, from *Kyllo*, through *United States v. Jones*, 565 U.S. 400 (2012), to *Riley v. California*, 573 U.S. 373 (2014), and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Court can provide a framework for administering the Fourth Amendment in a more reliable and juridical way. It's a framework that the Court should now apply to key cases, including this one dealing with video surveillance.

To stabilize courts' application of the Fourth Amendment and position them to administer "high-tech" cases, this Court should grant certiorari and decide this case using reasoning that eschews doctrine and hews more closely to the language and meaning of the Fourth Amendment. The Court can give lower courts, law enforcement, the bar, and all citizens clear signals about how to apply the Constitution as a law. Doing so would permit judges to address searches and seizures forthrightly, confidently assessing the reasonableness of government investigatory action.

ARGUMENT

I. THIS COURT SHOULD APPLY THE FOURTH AMENDMENT'S OWN TERMS, ASSESSING SEARCHES AND SEIZURES AS SUCH

The first phrase of the Fourth Amendment says, "The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. Absent confusing doctrine, courts would analyze its elements as follows: Was there a search? Was there a seizure? Was any search or seizure of "persons, houses, papers, [or] effects"? Was any such search or seizure reasonable? If there was a search or seizure, if it was of protected things, and if it was unreasonable, then the right has been violated. That is how to administer the Fourth Amendment.

In cases dealing with traditional searches and seizures of familiar objects, this Court applies the Fourth Amendment consistent with the language of the law. It looks for seizures and searches of defendants' protected items, then assesses whether or not they were reasonable. (Seizures often precede searches, so reversing the order in which the Fourth Amendment lists them is sensible.)

In *Terry v. Ohio*, 392 U.S. 1 (1968), for example, the Court applied the Fourth Amendment soundly, creating a lasting and useful precedent. The government had urged the Court to place brief "stop and frisk" incidents like pat-downs outside the scope of the law, *id*. at 16 n.12, arguing that police behavior short of a "technical arrest" or a "full blown-search" did not implicate constitutional scrutiny. *Id*. at 19. The Court rejected the idea that there should be a fuzzy line dividing "stop and frisk" from "search and seizure."

Instead, the Court wrote with granular precision about the seizure, then the search, of Terry, "that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down

the outer surfaces of his clothing." *Id.* One following the other, the seizure and search were reasonable and therefore constitutional. In dissent, Justice Douglas agreed that Terry was "seized" within the meaning of the Fourth Amendment. *Id.* at 35 (Douglas, J., dissenting) ("I also agree that frisking petitioner and his companions for guns was a 'search.'").

Terry and its progeny demonstrated their value again in *Riley*. 573 U.S. 373. Seizures and searches of familiar objects like cars and people in that case are a half-dozen dogs that didn't bark because the Court administered them using direct application of the Fourth Amendment's terms rather than doctrine.

In *Riley*, Officer Charles Dunnigan pulled David Riley over, seizing him and his car consistent with the application of the Fourth Amendment to traffic stops in *Brendlin v. California*. 551 U.S. 249, 254–63 (2007). Upon learning that Riley was driving with a suspended license, Officer Dunnigan removed him from the car, continuing the seizure with a further legal basis: reasonable suspicion of another violation.

Officer Ruggiero prepared the car for impoundment, a further seizure, consistent with a policy that prevents suspended drivers from returning to, and continuing to operate, their vehicles. He began an "impound inventory search" of the car, as approved in *South Dakota v. Opperman*. 428 U.S. 364, 376 (1976).

That search turned up guns in the engine compartment of the car, so Officer Dunnigan placed Riley under arrest, continuing the ongoing seizure of Riley's body under new legal authority. He then conducted a search incident to arrest—permitted to discover

weapons or evidence that suspects might destroy. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

Consistent with standard practice for a "booking search," yet another legal basis for both searching suspects and seizing their property, *see, e.g.*, *Illinois v. Lafayette*, 462 U.S. 640 (1983), Officer Dunnigan examined Riley's person and seized his possessions, including his cell phone. As to the contents of the phone, the *Riley* opinion laid down the general rule of the second half of the Fourth Amendment: "get a warrant." 573 U.S. at 403.

