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 Appeal
for the Thirteenth Circuit

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the government's search of Respondent's laptop at a border station a valid search pursuant to the border search exception to the warrant requirement?

II. Did the use of a PNR-1 drone and handheld Doppler radar device constitute a search in violation of Respondent's 4th Amendment rights?

STATEMENT OF FACTS

The Eagle City border station has seen an increase in criminal activity in the last two to three years. R. at 24. Generally, the peak time for criminal activity is immediately before peak traffic hours where there is an increased volume of cars moving through the border station. R. at 25. However, it is not unusual for arrests to occur during the early morning hours. R. at 25. Agents Ludgate and Dwyer typically stop of every vehicle that comes through the Eagle City Border Station between midnight and 8:00 A.M. and ask the drivers a routine set of questions. R. at 24.

On August 17, 2016 Agent Ludgate, along with her partner Agent Dwyer, were stationed at the Eagle City border station. R. at 24. While on duty, the agents stopped a black Honda Civic driven by Scott Wyatt. R. at 25. During the stop, the agents asked Mr. Wyatt whether he was travelling with $10,000 or more on his person and informed him that the stop was routine, and they had the right to search his vehicle. R. at 26. Agent Ludgate noticed that Mr. Wyatt was "agitated and uncooperative." R. at 26. He refused to make eye contact, fidgeted with the steering wheel, and appeared very pale. R. at 26. Due to Mr. Wyatt's unusual behavior, Agent Ludgate suspected that he was hiding something and asked him to step out of his vehicle and open his trunk. R. at 26.

While searching the trunk, Agent Ludgate saw a laptop with the initials "AK," and $10,000 in twenty dollar bills. R. at 26. When asked about the initials on the laptop, Mr. Wyatt told Agent Ludgate that the laptop belonged to his fiancé, Respondent Amanda Koehler. R. at 26. The laptop was not password protected so Agent Ludgate opened the laptop and could immediately scanned the desktop. R. at 28. She noticed multiple documents open on the desktop which contained personal information about Mr. Timothy Ford, such as his bank statements and his personal schedule. R. at 28. Agent Ludgate saw a lease agreement for an address that did not

pertain to Mr. Ford, but read the name "Laura Pope." R. at 28. Agent Ludgate searched Respondent's name in Eagle City Border patrol database to discover that Respondent used the alias "Laura Pope," had multiple felony convictions for various violent crimes, and was also a person of interest in the recent kidnappings of John, Lisa and Ralph Ford. R. at 27.

On July 15, 2016, the three Ford teenagers, children of billionaire tech mogul Timothy Ford, disappeared. R. at. 44. Recently the FBI and Eagle City Police Department (ECPD) received information that the Ford children were located somewhere in Eagle City, but there were no further leads. R. at 44. The ECPD informed their agents that the kidnappers had requested $10,000 in twenty dollar bills. R. at 27.

Agent Ludgate suspected Mr. Wyatt's was involved in the kidnapping based on the money found in the trunk matching kidnappers' request and his close personal relationship with Respondent. R. at 27. She subsequently arrested Mr. Wyatt for failing to disclose the $10,000 in his trunk. R. at 27. Agent Ludgate sent the information she gathered to lead investigator for the Ford kidnappings, Detective Perkins of the ECPD. R. at 31. The information obtained from the laptop listed the address to Macklin Manor, which is a large estate that sits on top of Mount Partridge located on the outskirts of Eagle City. R. at 32. ECPD recently learned that Respondent has used her alias Laura Pope to rent out Macklin Manor. R. at 32.

After receiving this information, Detective Perkins set out for Macklin Manor with Officer Lowe and Officer Hoffman. R. at 32. When the officers arrived, they did not immediately conduct a search. R. at 32. To ensure the premises was safe, Detective Perkins instructed Officer Lowe to conduct aerial observations using the PNR-1 drone. R. at 32.

The PNR-1 drone is one of the more affordable drones when comparing its price with its quality. R. at 39. The PNR-1 drone uses a high definition digital single-lens reflex camera or

DSLR. R. at 39. This DSLR allows an individual to see exactly what the lens is seeing when taking pictures. R. at 39. In addition, the drone is equipped with a video camera. R. at 39. The drone can hold 30 photos and 15 minutes of video time. R. at 40. Furthermore, the drone comes with a preprogrammed flight plan which forces the drone to fly at the state of Pawndale's maximum

height of 1640 feet. R. at 40. The PNR-1 drone accomplishes this pre-programmed height by connecting to a network. R. at 39. In the six months since the ECPD purchased the drone, Officer Lowe ran test-runs once every month to ensure effective performance, and the drone never exceeded 1640 feet. R. at 41. Furthermore, one of these test-runs occurred merely three days prior to the aerial observation of Macklin Manor. R. at 41.

