No. 4-422

IN THE

Supreme Court of the United States

United States of America,

Petitioner,

v.

Amanda Koehler,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

I. (A) Under the Fourth Amendment, does manually checking Respondent's laptop constitute a valid search under the border exception to the warrant requirement when the Government conducted a brief routine search, and only looked through open documents on the non-password protected laptop?

(B) Under the Fourth Amendment, does the Government have reasonable suspicion to search Respondent's laptop under the border exception to the warrant requirement when her fiancé was uncooperative during the border search, lied about transporting $10,000 in $20 bills across the border, and shared the laptop with a known violent felon who was named a person of interest in the kidnappings?

II. (A) Under the Fourth Amendment, does the use of a PNR-1 drone in aerial surveillance of Respondent's property constitute a search when Respondent made no effort to conceal her activities from public view, the area surveilled is considered an open field, and the PNR-1 flew in a non-intrusive manner within a lawful altitude per Pawndale law where aircraft routinely fly?

(B) Under the Fourth Amendment, does the use of a handheld Doppler radar device in electronic surveillance of Respondent's property constitute a search when the information obtained was otherwise discoverable through the continued use of foot and aerial surveillance by Eagle City officers and the Doppler radar device is readily available online, is widely manufactured, and similar radar-based technology is used by the public generally?

STATEMENT OF FACTS

Respondent Amanda Koehler ("Koehler") was indicted on three counts of kidnapping and one count of being a felon in possession of a handgun in violation of 18 U.S.C. § 1201(a) and 18 U.S.C. § 922(g)(1). R. at 1. The District Court for the Southern District of Pawndale denied Respondent's Motion to Suppress evidence seized during her arrest. *Id.* at 15. Following a guilty plea, Respondent was convicted and appealed her conviction to the United States Court of Appeals for the Thirteenth Circuit. *Id*. The Thirteenth Circuit reversed and remanded. *Id.*

On August 17, 2016, United States Border Patrol Agents Christopher Dwyer ("Dwyer") and Ashley Ludgate ("Ludgate") conducted a routine stop of a vehicle attempting to cross the Eagle City border station at 3:00 AM. *Id*. at 2. The driver was Scott Wyatt ("Wyatt"). *Id*. at 1. Eagle City is the capital of the state of Pawndale, which lies directly on the U.S.-Mexico border and is one of the largest and busiest border stations. *Id*. This border station is a major crossing point for criminals, experiencing increased criminal activity in the past few years. *Id*. at 2, 24. As is customary, the agents began the stop with several questions to detect objective signs of criminal activity. *Id.* at 24. From the outset of the stop, Wyatt appeared extremely agitated and uncooperative. *Id*. at 2. Ludgate asked Wyatt why he was crossing the border and whether he was transporting $10,000 or more in U.S. currency. *Id.* Wyatt refused to make eye contact, was curt in responding to the agents' questions, and fidgeted with the steering wheel. *Id*. at 26. Wyatt responded he was not transporting $10,000 or more in U.S. currency. *Id.* at 2. Noticing Wyatt was pale and appeared to be hiding something, Ludgate informed Wyatt of her right to perform a search of his vehicle. *Id.* at 2, 24, 26. Dwyer asked Wyatt to exit the car and open his trunk. *Id.* at 2.

The agents found $10,000 in $20 bills and a laptop with the initials "AK" in Wyatt's trunk. *Id.* Ludgate asked Wyatt if the laptop was his and Wyatt responded that he shared the laptop with

his fiancé, Koehler, and confirmed the initials on the laptop were Koehler's. *Id.* at 2, 26. The agents ran Koehler's name in the database and learned Koehler was a felon with multiple convictions for crimes of violence and was named a person of interest in the recent kidnapping of billionaire Timothy Ford's ("Ford") three children. *Id.* All agents at the Eagle City border station were briefed on the kidnappings, and the agents knew the children were likely transported across state lines and were being held in Eagle City. *Id.* at 2, 27. Ludgate knew the money in Wyatt's trunk matched the kidnappers' demands: The kidnappers delivered a ransom note to Ford's personal address demanding $10,000 in $20 bills for proof of life, due on August 18th—the following day. *Id.* at 2, 27, 44. Ludgate opened the laptop and discovered documents already running. *Id.* at 2–3, 27. The documents contained Ford's personal address, his upcoming appearances and meetings, and the names of his staff members. *Id.* at 3. Ludgate noticed a lease with the name "Laura Pope" and an unknown address. *Id.* The laptop was not password-protected. *Id.*

The agents immediately contacted Detective Raymond Perkins ("Perkins"), the lead detective on the Ford kidnappings case. *Id.* at 3, 31. Perkins discovered the address on the lease matched Macklin Manor, a secluded estate atop Mount Partridge in Eagle City, and he discovered Macklin Manor was purchased by a company called R.A.S., which is owned by "Laura Pope." *Id.* at 2, 3. After contacting the FBI, Perkins learned that "Laura Pope" is Koehler's alias. *Id.* At that point, Perkins believed he had adequate probable cause to get a search warrant. *Id.* at 31, 34. Nonetheless, Perkins decided to conduct surveillance on Macklin Manor before entering the premises to ensure the safety of his officers, fearing that Wyatt may have tipped off Koehler. *Id.* at 32, 35, 42. Koehler had a history of felony convictions for violent crimes and the investigation was taking place early in the morning when Perkins had only two officers available. *Id.* at 32.

At approximately 4:30 AM, Perkins assigned Officers Kristina Lowe ("Lowe") and

Nicholas Hoffman ("Hoffman") to conduct loose surveillance on Macklin Manor; Hoffman would patrol on foot and Lowe would deploy a drone to fly over the property. *Id.* at 3. Lowe deployed a PNR-1 drone to hover over Macklin Manor. *Id.* at 38. The PNR-1 drone is popular among drone enthusiasts and is currently used by police departments in thirty-five states. *Id.* at 38, 46. Magazines assert it is "storming the market" because it is one of the most affordable and well-regarded drones. *See id.* at 46. The PNR-1 is equipped with a single-lens camera that produces high definition photos and can hold thirty photos, a video camera that can record fifteen minutes of video, and a battery that lasts only thirty-five minutes. *Id.* at 39–40. It operates according to a preprogrammed flight plan, ensuring compliance with local regulations prescribing maximum altitude limits, which is 1,640 feet in Pawndale. *Id*. According to the manufacturer, some drones experience network connectivity errors, causing them fly as high as 2,000 feet. *Id.* at 40.