All the preliminary seizures and searches were unchallenged or readily approved by the lower courts because this Court had provided the juridical tools to dispose of any challenges: identify when seizures and searches have occurred, then determine whether or not they are reasonable. *See Brendlin*, 551 U.S. at 254 (defining seizure independent of "expectations"), *Opperman*, 428 U.S. at 371 n.6 (petitioner South Dakota conceding existence of search), *Chimel*, 395 U.S. at 762 (following *Terry*), *Lafayette*, 462 U.S. at 646–48 (following *Opperman*, in which search was conceded).

Courts are well-equipped to make those fact-specific judgments. If the constitutionality of all these investigatory steps turned on whether state agents had

defeated a society-wide "reasonable expectation of privacy," this Court would have a full cert. docket indeed.

A. This Court Should Treat "Search" as an Ordinary Term Even When Technology Is Involved

This Court need not retreat to doctrine when the claim is that some form of technology has been searched or used for searching. It should merely dig deeper into whether the essence of searching is found in the behavior of government agents.

The Court's early efforts to apply the Fourth Amendment in a technological environment struggled. The "reasonable expectation of privacy" test is a part of that struggle. In *Olmstead v. United States*, 277 U.S. 438 (1928), Chief Justice Taft described the technique of wiretapping relatively new telephone technology adequately: "Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office" of suspected bootleggers. *Id*. at 457. But to defend a finding of no search or seizure, he declaimed something different: "The evidence was secured by the use of the sense of hearing, and that only." *Id*. at 464. *Cf. Olmstead*, 277 U.S. at 487 (Butler, J., dissenting) ("The communications belong to the parties between whom they pass. During their transmission, the exclusive use of the wire belongs to the persons served by it. Wiretapping involves interference with the wire while being used. Tapping the

wires and listening in by the officers literally constituted a search for evidence.").

The case that reversed *Olmstead* 39 years later, of course, was *Katz v. United States*, 389 U.S. 347 (1967). In his solo *Katz* concurrence, Justice Harlan shared his sense of how the Constitution controls government access to private communications: "My understanding is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id*. at 361 (Harlan, J., concurring).

Adopted since as Fourth Amendment doctrine, Justice Harlan's concurrence has made the word "search" a term of art, with the difficult and unwieldy results that the Seventh Circuit emphasized below. But it is a word with common usage, as it was at the time of the framing. "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.' N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)." *Kyllo*, 533 U.S. at 32 n.1. The first question invited by the Fourth Amendment is whether or not there was a search.

B. Search Is Activity Done with the Purpose of Finding Something

New technologies have created new techniques for revealing evidence or fruits of crime, but the heart of the "search" concept remains the same. It is that focus that reflects a "purpose of finding something." At

some point, ordinary observation of people and things crosses over to searching.

As an aid to discerning the line between looking and searching, courts typically rely on some signal, often an associated seizure. So in *Arizona v. Hicks*, 480 U.S. 321 (1987), the moving of stereo equipment was the contemporaneous signal of the fact that government agents were not just observing what was around them, but searching for incriminating information. *Id*. at 324–25. In *United States v. Jones*, 565 U.S. 400 (2012), the minor seizure involved attaching a GPS device to a car, *id*. at 403, which helped establish that government agents were searching for (and finding) Jones so as to use his location over four weeks as evidence against him.

One of few cases of search without seizure is *Kyllo*, which is instructive for this case, both in how it uses technology as a signal to indicate searching and in how it overuses that signal. In *Kyllo*, agents of the Department of the Interior aimed a thermal imager at the home of Danny Kyllo. The heat emanations from the house suggested a marijuana grow operation; the agents used that information, along with other evidence, to secure a search warrant that confirmed their suspicions and lead to Kyllo's conviction. *Id*. at 29–30.