The drone revealed the layout of the estate, which contained a pool 15 feet from the residence, and a pool house 50 feet away from the main house. R. at 33. Furthermore, the drone captured an image of Respondent on the property. R. at 33. In addition to the drone surveillance, Officer Hoffman was instructed to use the handheld Doppler radar device. R. at 33.

The handheld Doppler radar is a device that is very popular among law enforcement agencies. R. at 33. The device is on the low end in price costing roughly $400. R. at 35. There were so many officers within ECPD using the device that Detective Perkins instructed Detective Lowe to hold a meeting about the device. R. at 33. The Doppler uses radio waves to detect movement in a structure within a range of 50 feet from the device. R. at 33. The Doppler detects how many people are breathing and gives a rough estimate as to the person's location. R. at 33. The device cannot reveal the specific layout of a building. R. at 33.

Officer Hoffman deployed the Doppler radar on the main house and on the pool house. R. at 33. The scan of the pool house revealed three stationary individuals with another individual pacing near the entrance to the pool house. R. at 34. After determining the number of individuals

on the premises, Detective Perkins obtained warrant for the estate and brought a SWAT team to search the home. R. at 34.

When the officers entered the pool house, they located the Ford children bound to chairs. R. at 34. Officer Lowe and Hoffman apprehended Respondent after a foot-chase. R. at 34. This suit followed shortly thereafter. R. at 1.

SUMMARY OF ARGUMENT

This Court should reverse the Appellate Court's ruling, which reversed the district court's denial of Respondent's motion to suppress evidence.

The digital border search conducted on Respondent's laptop did not violate the Fourth Amendment. Pursuant to the border search exception, the search was routine and nonintrusive. Alternatively, even if the search was nonroutine, the circumstances supplied the border agents with the requisite reasonable suspicion to search the laptop.

The use of the PNR-1 drone and handheld Doppler radar device did not constitute a search in violation of Respondent's Fourth Amendment rights. Respondent did not have a reasonable expectation of privacy from aerial observation by the PNR-1 drone. The use of the handheld Doppler radar device was not a search because the information gained was otherwise obtainable, and the device was in common use. Nevertheless, the evidence obtained from the pool house should not be suppressed because this was gathered outside of the curtilage of the home.

Finally, should this Court hold the use of the PNR-1 drone and handheld Doppler radar device were constitutional violations, the evidence obtained while searching Macklin Manor pursuant to a search warrant, should not be suppressed. Probable cause to obtain a search warrant existed after the digital border search.

STANDARD OF REVIEW

When considering the denial of a motion to suppress evidence, the district court's factual findings are reviewed for clear error and its legal conclusions *de novo*. *United States v. Woods,* 711 F.3d 737, 740 (6th Cir. 2013). This Court considers the evidence in the light most favorable to the government, and gives due weight to the factual inferences drawn by the district court. *United States v. Galaviz*, 645 F.3d 347, 352 (6th Cir. 2011); *United States v. Caruthers,* 458 F.3d 459, 464 (6th Cir. 2006). The burden of proof falls on the defendant to prove that he had a "legitimate expectation of privacy in the area searched." *United States v. Mathis*, 738 F.3d 719, 730 (6th Cir. 2013). Furthermore, this Court reviews a finding of probable cause to issue a search warrant for clear error, and gives "great deference" to such findings. *United States* v. *Krupa*, 633 F.3d 1148, 1151 (9th Cir. 2011)

ARGUMENT

I. This Court should reverse the appellate court's decision and deny Respondent's motion to suppress the evidence because the border patrol agents did not violate the Fourth Amendment when conducting the digital search.

The digital border search of Respondent's laptop at the Eagle City border station was valid and did not violate her Fourth Amendment rights. The agents simply exercised the government's responsibility to protect the sovereign from outside harm while upholding the Fourth Amendment. The Fourth Amendment protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV. The reasonableness of a search and seizure depends on the totality of the circumstances. *See United States v. Jacobsen*, 466 U.S. 109, 124 (1984). Although, all warrantless searches and seizures are presumed unreasonable, the search may be deemed reasonable if the government can point to an established exception. *Katz v. United States,* 389 U.S. 347, 357 (1967).

In short, reasonableness is determined by balancing the level of intrusion with the level of suspicion. *Id.*

A. The digital border search was routine and nonintrusive pursuant to the border search exception.

Agent Ludgate exercised her authority under the border search exception to search Respondent's laptop. Searches made at the border "pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country" are generally reasonable simply by the fact that they occur at the border. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). The border search exception allows government agents to conduct warrantless, suspicionless, routine searches of individuals, their vehicles, and their effects when passing through a border station. *Id.* The exception stems from the notion that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Id*. at 154. "Not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *United States v. Montoya de Hernandez,* 473 U.S. 531, 540 (1985).

