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Certiorari to the Colorado Court of Appeals No. 17CA1243 El Paso County District Court The Honorable Barbara L. Hughes, Judge Case No. 15CR4102	
THE PEOPLE OF THE STATE OF COLORADO Petitioner, v. RAFAEL PHILLIP TAFOYA, Respondent.	▲ **COURT USE ONLY** ▲
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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF COLORADO, AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT/RESPONDENT

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus breif complies with the applicable word limit set forth in C.A.R. 29(d).

X It contains 4,746 words (brief does not exceed 4,750 words).

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Colorado ("ACLU-CO") is a state affiliate of the national ACLU.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported digital civil liberties organization.

Through direct representation and amicus briefs, these organizations defend the right to be free from the government's use of technology to conduct unreasonable searches and seizures. *Amici*'s interest in this case is the preservation of federal and state constitutional guarantees against unreasonable government intrusions into private life.

[1] *Amici* wish to thank Isabella Caito, Arthi Naini, and Eli B. Watkins, students in N.Y.U. School of Law's Technology Law & Policy Clinic, for their invaluable contributions to this brief.

INTRODUCTION

This case implicates an exceptionally important issue: ensuring that technology does not erode the foundational freedom from government intrusion that was "one of the driving forces behind the Revolution itself." *Riley v. California*, 573 U.S. 373, 403 (2014). In Fourth Amendment cases involving the government's use of technology, the U.S. Supreme Court has sought to "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018); *United States v. Jones*, 565 U.S. 400, 406 (2012); *Kyllo v. United States,* 533 U.S. 27, 34 (2001). In the decision under review, the court of appeals correctly applied that principle, and this Court should affirm.

In this case, the State seeks license to surreptitiously record the activities around anyone's home using a remotely operated pole-mounted video camera for any period of time without any level of suspicion, let alone a warrant. If accepted by this Court, such a rule would authorize pervasive warrantless surveillance of homes by law enforcement across Colorado. Without any regulation under the Fourth Amendment or the state constitution, officers could unceasingly watch the comings and goings of the local political gadfly, track who leaves home with a

protest sign on the day of a Black Lives Matter demonstration, or observe in detail every socially distanced front-yard interaction between neighbors or friends.

As the high courts of two sister states have done, this Court should recognize that this surveillance violates reasonable expectations of privacy. Last year, the Massachusetts Supreme Judicial Court ruled that the continuous use of a pole camera directed at the home was a search under its state constitution. *Commonwealth v. Mora*, 150 N.E.3d 297, 309 (Mass. 2020). Likewise, the South Dakota Supreme Court has held that long-term pole camera surveillance violates the Fourth Amendment, noting the Orwellian implications of a ruling to the contrary, which would lead the way "to a true surveillance society." *State v. Jones*, 903 N.W.2d 101, 112–13 (S.D. 2017). Most recently, the *en banc* U.S. Court of Appeals for the First Circuit vacated a panel opinion to the contrary, in apparent recognition of the weighty privacy concerns at issue. *United States v. Moore-Bush*, 982 F.3d 50 (1st Cir. 2020) (mem.) (en banc) (oral argument to be held March 23, 2021). This case invokes identical concerns.

This Court hardly need tread new ground in rejecting the State's position. Following the guidance of the U.S. Supreme Court in *Carpenter* and predecessor cases, the depth and duration of the warrantless surveillance at issue here render it unreasonable. Furthermore, if allowed by this Court, warrantless pole camera

surveillance of homes would create unequal privacy rights depending on one's ability to erect surveillance-proof barriers, which will often hinge on the happenstance of personal income and municipal zoning law. This Court should reaffirm the foundational privacy guarantees of the federal and state constitutions and require law enforcement to obtain a warrant before it engages in long-term pole camera surveillance of a person's home.

ARGUMENT

I. Conducting long-term, continuous surveillance of a person's home with a pole camera, without a warrant, violates the Fourth Amendment.

Where an individual has a reasonable expectation of privacy, a search is "*per se* unreasonable under the Fourth Amendment" unless conducted pursuant to a judicial warrant. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Of course, the home is among the most private of spaces under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). And the U.S. Supreme Court has long made clear that even "by venturing into the public sphere," a "person does not surrender all Fourth Amendment protection." *Carpenter*, 138 S. Ct. at 2217; *see also Katz,* 389 U.S. at 351. Just as government collection of a person's longer-term cell phone location information impinges on reasonable expectations of privacy because of the privacies of life it reveals, *Carpenter*, 138 S. Ct. at 2223, so too does law enforcement's warrantless

use of a pole camera to record the details of a person's comings, goings, and activities at their home for an extended period.

