

No. 4-422

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IN THE  
**Supreme Court of the United States**

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United States of America,  
Petitioner,

v.

Amanda Koehler,  
Respondent.

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

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**BRIEF FOR RESPONDENT**

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## STATEMENT OF THE ISSUES

1. Whether the Thirteenth Circuit Court of Appeals properly affirmed Amanda Koehler's motion to suppress evidence gathered from her private laptop, seized by the border patrol through a warrantless search while her fiancé was temporarily detained.
2. Whether the use of advanced aerial drones and high-powered Doppler radar systems constituted unreasonable searches when conducted without a warrant. Further, whether the probable cause established by those warrantless searches should be suppressed as "fruit from the poisonous tree."

## STATEMENT OF THE FACTS

This is a case involving the Fourth Amendment's guarantee that citizens are to be free from unreasonable searches and seizures. U.S. Const. amend. IV. On August 17, 2016, Border Patrol Agents Dwyer and Ludgate stopped a car without cause on the United States-Mexico border near the Eagle City border station. R. at 2. This car was driven by Scott Wyatt, who was informed that he was under a "routine" stop and told that he must comply to a search of his vehicle. *Id.* Scott Wyatt reported to the agents that he was not carrying large sums of U.S. currency on him, however a brief warrantless search of the trunk revealed \$10,000 in \$20 bills, along with a laptop. *Id.* Scott Wyatt then informed the agents that the laptop inscribed "AK" belonged to his fiancé, Amanda Koehler. *Id.*

The agents submitted the name "Amanda Kohler" to a criminal database, which revealed that Amanda Koehler was a registered felon and a possible suspect in a case relating to the kidnapping of the children of Timothy Ford. *Id.*

Agent Ludgate was aware of the Ford investigation as it was being conducted by both the Eagle City Police Department and the Federal Bureau of Investigation. R. at 3. Agent Ludgate then proceeded, without consent, to open the laptop seized from Scott Wyatt's trunk, and search through its contents. *Id.* During Agent Ludgate's warrantless search, several documents relating to Timothy Ford appeared, along with a lease agreement for a "Laura Pope." *Id.* At this time Scott Wyatt was placed under arrest by the Border patrol for failing to declare funds in excess of \$10,000. Not declaring the funds was a violation of 31 U.S.C. § 5136. *Id.* After Scott Wyatt's detention, Agent Ludgate contacted the lead detective associated with the Ford Kidnappings. *Id.*

The lead detective, Raymond Perkins, researched the documents that Agent Ludgate had seized and located an address associated with the Laura Pope lease agreement. *Id.* The address

was for an estate perched atop Mount Partridge near the edge of Eagle City. *Id.* This manor was known to local law enforcement because the former Eagle City Chief of Police, Bartholomew Macklin, had owned the estate before his death, and given it the name “Macklin Manor.” *Id.* Macklin Manor is located in a particularly cloudy and foggy area of the mountain. *Id.* This natural feature generally keeps aircraft from flying overhead. Aircraft instead opt for the safety and visibility that flying around the mountain provides. *Id.* Further investigation into the Manor revealed that the property had been purchased by a company called “R.A.S.” which is wholly owned by Laura Pope. *Id.* It was also revealed that Laura Pope was an alias for Amanda Koehler. *Id.*

Detective Perkins ordered two of his officers to conduct “loose surveillance” of the manor at around 4:30 A.M. on the morning of August 18<sup>th</sup>, 2016. *Id.* The officers, Kristina Lowe and Nicholas Hoffman, arrived at the Manor and began to survey. *Id.* Officer Hoffman patrolled on foot, while officer Lowe employed a PNR-1 aerial surveillance drone over the home. *Id.*

The Eagle City Police Department is the only department in Pawndale that utilizes drone technology. *Id.* The PNR-1 Drone can reach heights of up to 2000 ft., is equipped with a digital camera, and can hover for up to 35 minutes. R. at 4. Officer Lowe used the drone to fly over the manor, hover above the residence for 15 minutes and collect photos and video of the estate. *Id.* When the drone was retrieved it revealed the layout of Macklin Manor, including photos and video of the main house, the pool, the patio and the pool house. *Id.* Images showed that the distance from the main house to the pool house was around 50 ft., but that the two buildings were joined by the pool and patio that were constructed between them. *Id.* The drone also contained a photo of a woman revealed to be Amanda Koehler on the property. *Id.*