To determine whether the border search exception applies, this Court must turn to a two-part inquiry: (1) whether the search was routine, and (2) whether the search was intrusive. *See United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013); *see also United States v. Arnold*, 523 F.3d 914, 947 (9th Cir. 2008). Routine searches are ones that "do not seriously invade an individual's right to privacy." *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). For this reason, routine searches do not require reasonable suspicion, probable cause, or a warrant. *Montoya de Hernandez*, 473 U.S. at 538. Typically, this Court has reserved the nonroutine label for intrusive border searches of a person—not their belongings or vehicles. *Flores-Montano*, 541

U.S. at 152. However, "some searches of property are so destructive" that they would be intrusive and require reasonable suspicion *Id.* at 155-56. Still, quick and nonintrusive digital border searches require no reasonable suspicion. *Arnold*, 523 F.3d at 947.

In *United States v. Arnold*, the defendant was instructed to "boot up" his laptop during a \ customs search at an airport. *Id.* The customs agent sifted through the defendant's laptop to find incriminating evidence. *Id.* While this may seem intrusive, the Ninth Circuit held that this was a routine search, and reasonable suspicion was not needed to examine files on defendant's laptop. *Id.* The court relied on the fact that the defendant never claimed the search was damaging in any way, and that the search was not conducted in a "particularly offensive manner." *Id.* at 1009.

Although the court in *United States v. Cotterman* came to a different holding, the court still upheld the rules and reasoning from *Arnold*. *Cotterman*, 709 F.3d at 960. In *Cotterman*, border agents retrieved two laptops and three digital cameras from the defendant's car. *Id*. After searching through their contents, one of the officers found several password-protected files. *Id.* The agents allowed the defendant to leave the border, but they retained the laptops and cameras for off-site forensic examination. *Id*. The court ultimately held that although this off-site forensic examination of the laptop required reasonable suspicion, had the search of the password protected files been conducted at the border, the court "would be inclined to conclude it was reasonable even without particularized suspicion." *Id.* at 961.

The search of Respondent's laptop was certainly routine and nonintrusive when compared to the searches in *Arnold* and *Cotterman.* .The search was neither damaging to the actual laptop nor its contents. Agent Ludgate opened the laptop and found several documents containing Timothy Ford's personal information and a lease agreement for Macklin Manor. R. at 28. This information was obtained without opening any additional documents. R. at 28. Also, the search

was not conducted in a "particularly offensive manner" because Agent Ludgate simply turned on the laptop and browsed through documents already open. R. at 28. Because agents in previous cases have been allowed, without reasonable suspicion, to pry through the contents of a laptop regardless of whether they were previously open, it was certainly reasonable to simply open Respondent's laptop. *See Arnold,* 523 F.3d at 947; *see also Cotterman*, 709 F.3d at 960.

Because Agent Ludgate's search of Respondent's laptop was routine and nonintrusive, the border search exception applies, and reasonable suspicion was not required. Consequently, Respondent's Fourth Amendment rights were not violated.

B. Even if this court was to find the search was non-routine, Agent Ludgate had reasonable suspicion to search the vehicle and laptop.

Though the above analysis establishes that the border search exception applies, Agent Ludgate nonetheless had authority to search the laptop because reasonable suspicion was present. Non-routine forensic digital border searches require reasonable suspicion. *Cotterman*, 709 F.3d at 968. A reasonable suspicion analysis hinges on the totality of the circumstances*. United States v. Smith*, 273 F.3d 629, 634 (5th Cir. 2001). To aid in this analysis, the Second Circuit Court of Appeal set forth a list of non-exhaustive factors: (1) "defendant's unusual conduct," (2) "discovery of incriminating matter during routine searches," (3) "computerized information showing propensity to commit relevant crimes," or (4) "a suspicious itinerary." *United States v. Irving,* 452 F.3d 110, 124 (2d Cir. 2006).

In *Irving*, the court used these factors to determine that the customs agents had the requisite reasonable suspicion to search the defendant's computer diskettes. *Id*. The defendant was a convicted felon and subject of an ongoing criminal investigation. *Id*. The agents discovered incriminating evidence in his luggage during a routine search. *Id*. These facts proved sufficient to establish reasonable suspicion for examining the diskettes.

Similarly, in this case, the factual analysis clearly gives rise to reasonable suspicion. Mr. Wyatt exhibited unusual conduct by appearing "extremely agitated and uncooperative." R. at 26. The incriminating matter discovered at the border include the $10,000 in twenty dollar bills in Mr. Wyatt's trunk, which Mr. Wyatt lied about having, and is exactly what the Ford kidnappers requested, along with Respondent's laptop. R. at 26. Furthermore, the border agents discovered that Respondent was a felon and person of interest in recent kidnappings of the Ford children, which when analyzed in conjunction with the money, shows propensity to commit relevant crimes R. at 26. Therefore, under the *Irving* factors, Agent Ludgate had reasonable suspicion to conduct a search of Respondent's laptop at the border.