The PNR-1 hovered over Macklin Manor for fifteen minutes, captured twenty-two photos, and recorded three minutes of video. *Id.* at 4. During the aerial surveillance, Lowe lost track of the drone's altitude for several minutes even though in the prior six test runs, including one three days before the drone's deployment over Macklin manor, the PNR-1 never experienced any difficulties nor exceeded its pre-programmed altitude limit. *Id.* at 41. The record shows there is no evidence that the PNR-1 drone exceeded the Pawndale altitude limit for drones. *Id.* at 10, 41. Despite common visibility issues over Mount Partridge, the aerial surveillance captured the layout of Macklin Manor and a picture of a young female near the pool house. *Id.* at 4, 33. The layout revealed that Macklin Manor contains a main house, an open pool, patio area, and a single-room pool house; the main house is adjacent to the patio area, is fifteen feet away from the pool, and is fifty feet away from the pool house. *Id*. at 4. Perkins confirmed that the female was Koehler. *Id.*

After corroborating that Koehler was on the premises, Perkins was fearful of endangering

the lives of any potential hostages and the three officers. *Id.* at 4, 33. Perkins and Hoffman used a handheld Doppler radar device to decide if the officers would be outnumbered in a foreseeable search of Macklin Manor. *Id.* The radar device is "super popular" among law enforcement and costs about $400. *Id*. at 33–34. The device emits radio waves to help officers infer the number of people present inside a building and where they might be located, but it cannot determine the internal layout of a building. *Id.* The officers approached the front of the main house and scanned the front door. *Id.* at 4. The officers then walked fifty feet and scanned the pool house. *Id.* at 5. The device detected one individual in the main house, and four individuals in the pool house—three of which appeared close together and unmoving. *Id.* The officers retreated from Macklin Manor and obtained a search warrant once they confirmed how many officers were needed for a search. *Id.* at 5, 34. At 8:00 AM, the three officers returned to Macklin Manor with a SWAT team and conducted a no-knock and notice search of Macklin Manor and the pool house, as permitted by the warrant. *Id.* at 5. In the main house, the officers apprehended two individuals and Koehler. *Id.* The officers found a Glock G29 handgun on her person. *Id.* In the pool house, the officers detained the individual standing guard and found the Ford children restrained but unharmed. *Id.*

The District Court denied Respondent's Motion to Suppress evidence seized during her arrest, holding that the search of Respondent's laptop and the surveillance of Macklin Manor via the PNR-1 drone and the handheld Doppler radar device were not searches in violation of the Fourth Amendment. *Id.* at 6, 8. The District Court reasoned that the border search exception extends to the contents of electronic devices and the use of the drone and the radar device "falls under well-established Supreme Court case law." *Id.* The Thirteenth Circuit disagreed and remanded the case to the District Court, vacating Koehler's conviction. *Id.* at 15.

SUMMARY OF THE ARGUMENT

Because the Thirteenth Circuit erred in reversing the District Court's ruling denying Koehler's Motion to Suppress evidence, the United States respectfully requests this Court reverse the decision of the Thirteenth Circuit.

Koehler's Fourth Amendment rights against unreasonable searches and seizures were not violated because the search of Koehler's laptop was a routine search and Ludgate had reasonable suspicion that Koehler was involved in criminal activity. A search is routine if the search was minimally invasive or the search was non-exhaustive. Reasonable suspicion is met if information about the individual is particularized and an officer identifies the individual's behavior or circumstances as suspicious. Koehler's laptop falls under the border exception because Ludgate performed a manual quick-look of the laptop, the laptop was not password protected, and the documents viewed were already open. Ludgate did not send the laptop in for forensic analysis nor did she search the hard-drive. Additionally, there was reasonable suspicion for the search because Wyatt lied about transporting money, the amount of money was identical to the ransom requested by the kidnappers, Wyatt shared the laptop with Koehler, Koehler was a person of interest in the kidnapping, and Wyatt was uncooperative during the investigation.

Koehler's Fourth Amendment rights were not violated by admitting evidence seized during her arrest because the use of the PNR-1 drone and handheld Doppler radar device to surveil Koehler's property did not constitute searches under the Fourth Amendment. A search occurs if the government violates an individual's subjective expectation of privacy that society is willing to recognize as reasonable. Aerial surveillance of areas where individuals have a reasonable expectation of privacy is not a search if conducted in public navigable airspace, in a non-intrusive manner, and is routine in the country. Surveillance of the interior of a home by a sense-enhancing

device, without physical trespass onto a protected area, is not a search if the information discovered is otherwise observable without entering the home and the device is in general public use. Even if the use of the PNR-1 and handheld Doppler radar device constitute warrantless searches, exclusion of evidence is not justified because the search warrant was supported by probable cause, and thus, Koehler cannot identify any "fruits" from the ostensible searches. Koehler does not have a subjective expectation of privacy because she did not erect any fences, signs, or other structures to conceal her privacy. Society will not recognize her alleged expectation of privacy as reasonable because it is an "open field," since the pool house lacked a close nexus to the main house. The use of the PNR-1 complied with Pawndale law, did not interfere with Koehler's use of her property, and drone use is routine. Lastly, the use of the handheld Doppler radar device on Koehler's pool house obtained information that was easily observable through continued surveillance and handheld radar technology is in general use in various sectors of the public.