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

(as here) the technology in question is not in general public use." *Kyllo*, 533 U.S. at 34.

New technologies like thermal imaging are interesting and attractive, but they need not get special treatment under the Fourth Amendment. Technically, the thermal imaging device in *Kyllo* allowed the Interior Department's agents to learn new facts about exterior temperatures and draw inferences about what went on inside the home. But legally what the thermal imaging did was to show that the Interior Department's agents were intently focused on Danny Kyllo's house, a constitutionally protected item, particularly its interior. They looked over it—through it via inferences—with a purpose of finding evidence.

It is possible to dedicate the same kind of focused effort without using technology or by using more familiar technology such as video cameras. In this case, government agents placed three cameras on public property in proximity of Travis Tuggle's home, directing them at his area of habitual entry and exit. They recorded his every coming and going for 18 months, as well as the effects he carried, every visitor he had, the time and duration of their visits, and more. The government retained the results to digest and refer to at any time. This highly directed and persistent observation provided new facts about Mr. Tuggle's activities and associations, and permitted inferences

about him and his activities inside the home. The government looked over Mr. Tuggle and his house with a purpose of finding evidence.

C. Searching Brings Information Out of Concealment

In *Hicks*, the serial numbers of the stereo equipment were concealed from officers' view by the opacity of the equipment itself and the orientation of the serial numbers away from them. Moving the stereo equipment brought information out of its natural concealment. In the same way, the thermal imager in *Kyllo* brought information out of concealment. The heat emanations of Danny Kyllo's walls do not appear in the human-visible spectrum. Moving the emanations into the visible spectrum using a thermal imager brought them out of their natural concealment. In *Terry*, the difference between the felt contours of Terry's body and other things under his clothes revealed a concealed weapon.

Here, the video cameras—and particularly the video recording—brought the movements of Mr. Tuggle out of the natural concealment given by time. Days, weeks, and months of observation could be collapsed into minutes spent by humans interpreting and drawing inferences from Mr. Tuggle's movements and the objects he carried. The technology made it easier, but it did not change the essential character of

what the government agents were doing: looking over him and his house with a purpose of finding evidence.

D. The Existence of a Search Doesn't Prejudge Its Reasonableness

In "reasonable expectations" doctrine, a search has occurred when there's a violation of privacy. That makes it seem as though the warrant requirement mechanistically follows from the existence of a search. This Court can show that the reasonableness of a search is to be considered separately by treating the Fourth Amendment as a text and not collapsing it into that doctrine.

Countless observations made by law enforcement personnel acting the way ordinarily curious people do within the law could be treated as reasonable searches. There may be many *Terry*-like activities that are sufficiently justified, brief, and minimally invasive that they are reasonable without a warrant.

In *Minnesota v. Carter*, 525 U.S. 83 (1998), a police officer acting on a tip looked through the gap in blinds covering a ground-floor window and observed the bagging of suspected drugs. This Court held that the men did not have a Fourth Amendment right against searching the apartment, but if they had, the case, well-administered, would have invited the question whether it is reasonable to spy for a few minutes as a nosy neighbor might, or whether such activity is unreasonable given all the circumstances.

Justice Scalia noted that search and reasonableness were separate questions. *Id*. at 91–92 (Scalia, J., concurring) ("[C]ase law . . . leaps to apply the fuzzy

standard of 'legitimate expectation of privacy'—a consideration that is often relevant to whether a search or seizure covered by the Fourth Amendment is 'unreasonable'—to the threshold question whether a search or seizure covered by the Fourth Amendment *has occurred*.") (emphasis original).

In this case, the questions the Court should consider in order are: (1) whether there was a search, and (2) whether it is constitutionally reasonable to monitor and record the comings and goings of Mr. Tuggle non-stop for 18 months. To help reform administration of the Fourth Amendment, this Court should treat reasonableness separately from the initial question of whether there was a search.