In conclusion, the digital border search was valid and within the confinements of the Fourth Amendment. The agents' actions were both routine and nonintrusive pursuant to the border search exception. Even if this Court was to find the search nonroutine, the agents' reasonable suspicion nonetheless justified the search. Therefore, the Supreme Court should reverse the appellate court's ruling and hold that the border search was constitutional.

II. The government's use of the PNR-1 drone and handheld Doppler radar did not violate Respondent's Fourth Amendment rights.

The use of the PNR-1 drone and handheld Doppler radar did not constitute a search because Respondent did not have a reasonable expectation of privacy. While courts admit that the standard regarding the use of modern technology is blurred, the court has also stressed the importance of allowing police to use modern technology to outsmart those who violate the law. The Sixth Circuit states specifically that "law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." *United States v. Skinner*, 690 F.3d 772, 778 (6th Cir. 2012).

This Court has long recognized that "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 360. Any Fourth Amendment analysis of one's reasonable expectation of privacy hinges on the inquires of "whether the individual manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). A defendant bears the burden of proving that he had a legitimate expectation of privacy in the object to be searched or items seized. *Mathis*, 738 F.3d at 729.

A. The use of the PNR-1 drone did not violate Respondent's Fourth Amendment rights because there was no reasonable expectation of privacy against the aerial observation.

Officer Lowe's use of the PNR-1 drone did not violate Respondent's Fourth Amendment rights because Respondent did not have a reasonable expectation of privacy against aerial observation above Macklin Manor. Although the Fourth Amendment does provide an expectation of privacy to individuals, this expectation does not extend to all areas or protect from all observation. *Hester v. United States*, 256 U.S. 57, 59 (1924). For example, the Fourth Amendment does not preclude an officer from making observations of clearly visible activities from a public vantage point in which the officer has every right to be. *Ciraolo*, 476 U.S. at 213. This Court specifically stated that the "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.* Furthermore, "there is no reasonable expectation of privacy when an aerial search occurs in navigable airspace in a nonintrusive manner, and any member of the public flying in the same airspace could have seen the area being searched." *Id.* In short, this Court in *Ciraolo* provides a four-part analysis to determine the constitutionality of aerial observation. Aerial

observation should be deemed permissible under the Fourth Amendment if it occurs (1) in public navigable airspace, (2) in a nonintrusive way, (3) from a vantage point where any member of the public could view, and (4) without violating any laws. *See Ciraolo*, 476 U.S. at 213; *see also Florida v. Riley*, 488 U.S. 445, 451 (1989).

1. The aerial observation by the PNR-1 drone occurred in public, navigable airspace which is permissible under the Fourth Amendment.

The PNR-1 drone was flying in navigable airspace when conducting surveillance over Macklin Manor. While this alone is not enough to fulfill the Fourth Amendment's requirements, it is the first of four considerations. In *Ciraolo*, Santa Clara Police flew over respondent's home responding to an anonymous tip about marijuana plants. 476 U.S. at 213. The plane flew at an altitude of 1,000 feet, which is within public navigable airspace, and police observed marijuana plants. This Court held in *Ciraolo* that "the Fourth Amendment does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 215.

It is indisputable that the PNR-1 drone flew in a public navigable airspace. There is no evidence in the record to suggest that this airspace—over Macklin Manor—at this altitude—1,640 feet—was not in public airspace open to the public. Thus, the PNR-1 drone was flying in public navigable airspace.

2. The aerial observation by the PNR-1 drone was nonintrusive.

The PNR-1 drone's aerial observation was nonintrusive to both Macklin Manor and its residents. Courts have established that "unobtrusive aerial observations of space open to the public are generally permitted under the Fourth Amendment, and even a minor degree of annoyance or irritation on the ground will not change the result." *State v. Davis*, 360 P.3d 1161, 1168 (N.M.

2015) (holding that the low-flying helicopter hovering 50-feet above a home for a prolonged period was unconstitutional pursuant to the degree of intrusion). There has been no violation of the Fourth Amendment when aerial observation did not interfere with the normal use of the home or curtilage, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, wind, dust, or threat of injury. *Florida v. Riley,* 488 U.S. at 451.

In *Florida v.* Riley, where the officers flew only 400 feet above land, this Court found that the absence of interference with respondent's normal use of the property, observation of intimate details within the home, undue noise, wind, dust or threat of injury indicated there was no violation of the Fourth Amendment. *Id.* Additionally, in *California v. Ciraolo*, this Court reasoned that officer's flying over the defendant's property at 1,000 feet was nonintrusive. 476 U.S. at 215.