STANDARD OF REVIEW

The review of a motion to suppress evidence, like determinations of probable cause and reasonable suspicion, presents a mixed question of law and fact. *Ornelas v. United States,* 517 U.S. 690, 697 (1996); *United States v. Lopez*, 474 F.3d 1208, 1212 (9th Cir. 2007). Mixed questions of law and fact are reviewed *de novo*. *Ornelas*, 517 U.S. at 699 ("We hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*."). The parties do not dispute the relevant facts, rather, Petitioner challenges the Thirteenth Circuit's application of undisputed facts to legal standards. R. at 15. Thus, *de novo* review is appropriate. *See Ornelas*, 517 U.S. at 699. When reviewing a trial court's decision on a motion to suppress, this Court should view the evidence in the light most favorable to the prevailing party. *United States v. Washington*, 340 F.3d 222, 226 (5th Cir. 2003).

ARGUMENT

I. The Thirteenth Circuit erred in holding that the search of Koehler's laptop violated her Fourth Amendment rights because under the border exception to the warrant requirement, Ludgate's search of the laptop was a routine search, and the officers had reasonable suspicion to search the laptop absent a warrant.

The Fourth Amendment enumerates with precision the right of people to be secure in their "persons, houses, papers, and effects" against warrantless searches. **U.S. Const.** amend. IV. As such, the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Warrantless searches are unreasonable unless they fall under an exception. *See id.* at 357. The border exception permits warrantless searches of any person or object without probable cause and applies to all passengers entering and exiting any U.S. port-of-entry. *See United States v. Ramsey*, 431 U.S. 606, 619 (1977) (clarifying that a port-of-entry can be an area which is functionally equivalent to the border such as an airport). The border exception stems from the government's interest in protecting its borders from unwanted people and contraband. *See id.* at 615. This interest is embedded in our nation's history and in the Constitution. *See United States v. 12 200-ft. Reels of Super 8MM Film*, 413 U.S. 123, 125 (1973).

The border exception applies to every routine search that is minimally invasive or non-exhaustive. *See United States v. Arnold*, 533 F.3d 1003, 1007–08 (9th Cir. 2008). If a search is non-routine, the search is lawful if agents have reasonable suspicion the individual is involved in suspected wrongdoing. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985). The search of Koehler's laptop was a routine search based on reasonable suspicion. First, Ludgate's search of the laptop was a quick-look manual search that was minimally invasive and non-exhaustive. Second, Ludgate had reasonable suspicion to search Koehler's laptop under the totality of the circumstances where Wyatt failed to claim he was transporting money, Wyatt was Koehler's fiancé, and Wyatt showed signs of suspicious behavior.

A. The search of Koehler's laptop was routine under the border search exception to the warrant requirement of the Fourth Amendment because Ludgate briefly flipped through the opened documents on the screen, the laptop did not require a password, and there was no forensic search and seizure of the laptop.

The border exception applies if the search was routine. *See Arnold*, 533 F.3d at 1007. A search is routine if the search was minimally invasive or the search was non-exhaustive. *See United States v. Flores-Montano*, 541 U.S. 149, 154 (2004); *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). A search is minimally invasive if there is "no serious invasion of privacy." *See Johnson*, 991 F.2d at 1291. Courts have held invasive searches only include body cavity searches, strip searches, or searches that "embarrass or offend" the traveler. *Id.* An exhaustive search occurs when the property is taken and either examined indefinitely or sent to a forensic analyst for further investigation. *See United States v. Levy*, 803 F.3d 120, 122 (2d Cir. 2015).

A search is routine when it is minimally invasive. The smuggler in *Johnson* attempted to enter the United States with narcotics concealed in a suitcase. 991 F.2d at 1287. The customs official questioned the smuggler and found the circumstances surrounding her trip suspicious. *Id.* at 1290. The customs official searched the suitcase, x-rayed it, and found a hidden package of heroin. *Id.* The court held the search of the suitcase was routine because it was minimally invasive and reasoned that routine searches "do not pose a serious invasion of privacy and . . . do not embarrass or offend the . . . traveler." *Id.* at 1292. Additionally, the search was routine because the field tests performed were brief, did not harm the suitcase, and the use of an x-ray machine was expected at an airport. *Id.* Conversely, the smuggler in *Montoya De Hernandez* ("*Montoya*"), attempted to enter the United States with narcotics in her alimentary canal. 473 U.S. at 533. The smuggler was frisked and the customs official noticed abnormalities in her abdomen. *Id.* at 537. The customs official performed a cavity search and found a balloon filled with cocaine. *Id.* This Court held the search was a non-routine search because the body cavity search was highly invasive

and led to an embarrassing exposure. *Id.* at 540. *But see United States v. Braks*, 842 F.2d 509, 513–15 (1st Cir. 1988) (finding a routine search when the smuggler lifted her skirt and showed her underwear to the officers because the smuggler was not required to remove her clothing, there was no physical contact with the officers, and the search was not insensitive to the smuggler's dignity).

A search is routine when it is non-exhaustive. The defendant in *Levy* was detained at the airport. 803 F.3d at 120. The officers searched the defendant's luggage and found a notebook with personal information, which they then examined and photocopied. *Id.* The court held the search was non-routine and exhaustive because photocopying the notebook went beyond the general searching allowed at a port-of-entry. *Id. But see id.* at 124 (skimming the notebook and returning it would have been sufficient for a routine search). Similarly, the defendant in *Cotterman* had his laptop taken from him by customs officials. *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013). The defendant was free to leave, but his belongings were brought to an office for a forensic examination. *Id.* The officer found password-protected files that contained hundreds of pornographic images, stories, and videos depicting children. *Id.* at 959. The court held the search was non-routine because the use of a forensic program to examine the laptop was exhaustive and allowed the officers access to an unprecedented amount of private information.[1] *Id.* at 967–68. *Contra Arnold*, 533 F.3d at 1009 (holding the search of defendant's laptop was routine because the officers performed a manual search and merely opened the laptop, which was not password-protected, and only searched the files that were visible).

[1] The Thirteenth Circuit erroneously applied the holding in *Riley v. California* and dictated all digital devices are exempt from routine border searches because of their capacity to hold private information. R. at 16–18; *see Riley v. California*, 134 S. Ct. 2473, 2494 (2014). While *Cotterman* identified that laptops can invoke an increased expectation of privacy, the court distinguished between manual and forensic searches of laptops. *See* 709 F.3d at 957. This Court should adopt the Ninth Circuit's distinction between manual and forensic searches as applied to searches under the border exception.