II. THIS COURT SHOULD REFORM JUDICIAL ADMINISTRATION OF THE FOURTH AMENDMENT

As noted above, the Court's escape from the errant ruling in *Olmstead* produced reasonable expectations doctrine, which is hard to apply. Courts have probably reached correct results most of the time, and reform of the Court's treatment of searches wouldn't upset many outcomes. But it would improve administration of the Fourth Amendment by making it a more juridical exercise: the application of law to facts. Going back to *Katz* helps illustrate this point.

A. The *Katz* Majority Inarticulately Applied the Fourth Amendment's Terms to Protect a Shrouded Oral Communication

Regrettably when this Court reversed *Olmstead*, it avoided stating directly that the suitably concealed

sound of a person's voice is a transitory "effect." And even more unfortunately, the popular treatment of *Katz v. United States*, 389 U.S. 347, has been to ignore the majority's reasoning in favor of Justice Harlan's solo concurrence, which attempted to reframe the Court's Fourth Amendment jurisprudence around "reasonable expectations of privacy."

But the *Katz* majority decision was an inarticulate parallel to *Ex parte Jackson*, 96 U.S. 727 (1877), which protected communications in transit suitably shrouded from public access. *Id*. at 733. The *Katz* Court, as the *Jackson* Court did, found that concealed communications can only be accessed with a warrant. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351 (citations omitted).

The paragraphs that followed discussed the import of Katz going into a phone booth made of glass, which concealed his voice. *Id*. at 352. Against the argument that Katz's body was in public for all to see, the Court emphasized precisely what was concealed: "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id*. The government's use of a secreted listening and recording device to enhance ordinary perception overcame the physical concealment Katz had given to his voice. Gathering the sound waves seized and searched something of Katz's. *See* Andrew Guthrie

Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 Wm. & Mary L. Rev. 1283 (2014).

But in his solo concurrence, which was unnecessary to the outcome, Justice Harlan shared his sense of how the Constitution controls government access to private communications: "My understanding," he wrote, "is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361. Justice Harlan's understanding has not helped courts' administration of the Fourth Amendment.

B. The "Reasonable Expectation of Privacy" Test is Fatally Flawed

Since *Katz*, courts have often followed Justice Harlan's concurrence instead of the majority's rationale, attempting to analyze whether defendants have had a "reasonable expectation of privacy" in information or things. Under Harlan's concurrence, the defeat of a "reasonable expectation of privacy" signals a constitutional search generally requiring a warrant. Alas, courts don't follow the full analysis Justice Harlan's formulation suggests. They rarely inquire into a defendant's "actual (subjective) expectation of privacy," for example, or how it was "exhibited." *See* Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi. L. Rev. 113 (2015).

The second half of the test may flatter justices and judges, who surely put care into their attempts to assess society's emergent views on privacy, but it is a

non-juridical exercise. It does not involve the application of law to facts or fact-specific judgements. It requires judges to use their own views or best estimations about privacy, something about which no one can actually know.

The slipperiness of Justice Harlan's formulation is compounded by its essential circularity. When things are going well, societal expectations guide judicial rulings, which in turn guide societal expectations, and so on. This circularity is especially problematic here at the onset of the Information Age because information technologies are only beginning to take their place in society. Expectations about privacy have yet to take form, and the technology continues to change, so there is simply no objectively reasonable sense of privacy for judges to discover.

C. Corollaries of the "Reasonable Expectation of Privacy" Test Are Worse

The "reasonable expectation of privacy" test has at least two corollaries that move doctrine even further from the Fourth Amendment's language and meaning. The first is the doctrine that treats searches tailored for illegal things as non-searches. The second is the "third-party doctrine," which denies that shared things can be unreasonably seized or searched.

Illinois v. Caballes, 543 U.S. 405 (2005), is typical of "reasonable expectation" cases in that it did not examine (or even assume) whether Roy Caballes had exhibited a subjective expectation of privacy in the trunk of his car, which government agents subjected to the ministrations of a drug-sniffing dog. Thus, the

Court could not take the second step, examining its objective reasonableness.