In this case, the PNR-1 drone hovered over Macklin Manor at a pre-programmed height of 1,640 feet. When compared to the helicopter at 400 feet in *Florida v. Riley* and the plane at 1,000 feet in *Ciraolo*, this altitude well exceeds both previous cases that were consequently deemed nonintrusive. It surveilled Macklin Manor for about 15 minutes while only taking 22 photographs and recording three minutes of video. R. at 40. The observation showed only the layout of Macklin Manor which is not surrounded by a gate or fence. R. at 4. The photographs produced images of an individual, confirmed as Respondent, roughly 50 feet from the main house. R. at 33. The drone surveillance did not interfere with Respondent's use of the property in any way. Furthermore, the surveillance did not produce any undue noise, wind, dust, or threat of injury. In accordance with jurisprudence produced by this Court, the PNR-1 drone surveillance was nonintrusive and thus is not in violation of the Fourth Amendment.

3. The PNR-1 drone was used in an area in which any member of the public could lawfully occupy.

Respondent did not have a reasonable expectation of privacy from aerial observation by the PNR-1 drone because any member of the public flying in this airspace could have seen what it observed. This Court determined that there should be no Fourth Amendment violation where any member of the public could fly at the altitude where the observation occurred and view the property. *Florida v. Riley,* 488 U.S. at 451. Further, the fact that a person has taken measures to restrict view does not preclude an officer from observing from a "public vantage point where he has a right to be and which renders activities clearly visible." *Ciraolo*, 476 U.S. at 213. The Appellate Court erred by considering whether "the airspace [was] accessible to the public and routinely used by other air craft" because this was derived from *Florida v. Riley*, a plurality opinion. 488 U.S. at 451. However, the majority opinion in *Ciraolo*, which is precedential authority, stated that it was only important that "any member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Ciraolo*, 476 U.S. at 213.

In *Florida v. Riley*, the aerial observation was not a violation of the Fourth Amendment because "[a]ny member of the public could legally have been flying over [Respondent's] property in a helicopter at the altitude of 400 feet and could have observed the greenhouse." 488 U.S. at 451. Also, in *Oliver v. United States*, this Court ignored the fact that the defendant has planted his marijuana garden in an area that was secluded and obstructed from view by natural foliage. 466 U.S. 170, 183 (1984). Property secluded in an area by natural foliage does not give rise to a greater expectation of privacy from aerial observation. *See id.*

While utilizing an incorrect legal standard, the Court of Appeals relied on the presence of fog and lack of navigability of the mountains surrounding Macklin Manor to disprove public use. R. at 19. Just as the defendant in *Oliver* attempted to obstruct the view by hiding illegal activity

with natural foliage, Respondent's estate was shielded from observation by fog and unforgiving travel conditions, R. at 19. However, the presence of fog and the frequency of flying are irrelevant when utilizing the correct legal standards from *Oliver* and *Ciraolo*. Furthermore, despite the fog, the officers were still able to use the PNR-1 drone to get a clear view of Macklin Manor from above, just as any member of the public could. Therefore, the use of the PNR-1 drone was in a designated area in which members of the public had a right to be.

4. The PNR-1 drone's aerial surveillance was done without violating any laws.

The evidence in the record makes it clear that the PNR-1 drone did not violate any laws during its observation of Macklin Manor. As previously stated, the PNR-1 drone has a pre-programmed maximum flight altitude of 1640 feet, which is within the legal limit allowed for drones in Pawndale. R. at 39. Drones do sometimes fly higher than that when experiencing network connectivity issues. R. 40. For that reason, Agent Ludgate conducts monthly test runs on the PNR-1 drone and has never herself experienced any network connectivity errors that allow the drone to exceed the 1,640-foot limit. R. at 41. In fact, one of the tests was taken only three days prior to the observation of Macklin Manor. R. at 41. Thus, the PNR-1 drone's flight over Macklin Manor was at 1,640 feet and within the confines of the laws.

In conclusion, the PNR-1 drone's surveillance did not violate Respondent's Fourth Amendment rights. The observation occurred in navigable airspace. The observation was nonintrusive due to the lack of interference and lack of intimate details observed. Any member of the public could view the information gathered by the aerial surveillance. Also, the aerial surveillance did not violate any laws. The four factors considered cumulatively prove that the government's use of the PNR-1 drone did not violate the Fourth Amendment.

B. The use of the handheld Doppler radar did not constitute a search in violation of the Fourth Amendment.

The use of the handheld Doppler radar did not constitute a search in violation of the Fourth Amendment. The Fourth Amendment prohibits the use of sense-enhancing technology to gather information that could not have been retrieved without going into a home. *United States v. Kyllo*, 533 U.S. 27, 40 (2001). However, when such devices are of common usage, a person's expectation of privacy may be lowered. *Id*. Furthermore, if the information obtained by the technology could have been obtained by other methods, the Fourth Amendment has not been compromised. *Skinner*, 690 F.3d at 777.

1. The information collected by the handheld Doppler radar was otherwise obtainable without physical intrusion into the home.