The search of Koehler's laptop was routine because it was minimally invasive. The search of Koehler's laptop occurred during a routine stop at the border, the search was brief, and the search did not pose a serious invasion of privacy or offend Koehler's dignity. *See* R. at 28. Ludgate found the laptop after searching Wyatt's car and identifying the $10,000 he lied about transporting. R. at 2. Ludgate opened the non-password protected laptop and flipped through the documents already open before corroborating the information with the database. *Id.* Similarly, the search of the smuggler's luggage in *Johnson* was minimally invasive because the officer performed a routine and brief search, and the search did not offend or pose a serious invasion of privacy. *See* 991 F.2d at 1292. In this case, Koehler was not subjected to a strip search, cavity search, or offensive search. *See generally* R. at 3, 5. This is in contrast to the search in *Montoya* that was non-routine because it required the officer to perform a humiliating cavity search and the search in *Braks* which was routine because the smuggler voluntarily lifted her skirt. *See* 473 U.S. at 540; 842 F.2d 513–15.

The search of Koehler's laptop was routine because it was non-exhaustive. While Koehler's laptop was an electronic device with greater storage capacity and access to personal information, there was no forensic search done to Koehler's laptop like there was in *Cotterman.* 709 F.3d at 967–68; R. at 3. The laptop in *Cotterman* was taken to a facility where the password-protected files were opened using a forensic software program and could be examined indefinitely. 709 F.3d at 957–59. Similarly, the notebook in *Levy* was photographed so the officers could examine each page *ad nauseam*. 803 F.3d at 124. These searches were exhaustive because they either deprived the defendants of their property, or created access for the officers to examine everything contained within the property. *Id.*; *Cotterman*, 709 F.3d at 967–68. The search of Koehler's laptop was like the routine manual search of the laptop in *Arnold* where the officers briefly opened the laptop, the laptop was not protected by a password, and the officers searched

through the files visible on the screen. 533 F.3d at 1009. Ludgate also briefly opened the laptop, the laptop was not protected by a password, and she flipped through the documents already open on the screen. R. at 3. Ludgate did not submit Koehler's laptop to an additional forensic search after the manual search. *Id.* In sum, Ludgate performed a routine search of Koehler's laptop because the laptop search was minimally invasive, it did not offend Koehler's dignity, and Ludgate performed a quick manual search of the laptop instead of a forensic search.

B. Assuming, *in arguendo*, the border search was non-routine, it was lawful under the border exception because Ludgate had reasonable suspicion to search Koehler's laptop since Ludgate knew that Wyatt was Koehler's fiancé, Koehler was a suspect in the kidnapping, the kidnappers requested the exact ransom amount that Wyatt lied about, and the laptop belonged to Koehler.

A non-routine search is also constitutional under the border search exception if the officer has reasonable suspicion to believe the individual is involved in criminal activity. *See United States v. Roberts*, 274 F.3d 1007, 1013 (5th Cir. 2001). Reasonable suspicion exists if information about the individual is particularized and an officer identifies the individual's behavior or circumstances as suspicious. *See Cotterman*, 709 F.3d at 963. Information is particularized if it identifies the individual being searched at the border. *See United States v. Jacobsen*, 466 U.S. 109, 112 (1984). An officer can identify the individual's behavior as suspicious when the individual is uncooperative, lies, or the officer observes oddities with the norm of travel. *Id.* Oddities may include unusual physical changes to the property or unidentified contraband. *Id.*

Reasonable suspicion exists during a non-routine search when information about the individual or crime is particularized. The defendant in *Saboonchi*, while returning to the United States, was referred to secondary screening because his name produced a hit in the database for being a distributor of parts used for military grade equipment. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 539–41, 543 (D. Md. 2014). After being interviewed, the defendant's cell phone

was taken and sent for forensic testing. *Id.* at 543. The court held that though the search was a non-routine search because of the privacy expectations related to a cell phone, it was a valid search under the border exception because there was particularized reasonable suspicion identifying the defendant as being involved in criminal activity. *Id.* at 571. Similarly, in *Roberts*, the officers received information that the defendant would be arriving at the airport and would be carrying diskettes containing child pornography. 274 F.3d at 1015. The officers corroborated this information with the defendant's photo and travel plans, stopped him, searched his luggage and the diskettes, and found child pornography. *Id.* at 1015–16. The court held reasonable suspicion existed for both searches because the officers corroborated particularized information identifying the defendant. *See id.* ("[T]he accurate transmission by . . . law enforcement agents of articulable objective facts, subsequently corroborated, was sufficient to create . . . reasonable suspicion.").

Reasonable suspicion exits during a non-routine search when an officer identifies the defendant's behavior or circumstances as suspicious of criminal activity. The officers in *Irving* received information during a search at an airport that the defendant was a convicted pedophile, was the subject of a criminal investigation, had visited an orphanage in Mexico, and was carrying children's books. *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006). The officers found the defendant's itinerary suspicious and subsequently discovered in his luggage diskettes containing child pornography. *Id.* The court held that the officers had reasonable suspicion to search the diskettes based on the "unusual conduct of the defendant, discovery of incriminating matter during routine searches, computerized information showing propensity to commit relevant crimes, [and] a suspicious itinerary." *Id.*; *see also Montoya De Hernandez*, 473 U.S. at 541–43 (holding that customs officials conducted a valid search based on reasonable suspicion because the officers were trained to identify the behavior of an individual smuggling drugs in her alimentary canal).

Ludgate had reasonable suspicion to search Koehler's laptop because the circumstances of the border search implicated criminal wrongdoing. Ludgate noticed that Wyatt appeared agitated and uncooperative, and specifically asked Wyatt if he was transporting $10,000, which he denied. R. at. 2. Ludgate asked Wyatt to open the trunk of the car and found $10,000 in $20 bills and a laptop with the initials "AK," which Wyatt said belonged to his fiancé, Koehler. *Id.* Ludgate ran Koehler's name through the border database and found a match, like in *Saboonchi*. *See* 990 F. Supp. 2d at 541; R. at 3. Ludgate discovered that Koehler was a felon and a person of interest in the kidnapping of the Ford children. R. at 3. Moreover, the money Wyatt lied about matched the description of the ransom the kidnappers specifically requested: $10,000 in $20 bills. *Id.* Like the searches in *Saboonchi* and *Roberts,* which were particularized and identified the defendants, the information Ludgate found connected Koehler to the laptop, to Wyatt, and to the potential ransom money, providing particularized suspicion of Koehler's involvement in the kidnapping. *See Roberts*, 274 F.3d at 1015; *Saboonchi*, 990 F. Supp. 2d at 541; R. at 3, 27–28.