A. Long-term, around-the-clock pole camera surveillance of a home reveals sensitive information and impinges on reasonable expectations of privacy.

People reasonably expect that the government will not use an inconspicuous camera surreptitiously mounted on a utility pole to monitor their every movement to, from, and around their home for extended periods of time.

As an initial matter, the home and its surroundings represent "the very core" of individual privacy under the Fourth Amendment. *Jardines*, 569 U.S. at 6. Law enforcement training surveillance on the exterior of the home, rather than the interior, does not put this concern to rest: "there exist no 'semiprivate areas' within the curtilage where governmental agents may roam from edge to edge." *Bovat v. Vermont*, 141 S. Ct. 22, 24 (2020) (Gorsuch, J., respecting the denial of certiorari) (discussing *Jardines*); *accord Jardines*, 569 U.S. at 1 (curtilage is "part of the home itself for Fourth Amendment purposes"); *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018) (describing curtilage as "an area adjacent to the home and to which the activity of home life extends" (quotation marks omitted)).

With those principles in mind, long-term, continuous pole camera surveillance of a residence reveals comprehensive and highly sensitive

information. In *Carpenter*, the Supreme Court explained that individuals have a "reasonable expectation of privacy in the whole of their physical movements" revealed by cell-site location information because the information revealed is "detailed, encyclopedic, and effortlessly compiled." 138 S. Ct. at 2216–17. As the Court explained, cell phone location data opens an "intimate window into a person's life, revealing . . . [their] 'familial, political, professional, religious, and sexual associations.'" *Id.* at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). Similarly, pole cameras constantly trained at a residence can reveal a great deal of sensitive and private information. Indeed, that is why law enforcement uses them. Over time, the recorded information compounds into a startlingly invasive picture—the kind of "comprehensive dossier" of a person's activities that concerned the *Carpenter* Court. *Id.* at 2220. Cameras can record the identities of a person's guests and visitors; whether someone other than their spouse visited at night (and how frequently); whether they left their home with a protest sign or a prayer shawl; and, depending on the camera's zoom capabilities, potentially whether they are holding documents such as medical bills or ballots. Taken altogether, this information captures manifold "privacies of life." *Id.* at 2217 (citation omitted). Such warrantless invasion violates the Fourth Amendment, whose drafters were concerned with the preservation of "security to forge the

private connections and freely exchange the ideas that form the bedrock of a civil society." *Mora*, 150 N.E.3d at 309.

The State fails to appreciate the difference between a person's expectation of privacy in a single snapshot of their activity and a constant, long-term video record of the same. It argues that because Mr. Tafoya's front yard, like those of most Coloradans, was "plainly visible" to the public, he had no reasonable expectation of privacy there, and that the duration of the surveillance is wholly irrelevant to the search analysis. Pet'r's Opening Br., p 14. But the fact that the exterior of one's home may sometimes be visible to the public does not diminish the invasion. While everyone understands that passersby may see this area fleetingly, the entirety of what pole cameras capture and preserve for later inspection is of an entirely different character. Moreover, as the U.S. Supreme Court has explained, the breadth of private information obtainable via technology-aided surveillance matters in evaluating expectations of privacy. Just as the government violates reasonable expectations of privacy when it captures information sufficient to reveal the whole of one's movements over time—even though people expose those movements to a third-party cell-phone provider or the public, *Carpenter*, 138 S. Ct. at 2217—the Fourth Amendment recognizes that people do not forfeit their expectation of privacy in the entirety of their behavior on their property merely

because some of this behavior is visible to the public at one given moment. *Jones*, 903 N.W.2d at 111.

The People argue that *Carpenter* is essentially inapplicable here, pointing primarily to the U.S. Supreme Court's description of its own decision as "narrow." Pet'r's Opening Br., pp 27–28. But while the Court's holding could only address the facts before it, nothing in the decision forecloses application of *Carpenter*'s reasoning to other similarly invasive surveillance, including long-term use of pole cameras. Likewise, the Court's remark that it was not "call[ing] into question conventional surveillance techniques and tools, such as security cameras," *Carpenter*, 138 S. Ct. at 2210, is wholly irrelevant in this case. When walking through a public space, an individual could reasonably expect to be under surveillance by security cameras; however, people do not expect intrusive, round-the-clock monitoring of their own front yard. As the court of appeals recognized, pole cameras are readily distinguishable from security cameras, which are installed (generally with public notice) in an attempt to provide *security* and prevent crime under their watch. *People v. Tafoya*, 2019 COA 176, ¶¶ 41–43. "Conventional 'security cameras' are typically deployed by property owners to keep watch over their own surroundings, not as a law enforcement tool for conducting a criminal investigation by peering into property owned by others." *United States v. Moore-*

Bush, 963 F.3d 29, 51 (1st Cir. 2020) (Barron, J., concurring) (vacated pending rehearing en banc).[2] Conventional security cameras are not at issue here.