The information gathered by the handheld Doppler radar was otherwise obtainable through visual observation. When determining whether the information gained by use of sense-enhancing technology could have been otherwise obtained, this Court has considered the nature of the technology used, and the sort of information obtained. *See generally Kyllo*, 533 U.S. 27. In *Kyllo*, the Agema Thermovision 210 thermal imager was used to scan the defendant's property and detected infrared radiation which virtually all objects emit, but is not visible to the naked eye. *Id.* at 29. The imager could convert the radiation emitted by the objects into an image based on relative warmth and operated essentially like a video camera showing heat images of the home. *Id*. at 30. This Court, in *Kyllo*, used the intrusiveness of the technology to determine that the information could not have otherwise been obtained. *Id*. at 38.

As compared to *Kyllo*, the handheld Doppler radar was not revealing or intrusive. The handheld Doppler radar was only able to detect movement and breathing within 50 feet. R. at 33. The device can only roughly determine the number of the people in the house and where they are located. R. at 33. Further, Detective Perkins stated that the handheld Doppler radar functions with

limited accuracy. R. at 35. When the agents initially scanned the home, there was one individual identified in front of the home. R. at 33. However, when the agents entered the home pursuant to the warrant, there was three individuals in the front room, one of which being the Respondent. R. at 34. Thus, the lack of intrusion by the handheld Doppler radar indicates that the information gained could have been otherwise obtained.

In *United States v. Knotts*, the defendant argued that the use of a beeper to determine the location of the item within his cabin violated his Fourth Amendment rights. 460 U.S. 276, 279 (1983). Defendant was suspected of manufacturing drugs so the police placed a tracking beeper in one of the items that defendant used to make drugs. *Id.* at 278. When the defendant purchased the item with the beeper and placed it in his vehicle, the police followed the signal until it was lost. *Id.* With the assistance of a monitoring device in a helicopter, the police located the defendant at his cabin. *Id*. This Court reasoned that although the beeper allowed the officers to determine the location of the device, the same information would have been gathered had the officer physically followed the defendant to his cabin and conducted more aerial observation. *Id.* at 282.

Similar to the officers in *Knotts*, the officers at Macklin Manor could have ascertained the number of individuals in the home through visual observation. In fact, through the drone's aerial observations and scanning the premises, they could have ascertained the movements of individuals to and from the home and the pool house. The drone was able to identify Respondent with only 15 minutes of observation. Furthermore, the officers could have surveilled the house for longer on foot to determine the movement of the various individuals. In sum, the information retrieved could have been otherwise obtained.

2. The PNR-1 drone was in common use.

The sense-enhancing technology must be in common use. *See Kyllo*, 533 U.S. at 27. As Justice Scalia stated in *Kyllo,* "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advances of technology." *Id*. at 34. Technology has slowly affected an individuals expectation of privacy. For example, advancements in flight have allowed portions of property that were once considered private to be to be open to official observation. *Ciraolo*, 476 U.S. at 213. Furthermore, the court anticipated such advances in technology like "Rada-Based Through-the-Wall Surveillance System" and the potential challenge these advances may pose to privacy. *Kyllo*, 533 U.S. at 36. This Court has stated there is an overriding societal interest in effective law enforcement. *California v. Carney*, 471 U.S. 386, 393 (1985). "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." *Chapman v. United States*, 365 U.S. 610, 615 (1961). Considering these interests, the standard set forth that that sense-enhancing technology must be in general common use amongst the public is inappropriate.

Handheld Doppler radars have gained popularity among law enforcement agencies in recent years. R. at 33. A detective two cities over introduced the handheld Doppler radar to Detective Perkins. R. at 33. Officer Lowe, the Department's technology specialist, was instructed to hold a meeting on the device because "so many" officers within the Eagle City Police Department were using the device. R. at 33. The handheld Doppler radar device sells for a mere $400. R. at 35. Although the device was not in public use, there is no evidence to suggest that the public did not have access to this technology. While the Eagle City Police department ordered the device from the manufacturer, there is no evidence to suggest this is the only means to obtain a

handheld Doppler radar. R. at 35. The public's lack of interest in a device should not forbid law enforcement from using technology to help further effective law enforcement practices.

The furtherance of effective law enforcement tactics was the reason for the Doppler Radar. In fact, Detective Perkins stated that the handheld Doppler radar was used to ensure that the officers were safe to approach Macklin Manor. R. at 35. Respondent was convicted of multiple violent felony offenses, and the size of the estate added to the risk of danger. R. at 32. When Detective Perkins arrived, he only had two officers with him. R. at 32. The use of the handheld Doppler radar supplied the officer with intel that ensured the safety of himself and his unit. R. at 32. In sum, the use of the handheld Doppler radar did not violate Respondent's Fourth Amendment rights because it did not retrieve any information that was not otherwise obtainable, and it is in common usage.