Ludgate had reasonable suspicion to search Koehler's laptop because Wyatt's behavior was suspicious and the circumstances surrounding the search provided reasonable suspicion a crime was occurring. The officers in *Irving* found the defendant's trip to Mexico suspicious because he was a convicted pedophile, he was the subject of a criminal investigation, he visited an orphanage, and carried children's books in his bag. 452 F.3d at 124. Similarly, Ludgate found Wyatt's circumstances suspicious because he was agitated and uncooperative, he lied about transporting $10,000, his fiancé was a person of interest in the kidnapping and the money Wyatt lied about matched the ransom amount that was due the following day. R. at 27–28. Like the officers in *Montoya*, the officers searching Wyatt's vehicle were trained as border patrol agents to identify suspicious activity during a search. 473 U.S. at 541–43; R. at 26–28. Just as the officers

in *Montoya* had reasonable suspicion to believe the defendant was smuggling drugs, Ludgate had reasonable suspicion to check Koehler's laptop after witnessing Wyatt's behavior and discovering the money. *See* 473 U.S. at 543; R. at 27–28. Thus, even if the search of Koehler's laptop was non-routine, Ludgate performed a valid search supported by reasonable suspicion because Wyatt lied about transporting money matching the form of the ransom and Wyatt's fiancé was Koehler.

II. The Thirteenth Circuit erred in holding that the use of the PNR-1 drone and the handheld Doppler radar device to surveil Koehler's property were searches under the Fourth Amendment because under this Court's Fourth Amendment jurisprudence, both were lawful methods of warrantless surveillance.

The touchstone of the Fourth Amendment analysis is reasonableness: The Fourth Amendment protects only a person's subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *California v. Ciraolo*, 476 U.S. 207, 211 (1986). A warrantless physical intrusion of a constitutionally protected area is presumptively unreasonable. *United States v. Jones*, 565 U.S. 400, 407 (2012). Without physical intrusion, however, whether a search occurred under the Fourth Amendment is confined to the two-part reasonableness standard elucidated in *Katz* and its progeny. *Id*. at 412.

Therefore, the question of whether the use of the PNR-1 was a search will be analyzed under the *Katz* standard and this Court's jurisprudence regarding the constitutionality of non-trespassory aerial surveillance. *Infra* Part II.A. The question of whether the use of the Doppler radar device was a search, however, will be analyzed under the *Jones* and *Jardines* test for physical intrusion onto a constitutionally protected area and this Court's analysis in *Kyllo* regarding the constitutionality of sense-enhancing surveillance. *Infra* Part II.B.

A. The use of the PNR-1 drone was not a search under the Fourth Amendment because Koehler did not have a subjective expectation of privacy in the area surveilled that society will recognize as reasonable since she made no effort to conceal her activities from public view and the PNR-1 flew in a non-intrusive manner within a lawful altitude where aircraft routinely fly, rendering her expectation of privacy illusory.

Katz and its progeny have established a two-part inquiry to determine whether a person has a constitutionally protected expectation of privacy: The individual must have manifested a subjective expectation of privacy in the object of the challenged search and society must be willing to recognize that expectation as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Ciraolo*, 476 U.S. at 211. Thus, to constitute a Fourth Amendment search, the ostensible intrusion must impinge on both. *Oliver v. United States*, 466 U.S. 170, 177 (1984).

1. Koehler does not have a subjective expectation of privacy in open fields that society will recognize as reasonable.

An individual manifests a subjective expectation of privacy if the individual takes affirmative steps to conceal allegedly private activity from public view, such as erecting fences or awnings on his or her property, posting signs, or otherwise indicating the public's gaze is unwelcome.[2] Moreover, society will recognize an individual's expectation of privacy concerning activities conducted in the home or in the "curtilage" as reasonable, but will not recognize an alleged expectation of privacy concerning activities conducted in an "open field" as reasonable. *Ciraolo*, 476 U.S. at 213. The curtilage is the area immediately surrounding the home that extends the intimate activity associated with the home. *Id.*; *see also United States v. Dunn*, 480 U.S. 294, 301 (1987) (listing four factors indicative of whether a particular area is the curtilage).

[2] For example, in *Riley,* the defendant erected a wire fence around his entire property, posted a "Do Not Enter" sign, and covered the roof of his greenhouse with corrugated roofing panels. *Florida v. Riley*, 488 U.S. 445, 448 (1989). The defendant in *Ciraolo* erected a six-foot outer fence and a ten-foot inner fence completely enclosing the backyard of his residence. 476 U.S. at 209. In both cases, this Court found that each defendant manifested a subjective expectation of privacy. *See Riley*, 488 U.S. at 450; *Ciraolo*, 476 U.S. at 211.

The government's intrusion upon an "open field," however, is not a search proscribed by the Fourth Amendment because society will not recognize as reasonable the privacy of activities conducted in plain view. *Oliver*, 466 U.S. at 180 n.11 (noting that an open field "need be neither 'open' nor a 'field'"). In *Riley*, the area observed (the defendant's greenhouse) was located ten feet behind the defendant's home, while in *Ciraolo*, the area observed (the defendant's backyard) was "immediately adjacent" to the defendant's home. *Riley*, 488 U.S. at 448; *Ciraolo*, 476 U.S. at 213. In both cases, this Court held that the "close nexus" between the observed area and the home rendered each area within the curtilage. *Ciraolo*, 476 U.S. at 213; *accord* Riley, 488 U.S. at 450. *But see United States v. Breza*, 308 F.3d 430, 437 (concluding, after applying the *Dunn* factors, that a vegetable garden fifty feet away from the defendant's home was not curtilage).