Instead, the *Caballes* Court skipped forward to a corollary of the "reasonable expectations" test that the Court had drawn in *United States v. Jacobsen*, 466 U.S. 109 (1984): "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 123). Possession of drugs being illegal, there's no legitimate expectation of privacy there. Thus, a search aimed at illegal drugs is not a search. That's confounding.

That entirely logical extension of "reasonable expectations" doctrine reveals the doctrine's role in delinking Fourth Amendment jurisprudence from the Fourth Amendment's text. Now, instead of examining whether searches and seizures are reasonable, courts applying the *Jacobsen/Caballes* corollary can uphold any activity of government agents that appears sufficiently tailored to discovering only crime. The most intensive government examination given to persons, houses, papers, and effects can be "not a search," no matter how intimate it is or how often it recurs, and irrespective of any context or circumstances.

A second corollary of "reasonable expectations" doctrine similarly breaks the link between the terms of the law and outcomes in cases. That is the "third party doctrine."

The Bank Secrecy Act ("BSA"), Pub. L. No. 91-508, 84 Stat. 1114 (2000) (codified as amended at 12 U.S.C. §§ 1951–59), requires banks to maintain records and file reports with the Treasury Department if they

"have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U.S.C. § 1829b(a)(2). In *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), several parties challenged the BSA's requirements. The records-collection part of the law does not require disclosure to the government, so the Court found that it does not implicate the Fourth Amendment. *Id*. at 54. As to the reporting requirements, the Court denied standing to bank depositors who could not show that information about their financial transactions had been reported. *Id*. at 67–68.

Justice Marshall criticized how the Court avoided finding that mandated record-keeping affects a constitutional seizure just because the government would acquire the records later. "By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." *Id*. at 97 (Marshall, J., dissenting).

Two years later, in *United States v. Miller*, 425 U.S. 435 (1976), the Court held that a defendant had no Fourth Amendment interest in records maintained about him pursuant to the BSA. *Id*. at 442–43. It did not examine whether the operation of the BSA was a seizure or search, but used "reasonable expectations" doctrine to dismiss Miller's Fourth Amendment interests in documents reflecting his financial activities

because they were held by a financial services provider: “we perceive no legitimate ‘expectation of privacy’ in their contents.” *Id*. at 442.

Under these cases, the government can compel a service provider to maintain records about a customer and then collect those records without implicating his or her Fourth Amendment rights. *But see Los Angeles v. Patel*, 576 U.S. 409 (2015) (holding rule that hotel operators make their guest registries available to the police on demand facially unconstitutional).

The rule of *Miller* appears to be that Americans forfeit their Fourth Amendment interests in any material that comes into possession of a third party. This at least elides questions about who owns communications and data such as to enjoy a right to its protection from unreasonable seizure and search.

Based as they are in “reasonable expectations” doctrine, these holdings are hard to square with the Fourth Amendment’s text. And they grow further out of sync with each step forward our society takes in modern, connected living. Incredibly deep reservoirs of information are constantly collected by third-party service providers. Cellular telephone networks pinpoint customers’ locations throughout the day via the movement of their phones. Internet service providers maintain copies of huge swaths of the information that crosses their networks tied to customer identifiers. Search engines maintain logs of searches that can be correlated to specific computers and individuals.

Payment systems record each instance of commerce and the time and place it occurred.

The totality of these records are very, very revealing of innocent people's lives. They are a window onto each individual's spiritual nature, health, feelings, sexuality, and intellect. They reflect each American's beliefs, thoughts, emotions, sensations, and relationships. Their security ought to be protected from unreasonable seizure, as they are the modern iteration of our papers and effects. *See Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). These items should generally not be seized without a warrant.

Thanks to recent cases, this Court is positioned to apply traditional legal concepts such as property rights to communications and data, placing them within the framework dictated by the text of the Fourth Amendment when they are seized. In this case, this Court can begin to develop a sorely needed jurisprudence around literal search.