C. Even if the use of the PNR-1 drone and handheld Doppler radar on the house was a violation of Respondent's Fourth Amendment rights, the property under surveillance was outside the curtilage of the home, and thus is not provided Fourth Amendment protection.

Regardless of whether this Court determines the use of technology violated Respondent's Fourth Amendment rights, the evidence obtained near the pool house should not be suppressed because the pool house is outside the curtilage. To determine whether a structure lies within the curtilage, this Court must decide "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987). This is a fact-based analysis. *Id*. This Court must consider: (1) the proximity of the area to the home, (2) enclosures surrounding the area, (3) the nature and use to which the area is put, and (4) the steps taken to protect the area from observation. *Id*. If the area in question does not meet these four factors, it will not be considered curtilage and protected by the Fourth Amendment. *Id*.

1. The pool house was not in close proximity to the home.

The pool house is not in close proximity to the home. The proximity factor is case specific, and it is not alone determinative. *Bleavins v. Bartels*, 422 F.3d 445, 451 (7th Cir. 2005). There is no "bright-line distance test" to define proximity nor can it be established based on precedent or property lines. *United States* v. *Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998); *see* also *Bleavins*, 422 F.3d at 451. Although an area within twenty feet of the home may have higher expectations of privacy, being near the home does not equate to being within the curtilage. *United States v. French,* 291 F.3d 945, 951 (7th Cir. 2002) (holding that although a gravel walkway was twenty feet from residence, it was not within curtilage because other factors weighed heavily against a finding that walkway was part of home).

In this case, the pool house is about 50 feet from the main house. R. at 32. The pool further separates the main house from the pool house, nestled directly in between. R. at 32. This substantial distance, in combination with the other three factors, supports a finding that the pool house is outside of the curtilage.

2. There are no enclosures in place around the pool house.

The pool house is not within the curtilage of the home due to Macklin Manor's lack of gates or fences enclosing the area. An area is included within the curtilage of the home if the area is within an enclosure surrounding the home. *Dunn*, 480 U.S. at 301. For most homes, the boundaries of the curtilage will be clearly marked. *Oliver*, 466 U.S. at 179. Fencing is an important consideration for this factor.

In *Dunn*, the court held that the first fence surrounding the defendant's home demarcated the residence and the areas used as part of the home from the remainder of the ranch. 480 U.S. at 301. Similarly, in *Bleavins*, the court concluded that the defendant's interior fence marked a

division between the areas “readily identifiable as part and parcel of the home” and those not associated with the home. *Bleavins*, 422 F.3d at 452 (citing *Dunn*, 480 U.S. at 302).

In this case, there is no fencing surrounding the estate. R. at 33. There is no demarcation around the residence to include the pool house within the curtilage. R. at 4. This lack of fencing or enclosures lends to the determination that the pool house is outside the curtilage of the home.

3. The pool house is not put to a nature or use intimately tied to the workings of a home.

The nature and use of the pool house is not one that is intimately tied to the workings of the home. This factor will not weigh in favor of a finding that the area is within the curtilage, absent evidence that the area is used for “intimate activities associated with the sanctity of the home and the privacies of life.'' *French,* 291 F.3d at 951. Although backyards are typically considered part of the home’s curtilage, *id.*, areas used primarily for storage, parking, leisure, or work-related activities are not associated with the intimacies of the home, *Bleavins*, 422 F.3d at 452. Activities that occur must be associated with domestic life and must normally take place within this type of area. *See Bleavins*, 422 F.3d at 451.

In *Bleavins*, the plaintiff’s property was being used for parking and storage. *Id*. at 452. The court concluded that the use of an area for parking and storing a boat and tools was related to the plaintiff’s work and leisure activities. *Id*. These were not domestic activities associated with the home. *Id*. at 452. The court further concluded that the objects that surrounded the area were not objects that would lead a person to presume the area was used for domestic activities. *Id*. at 451.

Similarly, in this case, the property in question is a pool house. By its very nature, a pool house is typically a place of leisure and storage. There are no facts present in the record to indicate the pool house was used as an extension of the home. Therefore, this factor in combination with

satisfaction of the other three factors indicates that the pool house is outside of the curtilage of the home.

4. There were no steps taken to protect the area from observation.

Respondent took no steps to protect the pool house from observation. Curtilage marks "an imaginary boundary line between privacy and accessibility to the public." *Redmon*, 138 F.3d at 1112. A resident must take sufficient steps to protect the area from observation to be included within the curtilage of the home. *Dunn*, 460 U.S. at 301. Law enforcement agents are not expected to shield their eyes when passing by a home or public area. *Ciraolo*, 476 U.S. at 211.