In this case, Koehler did not manifest a subjective expectation of privacy because she did not take any affirmative steps to conceal her allegedly private activity from public view[3] and, more importantly, society will not recognize Koehler's expectation of privacy as reasonable because the activity in question occurred in an open field. The record establishes that the PNR-1 captured an image of a female near the pool house, which is fifty feet from the main house. R. at 4, 33. In *Ciraolo*, this Court required a "close nexus" between the defendant's home and the area observed to recognize the area as curtilage. *Compare* 476 U.S. at 213, *and Riley*, 488 U.S. at 448 (recognizing the area surveilled as curtilage because it was within ten feet of the defendant's home), *with Breza*, 308 F.3d at 437 (holding that the defendant's vegetable garden was an open field because it was fifty feet away from the main house). Moreover, an analysis under the factors

[3] There was no fencing enclosing the Macklin Manor property, no signs indicating the public's gaze was unwelcome, nor were there awnings or shading that would have otherwise shielded the exposed area between the main house and the pool house from aerial observation. R. at 10. This is in stark contrast to *Riley*, where the defendant erected a fence around his property, posted a "Do Not Enter" sign, and used roofing panels to cover his illicit activity. *Riley*, 488 U.S. at 448.

posited in *Dunn* for resolving curtilage questions is equally problematic for Koehler: (1) the pool house was not in close proximity to the main house; (2) it was not included within an enclosure surrounding the home; (3) it was not being used "for intimate activities of the home"; and (4) Koehler did not take any steps to impede public observation. *See Dunn*, 480 U.S. at 302–04.

2. Even if Koehler manifested a subjective expectation of privacy and the area surveilled is the curtilage, the use of the PNR-1 was not a search because lawful aerial surveillance rendered that expectation of privacy illusory.

Society will not recognize an individual's expectation of privacy in the curtilage as reasonable, under the second prong of *Katz*, if aerial surveillance is conducted in public navigable airspace and does not interfere with the defendant's use of his or her property. *Riley*, 488 U.S. at 449–50; *see, e.g.*, *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986). Of additional importance is whether "private and commercial flight [by the specific aircraft] in the public airways is routine in this country." *Riley*, 488 U.S. at 450. Moreover, whether the area observed is curtilage or an open field is irrelevant for deciding if warrantless aerial surveillance is a search.[4]

First, aerial surveillance is not a search if it is conducted in public navigable airspace: The surveilling aircraft operates from a lawful vantage point, in compliance with applicable regulations for the altitude limit of that specific aircraft. In *Riley*, the government surveilled a greenhouse on defendant's curtilage from a helicopter and this Court held that the government was "free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace" because society will not recognize as reasonable a claim for privacy from public observation within the public airways. 488 U.S. at 450–51; *accord Ciraolo*, 476 U.S. at 213–14. Because the altitude where an aircraft is lawfully in the public navigable airspace turns on the law regulating that specific aircraft, this

[4] The curtilage is not protected from visual surveillance that involves no physical invasion. *Katz*, 389 U.S. at 351; *see also Jones*, 565 U.S. at 412 (holding that in the absence of a physical invasion of a protected area, "mere visual observation does not constitute a search").

Court has held that aircrafts at varying altitudes are within the public navigable airspace. *See Dow*, 476 U.S. at 229 (airplane at 12,000 and 1,200 feet); *Riley*, 488 U.S. at 450 (helicopter at 400 feet).

Second, aerial surveillance of a home is not a search if it is conducted in a non-intrusive manner. Aerial surveillance is intrusive if there is "undue noise, wind, or threat of injury," the surveillance uncovers intimate details, or otherwise interferes with the individual's "normal use" of his or her property. *Riley*, 488 U.S. at 446. In the three aerial surveillance cases this Court has decided, none were found to be intrusive. *See Riley*, 488 U.S. at 446 (no intrusion from 400 feet); *Ciraolo*, 476 U.S. at 214 (no intrusion from 1,000 feet); *Dow*, 476 U.S. at 229 (holding that photographs from aerial surveillance were "not so revealing of intimate details as to raise constitutional concerns," despite the precision camera's ability to identify objects one-half inch in diameter). *But see United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (holding that video surveillance of defendant's backyard for thirty days is intrusive); *NORML v. Mullen*, 608 F. Supp. 945, 955 (N.D. Cal. 1986) (angling helicopter to see inside window is intrusive).

Third, aerial surveillance is not a search if flight by the specific aircraft in the public airspace is routine in this country. In *Ciraolo*, this Court held that one does not have a reasonable expectation of privacy from "private and commercial flight [of airplanes] in the public airways" as they are "routine." 476 U.S. at 215. In *Riley*, this Court held that aerial surveillance was not a search because private and commercial flight by helicopters in the public airways "is routine in this country." 488 U.S. at 450. The relevant inquiry is not, as Respondent will likely argue, whether the aircraft was in the specific public airways where the public travels with sufficient regularity.[5]

[5] The Thirteenth Circuit erroneously interprets the "routineness" requirement to mean that the aircraft must fly in an area "routinely used by other aircraft" to satisfy *Riley*. *See* R. at 19. Although the Thirteenth Circuit cites to *Riley*, *id.*, this Court has never required the aircraft to operate in the specific public airways where the public travels with "sufficient regularity." *See* Brandon Nagy, *Why They Can Watch You: Assessing the Constitutionality of Warrantless Unmanned Aerial*

In this case, the use of the PNR-1 was not a search because the drone operated lawfully in navigable airspace per Pawndale law, the drone did not interfere with Koehler's use of her property in any manner, and the use of drones is routine in U.S. public airways.

First, the PNR-1 drone is pre-programmed to navigate at a maximum altitude of 1,640 feet, the limit for drones in Pawndale. R. at 39. Although some PNR-1 drones have network connectivity errors causing them to operate as high as 2,000 feet, Officer Lowe testified that in the PNR-1's previous six deployments it did not exceed its pre-programmed altitude limit and experienced no difficulties. *Id.* at 38–41. Respondent will likely argue that since the police lost track of the PNR-1's altitude for four-to-five minutes, it was not lawfully in the public airspace. *Id.* at 41. However, that is speculation, and without any evidence of non-compliance, Koehler has not met her burden.