B. Prolonged pole camera surveillance of a home significantly encroaches upon traditional spheres of privacy otherwise unknowable via physical surveillance methods.

In a series of cases involving Fourth Amendment protections in the face of evolving technology, the U.S. Supreme Court "has sought to 'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo*, 533 U.S. at 34). In *Carpenter* and *Jones*, for example, the Court explained that "[p]rior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.'" *Id.* at 2217 (quoting *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment)). "For that reason, 'society's expectation has been that law enforcement agents and others would not—and indeed, in the main,

[2] In *Moore-Bush*, a First Circuit panel reversed the district court's ruling that eight months of warrantless pole camera surveillance violated the Fourth Amendment. Although Judge Barron concurred on law-of-the-circuit grounds, he agreed with the district court's analysis under *Carpenter* and encouraged the full First Circuit to reevaluate its prior precedent in an *en banc* proceeding. 963 F.3d at 58 (Barron, J., concurring). The full First Circuit subsequently vacated the panel opinion and agreed to rehear the case *en banc*.

simply could not—secretly monitor and catalogue" a person's movements "for a very long period." *Id.* (quoting *Jones*, 565 U.S. at 429 (Alito, J.)).

Likewise here, prior to the advent of modern pole camera technology, police could have watched a suspect's home for a brief period surreptitiously, but the "continuous, twenty-four hour nature of the surveillance is an enhancement[ ] of what reasonably might be expected from the police," *Mora*, 150 N.E.3d at 312 (quotation marks omitted, alteration in original); *accord Jones*, 903 N.W.2d at 112. The limited resources available to law enforcement and the difficulty of maintaining undetected physical surveillance over time required police agencies to be judicious in the way they expended resources when conducting surveillance. The long-term use of pole cameras radically transforms the capabilities of law enforcement to peer into individuals' private lives, threatening to disrupt the traditional "relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring).

The technological capabilities of pole cameras give police access to information that would be nearly impossible to obtain through traditional surveillance methods. The remote-viewing capabilities of the technology allow police to evade detection, while unlimited recording allows the police to "travel back in time," *Carpenter*, 138 S. Ct. at 2218, and scrutinize an individual's day-to-

day activities at their home over the course of months, or even years. And the ability of the cameras to zoom, pan, and tilt—which allows the government to "see very close to things, faces, to be able to identify objects, things of that nature" (TR 8/23/16, p 20: 19–23)—magnifies the invasion.[3]

Compared to conventional surveillance techniques, pole camera surveillance is "remarkably easy, cheap, and efficient," and enables monitoring "at practically no expense," *Carpenter*, 138 S. Ct. at 2218.[4] Accepting the government's position

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[3] As the Supreme Court emphasized in *Kyllo*, courts must also "take account of more sophisticated systems that are already in use or in development." 533 U.S. at 36. The development of even more advanced video technology—from enhanced image quality, to long-range audio capabilities, to the incorporation of facial recognition technology and artificial intelligence video analytics—only increases the need for this Court to announce strong protections now. *See* Jay Stanley, *The Dawn of Robot Surveillance: AI, Video Analytics, and Privacy*, ACLU (June 2019), https://www.aclu.org/sites/default/files/field_document/061119-robot_surveillance.pdf (describing advances in automated video analytics capabilities).

[4] Relying on the general methodology employed in a widely cited analysis estimating the cost of various surveillance techniques, *see* Kevin S. Bankston & Ashkan Soltani, *Tiny Constables & the Cost of Surveillance: Making Cents out of* United States v. Jones, 123 Yale L.J. Online 335, 342–43 (2014), *amici* estimate that it would cost the Colorado Springs Police Department more than $90,000 to monitor a home consistently for three months based on the government pay scale and locality pay. By contrast, a standard pole camera costs a small fraction of that amount. *See, e.g.*, General Services Administration, *Authorized Federal Supply Schedule Price List,* https://www.gsaadvantage.gov/ref_text/47QSWA20D0016/0VEKR2.3R4XPT_47QSWA20D0016_VALORENCEGSAADVANTAGEPRICELIST05292020.PDF

here would allow law enforcement to cheaply use concealed camera technology to secretly monitor every household in Colorado, and indeed America, indefinitely and without a warrant. *See* Tr. Oral Arg. at 9–10, *United States v. Jones*, 565 U.S. 400 (2012) (No. 10-1259) (counsel for United States conceding that under the government's view, it could attach GPS trackers to the cars of every member of the Supreme Court without a warrant). That outcome would be intolerable under the Fourth Amendment.