In *Dunn*, the defendant failed to take steps to shield his barn from observation. 480 U.S. at 301. Although there were several fences on the property, there was nothing in place to block the officers' view of the barn from the open fields. *Id.* This Court held that because the defendant did not take measures to "prevent persons from observing what lay inside the enclosed areas," this factor did not lend itself to a finding that the barn was within the curtilage. *Id.*

From the exterior, the public can view the entire layout of the estate. R. at 39. Without any enclosure surrounding the property, a passerby could see the main house, adjacent patio, pool, and small pool house. R. at 39. The lack of steps taken to protect the pool house from observation lends to the pool house being outside of the curtilage of the home.

In conclusion, the use of the PNR-1 drone and handheld Doppler radar was warranted under the Fourth Amendment because the property under surveillance was outside of the curtilage of the home. The pool house is not proximate to the home. There are no enclosures surrounding the pool house. The nature and uses of the pool house do not lean toward domestic. Finally, there were no steps taken to protect the area from observation. The satisfaction of these four factors establishes

that the pool house is outside of the curtilage of the home and thus not awarded Fourth Amendment protection.

D. The evidence obtained by the warranted search of Macklin Manor should not be considered "fruits of the poisonous tree."

The evidence obtained from Macklin Manor pursuant to a search warrant should not be suppressed because probable cause existed to obtain a warrant after the border search. In 1939, this Court established the fruit of the poisonous tree doctrine by its decision in *Nardone v. United States*. 308 U.S. 338, 341 (1939). This doctrine requires that not only the primary evidence obtained by illegal search or seizure be inadmissible, but also evidence later discovered found derivative of an illegality should be suppressed because it is the so-called "fruit of the poisonous tree." *Id.* This Court has further clarified that "suppression of evidence due to Fourth Amendment violations is the court's last resort, not its first impulse." *Utah v. Strieff,* 136 S.Ct. 2056, 2060 (2016).

Respondent contends that the PNR-1 drone and Doppler radar searches were unconstitutional, and thus, the evidence obtained by searching Macklin Manor should be suppressed as fruits of the poisonous tree. First and foremost, as proven above, both the PNR-1 drone aerial observation and Doppler radar search were constitutional. Regardless, probable cause existed to obtain a warrant and search Macklin Manor after the digital border search occurred.

This Court in *Maryland v. Pringle* stated that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." 540 U.S. 366, 370–71 (2003). Further, determination of probable cause for search without a warrant "requires a dealing with probabilities, which are not technical, but are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act, and the standard of proof is accordingly correlative to what

must be proved." *Brinegar v. United States*, 388 U.S. 160, 175 (1990). Probable cause exists "where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.*

In this case, Mr. Wyatt was stopped at the Eagle City border station, a notorious crossing point for criminals. R. at 25. The agents found $10,000 in twenty dollar bills, exactly as the Ford kidnappers has asked for. R. at 26. Further, Mr. Wyatt admitted the laptop with the initials "AK" on it belonged to his fiancé, Respondent Amanda Koehler. R. at 26. After the agents searched the database, the agents found that Respondent had multiple felony convictions for violent crimes, R. at 27., and that she was a person of interest in the Ford kidnappings. R. at 27. The FBI and Eagle City Police Department believed that the teenagers were being kept somewhere in Eagle City. R. at 27.

Agent Ludgate opened Respondent's laptop to see documents regarding Mr. Timothy Ford's personal information such as his bank statements and personal schedule. R. at 28. The open documents also revealed a lease agreement for a "Laura Pope", Respondent's alias. R. at 28. Under the totality of the circumstances, these facts would undoubtedly give an objectively reasonable officer the belief that probable cause existed to search Macklin Manor.

In conclusion, the use of technology such as the PNR-1 drone and the handheld Doppler radar did not violate Respondent's Fourth Amendment rights. The aerial surveillance by the PNR-1 drone was reasonable. The information handheld Doppler radar could've been otherwise obtained, and the device is in common use. Furthermore, the pool house is outside of the curtilage of the home and thus not awarded the same Fourth Amendment protection. All information

obtained from the search of Macklin Manor was justified pursuant to probable cause from the digital border search.

In turn, this Court should reverse the appellate court's decision to suppress the evidence because the digital border search and use of the PNR-1 drone and handheld Doppler radar was not a violation of Respondent's Fourth Amendment rights. Furthermore, these facts would undoubtedly give an objectively reasonable officer the belief that probable cause existed to search Macklin Manor. Thus, the evidence obtained pursuant to a search warrant should not be suppressed.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, Petitioner requests that this Court reverse the decision of the appellate court and deny Respondent's motion to suppress evidence in its entirety. Petitioner specifically requests that this Court find the agents did not violate Respondent's Fourth Amendment rights by either searching Respondent's laptop during the security-heightened border search, or using the PNR-1 drone and Doppler radar. In addition, Petitioner additionally requests that this Court find probable cause sufficient to obtain a search warrant for Macklin Manor.