Second, the deployment of the PNR-1 was non-intrusive. The PNR-1 was deployed at approximately 5:00 AM and hovered over Macklin Manor for only fifteen minutes, wherein it recorded three minutes of videos and twenty-two photographs. R. at 4–5. The drone did not break through any barriers nor did it observe intimate details associated with Koehler's use of the property. *Id*. at 4, 10. This is in stark contrast to the intrusive search in *Mullen*, where numerous helicopters flew below tree-top altitudes and angled themselves to see inside the victim's windows. 608 F. Supp. at 955. Moreover, the use of cameras in aerial surveillance has been sanctioned by this Court in *Dow*, 476 U.S. at 229, and the use of the PNR-1 to capture three minutes of video is vastly different from the intrusive, thirty-day video surveillance in *Cuevas-Sanchez*. *See* 821 F.2d at 249. Notably, the Thirteenth Circuit does not argue that the PNR-1 was intrusive. R. at 19.

Third, private and commercial use of drones is routine in the United States. Although

---

Surveillance by Law Enforcement, 29 **Berkeley Tech. L.J.** 135, 154 (2014) (contrasting the language in the plurality opinion in *Riley* to the concurrence). *But see Riley*, 488 U.S. at 445 (O'Connor, J., concurring) (advocating for a "sufficient regularity" standard).

Respondent may argue that the PNR-1's use is not routine in the public airways because Eagle City is the only department in Pawndale using the drone, the PNR-1 is used by police departments in thirty-five states and the relevant inquiry does not turn on the model of the aircraft, but rather the use of that aircraft "in this country." *See Riley*, 488 U.S. at 450 n.2 (examining the public and private use of all helicopters in 1980 and concluding that helicopter flight is routine); R. at 46. Like helicopter use in 1980, drone use in the public airways today is routine in the United States.[6]

Thus, even if Koehler manifested a subjective expectation of privacy and the area surveilled is curtilage, the use of the PNR-1 was not a search because routine and non-intrusive aerial surveillance conducted in navigable airspace renders her expectation of privacy illusory.

B. The use of a handheld Doppler radar device was not a search under the Fourth Amendment because the information obtained was otherwise discoverable through the continued use of foot and aerial surveillance and Doppler radar devices are readily available online at a low cost, are widely manufactured, and such radar-based technology is used by the public generally.

The use of sense-enhancing technology to obtain information regarding the interior of a home constitutes a search if the information could not otherwise have been obtained without physical intrusion into a constitutionally protected area and the technology in question is not in public use. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Where the government obtains information by physically intruding onto a constitutionally protected area, a search has occurred. *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *e.g*, *Jones*, 565 U.S. at 407. The government in this case employed a handheld Doppler radar device in two distinct instances: (1) outside of the front door of Koehler's main house; and (2) outside of Koehler's single-room pool house, which is fifty

[6] Purchasers can choose from 146 different types of drones manufactured by sixty-nine different companies. Nagy, *supra* note 5, at 138. Drones are used by numerous law enforcement agencies for search and rescue missions, at least two colleges offer training for remote pilots, and it is estimated that 10,000 commercial drones will be operating in the United States by 2020. *Id.* at 139–42.

feet away from the main house. R. at 4–5. Although the area immediately outside of the main house's front door is likely protected as "curtilage," the area outside the pool house is an unprotected "open field." *See supra* Part II.A.1. Because the constitutionality of each use of the radar device depends partially on if the government physically invaded a constitutionally protected area, whether each use of the Doppler radar device was a search must be treated separately.

1. The use of the handheld Doppler radar device *on the pool house* was not a search because there was no trespass on a protected area, the device revealed information that was otherwise obtainable, and the device is in public use.

The use of sense-enhancing technology to gather information regarding the interior of a home is not a search under the Fourth Amendment if the information could "otherwise have been obtained without physical intrusion into a constitutionally protected area," and the technology is not in general public use. *Kyllo*, 533 U.S. at 34. In a 5-4 decision, this Court held in *Kyllo* that the use of a thermal-imaging device, capable of detecting the emission of infrared radiation from objects inside of a home, constitutes a search. 533 U.S. at 29–30, 34 (stating that the ability to detect "relative amounts of heat within the home" is a violation of one's objective expectation of privacy). This Court did not address the dissent's proposition that heat emitting from a home might otherwise be observable without physical intrusion: "[T]he ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building . . . ." *Id.* at 43 (Stevens, J., dissenting).[7] Moreover, *Kyllo* failed to provide a standard for determining when a device is in "general public use" and declared without reason that thermal-imaging devices were not in public use. *See id.* at 47 (Stevens, J., dissenting) ("[T]he contours of its new rule are uncertain . . . how much use is general public use is not even hinted at by the Court[] . . . ."). Proposing that thermal-

[7] The Tenth Circuit is the only circuit court to ponder the validity of a handheld Doppler radar device, but the court did not have enough information about the device to determine whether its use was a search under *Kyllo*. *See United States v. Denson*, 775 F.3d 1214, 1218 (10th Cir. 2014).

imaging devices might be in general public use, the dissent noted that the device had 1,000 manufactured units and is "readily available to the public for commercial, personal, or law enforcement purposes." *Id.* The four justices thus offer criteria for if a device is in public use: (1) the number of manufactured units; and (2) whether the device is readily available to the public. *Id*.