II. The Fourth Amendment does not require people to take extraordinary measures to protect their property against invasive government surveillance, and a contrary rule would both disproportionately harm low-income Coloradans and Coloradans of color and randomize the protection of Coloradans' privacy rights.

Courts have long held that people do not need to take extraordinary measures to protect against invasive government surveillance. *Contra* Pet'r's Opening Br., pp 15–16 (suggesting Tafoya needed to ensure no part of his backyard was visible either through slats of a neighbor's fence or from high vantage points including utility poles and staircases of a multi-level building in order to protect it against long-term surveillance). For example, the U.S. Supreme Court has explained that a person need not add extra insulation to protect against

(last accessed January 25, 2021) (listing pole camera models for approximately $8,000 to $9,000).

the use of thermal-imaging equipment, *Kyllo,* 533 U.S. at 29–40, or disconnect from their phone network to avoid sharing their every movement, *Carpenter*, 138 S. Ct. at 2220. Due to the vantage point of a camera placed atop a utility pole—a vantage point that no passerby would be able to obtain without climbing atop the utility pole themselves—an individual would have to build very tall, fully opaque barriers around their property to protect against government surveillance. A requirement of this sort would not only be extraordinary and impractical—and, in many Colorado jurisdictions, illegal—but would also be impossible for many Coloradans who lack the resources to protect themselves in this way or rent the property they live on.

A. Allowing law enforcement to engage in warrantless, long-term pole camera surveillance of a home would have a disparate impact on those with the fewest resources to protect themselves.

The Supreme Court has long held that "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). However, "requiring defendants to erect physical barriers around their residences before invoking the protections of the Fourth Amendment . . . would make those protections too dependent on the defendants' resources." *Mora*, 150 N.E.3d at 306. Wealthy individuals can purchase homes in gated communities or neighborhoods with

underground utility poles, and they can afford to take measures such as building a privacy fence if that becomes necessary. Lower-income individuals do not have the same opportunities. Even the cost of building a simple fence is estimated to fall somewhere between $1,000 to $10,000 on average.[5] And people who rent their home are further barred from altering the leased premises, even if they could afford to.

The gulf between the highest- and lowest-earning households in the United States is massive,[6] and racial disparities often correlate with economic inequality.[7] For example, a recent study found the median Black household income in Colorado was 63 cents for every dollar of white household income.[8] Moreover, most lower-income people, and many people of color, are renters.[9] Under the

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[5] Home Depot, *How Much Does it Cost to Install a Fence?* (2018), https://www.homedepot.com/c/cost_install_fence.

[6] U.S. Census Bureau, *Income and Poverty in the United States: 2019*, 38–44 tbl.A-4 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf.

[7] *Id.* at 57 tbl.B-1.

[8] Ana Hernández Kent, *Examining U.S. Economic Racial Inequality by State*, 3 Bridges, Fed. Reserve Bank of St. Louis (Aug. 17, 2020), https://www.stlouisfed.org/publications/bridges/volume-3-2020/examining-us-economic-racial-inequality-by-state.

[9] *See, e.g.*, Jacob Passy, *Black Homeownership Has Declined Since 2012—Here's Where Black Households are Most Likely to be Homeowners*, Market Watch (July

Fourth Amendment, privacy should not be cost-prohibitive for some while available to others. Allowing warrantless, long-term pole camera surveillance would disproportionately harm people of lesser means and communities of color.

B. Because a Colorado resident's ability to build a privacy fence varies greatly depending on local zoning regulations, a constitutional rule depending upon the existence of such barriers would lead to different levels of privacy protection throughout the state.

Most municipalities in Colorado impose restrictions on what kind of fences, walls, and other barriers individuals can place around their property. There is no discernible pattern to these restrictions, and they vary widely. If physical protection against pole camera surveillance were necessary, whether an individual could protect their privacy would become a matter of chance. For example, in Colorado Springs, where Mr. Tafoya lives, front yards can only be fenced up to 42 inches high. Colo. Springs, Colo., Mun. Code § 7.3.907(A)(20)(b). Because 42 inches is not remotely high enough to block a pole camera's view, residents of Colorado Springs are essentially defenseless against this kind of surveillance.