III. THIS COURT'S RECENT CASES PROVIDE A FRAMEWORK FOR ADMINISTERING THE FOURTH AMENDMENT IN A RELIABLE AND JURIDICAL WAY

The "reasonable expectation of privacy" test sidesteps the challenges in integrating the Fourth Amendment's terms with the facts in particular cases. This Court's recent opinions, though, provide a framework for a clear return to adjudicating the Fourth Amendment as a law, even in difficult "high-tech" cases. In all cases, this Court can follow the methodology suggested by the Fourth Amendment, which is

to look for searches, look for seizures, determine whether they go to constitutionally protected items, and then determine whether they are reasonable.

This does not mean that the precise way to apply basic Fourth Amendment concepts such as "search" is already obvious in all cases. But carefully integrating long-standing legal principles with advancing technologies will facilitate the application to modern problems of Fourth Amendment concepts such as "seizure," "search," "papers," and "effects."

A. *Jones* Was a Search-Via-Seizure Case

Although this Court referred to the totality of the disputed government action in *Jones* only as a "search," the precipitating constitutional invasion was a seizure. That seizure occurred when government agents attached a device to a car that was not theirs, making use of the car to transport their device, without a warrant. *Id*. at 404; *see ACLU v. Clapper*, 785 F.3d 787, 823 (2d Cir. 2015) (referring to attachment of GPS device in Jones as "a technical trespass on the defendant's vehicle").

Though small, that seizure of Jones's car, in the form of "use," was a sufficient trigger of scrutiny for constitutional reasonableness. It facilitated a weeks-long, contemporaneous search for Jones's location and signaled the purpose of finding evidence. Considering the outsized effect on Jones, who was still presumed innocent, the seizure and the search were unreasonable without a warrant.

The present case looks similar because technology facilitated the gathering of a suspect's comings and

goings from home over a much longer period. But it is rightly classed as a pure search case, there being no precipitating seizure as there was in *Jones*.

Was the search "reasonable"? Again, the question comes later in a methodical analysis.

B. *Kyllo* Was a Pure Search Case

As noted above, *Kyllo*, 533 U.S. 27, is a wonderfully instructive modern "search" case, because it features search in the absence of seizure. That allows us to observe search in the abstract and see how concealment subjected to search produces exposure. Manufactured exposure of concealed things is a strong signal that a search has occurred.

The thermal-imaging cameras government agents used in *Kyllo* detect radiation in the infrared range of the electromagnetic spectrum (with longer wavelengths than visible light). They produce images of that radiation called thermograms by showing otherwise invisible radiation in the visible spectrum.

Using a thermal imager on a house was a search, as this Court found. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion," the Court held, "the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 553 (2005) ("For the holding in *Kyllo* to make sense, it must be the transformation of the existing signal into a form that communicates information to a person that constitutes

the search. What made the conduct in *Kyllo* a search was not the existence of the radiation signal in the air, but the output of the thermal image machine and what it exposed to human observation.”).

Here, we have another search independent of any seizure. The extended use of a powerful technology signals that this was indeed a case where government agents had that “purpose of finding something.” They brought Mr. Tuggle’s movements out of the natural concealment given by the passage of time. The focus and intensity of their efforts probably crossed over the line between ordinary looking and searching.

CONCLUSION

The literal, textual framework suggested above tees up the issue that is the central focus of the Fourth Amendment: the reasonableness of government agents in searching or seizing particular items. The focus in Fourth Amendment cases should not turn back on Americans, analyzing the suitability of their privacy preferences.

The reasonable-expectation-of-privacy test has acutely disserved justice here, seemingly allowing full-time, non-stop video surveillance of anyone’s movements outside their home. There are very good arguments that such surveillance is a search. That matches with intuitions that something is going on when government agents direct their attention so acutely at one person and his home. It is probably un-

reasonable to search that intently for that long without getting sign-off from a neutral magistrate in the form of a warrant.

In sum, this case is an opportunity for the Court to improve the administration of the Fourth Amendment by treating it as a law and using traditional legal principles in its interpretation.

Respectfully submitted,

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