In this case, Perkins' use of the handheld Doppler radar device did not reveal information that was not otherwise observable without physical intrusion into the pool house. The use of the device on the pool house revealed two pieces of inferences: (1) that there were three individuals in the pool house, close together and unmoving; and (2) a fourth individual was nearby, pacing. R. at 5. The District Court correctly found that this information was otherwise observable without physical intrusion into a protected area. *Id.* at 11. First, Hoffman was conducting surveillance on foot and eventually would have observed the number of people going in and out of Macklin Manor. *See id.* at 3. Second, continued aerial surveillance would have detected the number of people going in and out of the pool house. *Id.* This conclusion is consistent with this Court's jurisprudence on electronic and aerial surveillance of individuals in their home. *See Ciraolo*, 478 U.S. at 213 (holding that aerial surveillance of a home was not a search because "any member of the public" could have seen what the "officers observed"). The District Court's opinion is also supported by the four justices in *Kyllo*. *See* 533 U.S. at 43 (Stevens, J., dissenting) (noting that a neighbor could observe heat emanating from a home). Respondent may argue that a Doppler radar device is invasive, but the District Court's opinion cannot be said to approve of intrusive technological surveillance when the police could see no more than a casual observer. Moreover, the information attained through the Doppler radar device was not information "regarding the interior of the home," but rather, inferences that the officers drew from a device that emits radio waves and detects changes in frequency. The Doppler radar device cannot reveal the internal layout of a

building, instead, it emits a radio wave that detects movements up to fifty feet away, allowing police to draw inferences from frequency undulations. R. at 4, 33. The device does not produce a numerical number and attaches significance to it; instead, the officers interpret the frequency undulations and infer how many people are inside the building. *See id*. The device can be misled by house pets moving in a building and the officers can draw incorrect inferences—as they did, identifying one person inside of the main house when there were three individuals. *Id.* at 35.

In addition, handheld Doppler radar devices are in public use. Although *Denson* did not address whether handheld Doppler radar devices are in public use, the record demonstrates that Doppler radar devices are "extremely popular" among law enforcement and are used extensively in Eagle City's Police Department.[8] *See* R. at 11, 33. The Thirteenth Circuit disagreed, arguing that *Kyllo* requires them to be "generally in common use." R. at 20. Since "generally" is undefined in *Kyllo*, the criteria offered by the dissent is instructive. *See* 533 U.S. at 47 (Stevens, J., dissenting). First, the Doppler radar device is cheap, costing about $400, and similar radar devices, like the Range-R, are manufactured in North America and Europe. R. at 34; *see* **Range-R Through the Wall Radar**, http://www.range-r.com/distrib/na.htm (last visited Oct. 15, 2017). Second, these devices are readily available to the public online. R. at 34. Last, the Doppler radar technology is not novel, it is used generally: Medical providers use radar devices for prenatal care, geographers use Doppler devices to predict weather, and police use handheld radar devices to issue citations.

2. Even if the use of the handheld Doppler radar device on Koehler's *main house* was a trespass onto a constitutionally protected area, Koehler cannot identify any "fruits" of that particular search and suppression is therefore not appropriate.

Where the government physically intrudes onto a constitutionally protected area to obtain

[8] Furthermore, at least fifty U.S. law enforcement agencies use radar devices for surveillance. *See* Brad Heath, *New Police Radars Can 'See' Inside Homes*, USA TODAY (Jan. 20, 2015, 1:27 PM), http://www.usatoday.com/story/news/2015/01/19/police-radar-seethroughwalls/22007615.

information, a search has occurred. *Jardines*, 569 U.S. at 1, 11 (finding that the government's physical intrusion onto the front porch of a home with a drug-sniffing dog constituted an impermissible search of the curtilage—a constitutionally protected area). In this case, Perkins used a handheld Doppler radar device to scan the front door of Koehler's main house. R. at 4–5. Thus, Perkins' physical trespass onto Koehler's front porch to obtain information about *the main house* is likely a warrantless search. Nonetheless, the search of Koehler's main house did not produce any "fruits" warranting suppression because the search only uncovered that one person was in the front room of the main house. *Id*. at 5. It is unfathomable that this modicum of information could have made the difference in a probable cause determination. *See infra* Part III.

III. Assuming, in *arguendo*, that the use of the PNR-1 drone and handheld Doppler radar devices are searches under the Fourth Amendment, Koehler is not entitled to relief because she fails to show "fruits" from the searches since the border search of Wyatt's car and the ensuing investigation created probable cause to support a search warrant.

Under the exclusionary rule, evidence seized during an illegal search must be suppressed as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). In assessing whether evidence was independently obtained or must be suppressed as "fruits," courts must determine whether the evidence seized was obtained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*. at 488.

Probable cause existed to support a search warrant for Macklin Manor notwithstanding the information obtained from the PNR-1 and handheld Doppler radar device. The District Court accurately concluded that "Detective Perkins had adequate probable cause for a search warrant [] without the information acquired by the PNR-1 drone and the handheld Doppler radar device," and he only initiated more surveillance to "maintain officer safety" when executing a search

warrant.[9] R. at 11. The Thirteenth Circuit was wrong in claiming that "the officers were only able to link Macklin Manor to the kidnappings after using the PNR-1 drone and the handheld Doppler radar device." *Id*. at 20. Prior to the PNR-1 and Doppler radar device "searches," the police established: (1) that Koehler's fiancé, Wyatt, was crossing into Eagle City, where the children were likely being held; (2) that Wyatt was uncooperative and lied about carrying the exact amount of money listed in the ransom note given to Ford; (3) that Wyatt sought to cross the border the day before the ransom money was due; (4) that Koehler's laptop contained files noting Ford's home address; (5) that Koehler owned Macklin Manor; and (6) that Koehler was a convicted felon and was a person of interest in the kidnappings. *Id.* at 2–3, 44. These facts support the conclusion that a link between Macklin Manor and the kidnappings existed *prior* to the drone and radar use, and thus, a neutral magistrate would have issued a warrant upon probable cause stemming from the border search and the ensuing investigation. *See United States v. Sokolow*, 490 U.S. 1, 10 (1989) ("In determining probable cause, the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal act.").

The evidence seized during Koehler's arrest was not procured by the exploitation of ostensibly unlawful searches, but rather by "means sufficiently distinguishable" to purge the searches of "the primary taint" and suppression is not warranted under this Court's jurisprudence.

CONCLUSION

For the foregoing reasons, the judgement of the United States Thirteenth Circuit Court of Appeals should be reversed and Respondent's conviction reinstated.

Respectfully submitted.

[9] "A reviewing court should take care . . . to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts" by trial court judges who are intimate with the background facts and thus "deserve deference." *Ornelas,* 517 U.S. at 699.