1, 2020), https://www.marketwatch.com/story/black-homeownership-has-declined-since-2012-heres-where-black-households-are-most-likely-to-be-homeowners-2020-06-30 (As of 2018, in Denver, 70% of whites, but only 38% of Blacks, owned homes).

In counties and cities throughout Colorado, fence height restrictions range from as short as 30 inches to as tall as seven feet,[10] and in some cases fencing of any kind without a permit is prohibited altogether. In addition to municipal restrictions on fence heights, the more than 7,800 homeowners associations operating in Colorado often place their own, even more restrictive building constraints on residents.[11] Many of them prohibit fencing altogether, so if residents purchase property within these associations, a contrary rule would mean they forfeit their right to privacy in the immediate vicinity of their home. *See, e.g.,* Gleneagle Homeowners Association Filing 9, art. I § 119; Belcaro Park Homeowners Association Filing 1, art. 11(b).

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[10] *E.g.* Arvada, Colo., Mun. Code §6.5.8(A) (30 inches); Boulder Cty., Colo., Bldg. Code § 105.2(2) (6 feet); Fort Collins, Colo., Land Use Code § 3.8.11(C)(1)-(3) (4 feet); Grand Junction, Colo., Land Use Code § 21.020.070 (6 feet); Mineral Cty., Colo., Zoning Regs. § 2.9(A)(3)(c) (40 inches); Pitkin Cty., Colo., Mun. Code § 5-20-100(e) (42 inches); Pueblo, Colo., Mun. Code § 17-4-4(f)(5)(c) (4 feet); Rio Grande Cty., Colo., Land Dev. Code § 6.02(C)(2) (7 feet); San Miguel Cty., Colo., Land Use Code § 5-314(F) (30 inches).

[11] Aldo Svaldi, *Looking for a Fairer Fight with your HOA? In Colorado, Help May Be on the Way*, Denv. Post (Oct. 21, 2019), https://www.denverpost.com/2019/10/21/colorado-homeowners-association-center-complaints-resolution/ (finding 7,881 active HOAs in Colorado).

III. The Colorado Constitution grants even greater protection from government intrusion than the Fourth Amendment.

A. Tafoya did not waive his claim under article II, section 7 of the Colorado Constitution.

Because Mr. Tafoya has consistently invoked the protection of article II, section 7 throughout this litigation, this Court has "a responsibility to engage in an independent analysis of [Colorado's] state constitutional provision." *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 34. Mr. Tafoya raised article II, section 7, in his motion to suppress (CF, p 44, ¶ 15), and he appealed the district court's order in part on that basis, asserting an independent argument for reversal under the state constitution. Def.'s Opening Br., pp 22–23. Even the State agreed before the court of appeals that Mr. Tafoya had preserved the state constitutional issue. People's Answer Br., p 6.

Nevertheless, the court of appeals effectively deemed this issue waived. *Tafoya,* 2019 COA 176, ¶ 19. The court of appeals erred in doing so, clashing with this Court's precedent directing courts to "indulge every reasonable presumption against waiver." *People v. Rediger,* 2018 CO 32, ¶ 39 (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)). Alternatively, this Court may conclude that the court of appeals merely thought it unnecessary to analyze the state provision

separately given its resolution of Mr. Tafoya's federal claim. Either way, Mr. Tafoya is entitled to a determination on his state constitutional claim.

Although this Court may remand the remaining state constitutional issue to the court of appeals, it is better situated to resolve the issue now, given this Court's vital role in interpreting the Colorado Constitution and the pressing need to provide Coloradans guidance on whether their constitution allows the State to record their homes without a warrant for an undefined duration.

B. Under article II, section 7, law enforcement must obtain a warrant before conducting long-term, continuous pole camera surveillance.

"The Colorado proscription against unreasonable searches and seizures protects a greater range of privacy interests than does its federal counterpart." *People v. Oates*, 698 P.2d 811, 815–16 (Colo. 1985); *see also People v. McKnight*, 2019 CO 36, ¶ 38, *reh'g denied* (No. 17SC584) (July 1, 2019) (quoting *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983)) ("[D]espite the substantial similarity between article II, section 7 and the Fourth Amendment," this Court is "'not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections.'"). Indeed, decades of this Court's rulings have recognized Coloradans' reasonable expectation of

privacy under the state constitution in circumstances held to fall outside the scope of Fourth Amendment protection. *McKnight*, ¶ 38.

For example, this Court has found a reasonable expectation of privacy under article II, section 7 in the register of phone numbers an individual has dialed, irrespective of federal Fourth Amendment jurisprudence to the contrary. *Compare Sporleder*, 666 P.2d at 140–141, *with Smith v. Maryland*, 442 U.S. 735, 742 (1979). A few years later, this Court concluded that law enforcement's warrantless attachment of a tracking beeper to purchased goods violates the state constitution, even though the U.S. Supreme Court had held just a few years earlier that the same conduct was not a search under the Fourth Amendment. *Compare Oates*, 698 P.2d at 815–16, *with United States v. Knotts*, 460 U.S. 276 (1983). And just recently, this Court found a sniff from a dog trained to detect marijuana is a search for the purposes of the state constitution, staking out an independent position from the "federal fold." *McKnight*, ¶¶ 25–34. Here, too, this Court should reaffirm that the Colorado Constitution "impos[es] more stringent constraints on police conduct than does the Federal Constitution," *id.* at ¶ 38 (quoting *California v. Greenwood*, 486 U.S. 35, 43 (1988)), and hold that article II, section 7 requires law enforcement to obtain a warrant before undertaking long-term pole camera surveillance.

In the above-cited cases and others, this Court has made clear that protections against government intrusion develop accordingly with the advancement of technology and that courts "cannot accept the additional intrusion that occurs when information revealed to private observers becomes the subject of comprehensive governmental electronic surveillance." *Oates*, 698 P.2d at 815–16, 818; *see also People v. Galvadon*, 103 P.3d 923, 927 (Colo. 2005) (noting—in a case involving video surveillance—that the Court reads the Colorado Constitution's conception of expectation of privacy more broadly than the federal constitution); *People v. Corr*, 682 P.2d 20, 27 (Colo. 1984) (extending *Sporleder* to toll records). Given Colorado's distinctive and protective constitutional tradition under article II, section 7, this Court should reject the State's expansive view of its pole-camera surveillance authority as incompatible with the Colorado Constitution.[12]

This Court may look to the recent decision of the Massachusetts Supreme Judicial Court for guidance in applying the state constitution to guard against law

[12] In *Hoffman v. People*, this Court observed that "[t]here is no invasion of privacy in the observation of that which is plainly visible to the public." 780 P.2d 471, 474 (Colo. 1989). But for the reasons given above, *supra* Part I, the whole of information obtained through the use of a pole camera is not meaningfully "visible to the public," in the same way that the *Carpenter* Court observed the whole of a person's movements are not meaningfully exposed to the public, either.

enforcement's long-term deployment of pole cameras to target individuals at their homes. Without taking a position on the Fourth Amendment rule, last year the Massachusetts high court held that long-term streaming and recording of people's homes through cameras similar to those used here violated that state's constitution and warned that were the contrary true, it would imperil the traditional security of the home and its associated freedoms. *Mora*, 150 N.E.3d at 309–10. The South Dakota Supreme Court has similarly ruled such long-term pole camera surveillance to be a search under the Fourth Amendment, drawing a comparison to the warrantless GPS tracking it had previously ruled unconstitutional, and distinguishing long-term pole camera surveillance from other video surveillance given its duration and technological capabilities. *Jones*, 903 N.W.2d at 112–13. This Court should reach the same conclusion under the Colorado Constitution.

States are the "first bulwarks of freedom" in our constitutional system. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 179 (2018) (citation omitted) ("One of the most pervasive arguments against a federal bill of rights was that it was unnecessary . . . . The obvious corollary was that the states would shoulder the primary responsibility for protecting citizens' individual rights."). Here, consistent with the states' role as the "primary guardian of the liberty of the people," *McKnight,* ¶ 38 (quoting

Massachusetts v. Upton, 466 U.S. 727, 739 (1984) (Stevens, J., concurring)), decades of case law affirming greater privacy rights under article II, section 7, and the decisions of sister state high courts, this Court should hold that article II, section 7 renders long-term continuous, warrantless surveillance of a person's home to be an illegal search.

CONCLUSION

For the reasons above, amici respectfully urge this Court to hold that longer-term pole camera surveillance of a home requires a warrant.

January 25th, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, I served a true and exact copy of the foregoing document via Colorado Courts E-filing System (CCES) upon the following Counsel of Record:

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