After Amanda Kohler was discovered to be present, Detective Perkins and Officer Hoffman chose to employ a handheld Doppler radar system to scan the house for additional people. *Id.* This scan was done without a warrant. *Id.* The two officers clandestinely walked to the front of the home to begin their first scan. *Id.* The Doppler device used in this situation is advanced enough to penetrate the walls of a home and pinpoint a person's breathing. *Id.* This allows the user to know how many people are present, and their rough whereabouts within the building. *Id.* The first scan of Amanda Koehler's property revealed a single person in the front room of the house near the door. R. at 5. The officers then went onto the side of the home, into the back yard and scanned the nearby pool house with the Doppler radar device. *Id.* This second scan revealed three people sitting near each other, and a fourth standing nearby. *Id.*

The officers then left the property, used the evidence collected by both the drone and the handheld Doppler radar to obtain a search warrant for the premises. *Id.* Shortly thereafter a SWAT team arrived at Macklin Manor. *Id.* The SWAT team entered the home and found a total of seven people on the premises, three of which were the Ford children that Amanda Koehler was suspected of kidnapping. *Id.* Amanda Koehler was arrested on sight, where it was discovered that she was carrying a small firearm. *Id.*

Shortly thereafter, Amanda Koehler was indicted on three counts of kidnapping under 18 U.S.C. § 1201(a), and one count of felon in possession of a handgun under 18 U.S.C. § 922(g)(1). Amanda Koehler, by her attorneys, filed a motion to suppress the evidence captured on the day of her arrest. *Id.* The motion was denied in the Southern District of Pawndale, but then reversed and remanded in the Thirteenth Circuit Court of Appeals. R. at 1; R. at 21. The issue now comes before the Court on Writ of Certiorari.

## SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit Court's holding to suppress evidence relating to warrantless searches conducted by the Border Patrol and the Eagle City Police Department because those searches were unreasonable under the Fourth Amendment. U.S. Const. amend. IV.

The first issue before the Court is whether Scott Wyatt and Amanda Koehler's Fourth Amendment right to be free from unreasonable searches and seizures were violated when the Border Patrol stopped Scott Wyatt at the border station and proceeded to search his car and the contents of his fiancé's laptop.

Border searches are subject to limitations and require reasonable suspicion. Although searches at the border are given broader leeway because they occur at the border, the Court has been explicit in saying that they are not without limitations. *United States v. Seljan*, 547 F.3d 993, 1000 (9<sup>th</sup> Cir. 2008). The Court has required that searches be conducted only when there is reasonable suspicion. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985). Here, Scott Wyatt was discovered to have large amount of U.S. currency, and a laptop belonging to his fiancé, Amanda Koehler. Although the undeclared cash was in violation of Federal Rule 31 U.S.C. § 5136, the laptop was not. Therefore, the border agents did not have adequate reasonable suspicion to search the laptop.

The search of the laptop by the border patrol exceeded the scope of the Border Agent's purpose and authority. See *United States v. Ramsey*, 431 U.S. 606 (1977). The purpose of border searches is to prevent the flow of contraband and smuggled goods between borders. *Ramsey*, 431 U.S. at 619. The laptop being carried by Scott Wyatt was not contraband, and there

was not reasonable suspicion that it was related to illegal border activity. Further, Amanda Koehler, the owner of the laptop, was not present at the time of the search.

Searches of digital containers, such as a laptops and cell phones, should be afforded a higher level of protection. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Laptops, and other digital devices, carry a large number of files and personal information about the owner. For that reason, the Court has held that such devices cannot be searched without sufficient probable cause or search warrant. *Riley*, 2473, U.S. at 2489. Here the Border Patrol Agents had neither sufficient probable cause or a valid search warrant.

Lastly, the suppression of the evidence in accordance with the Fourth Amendment would not unduly prejudice the Petitioner, as there is other evidence available to the government that could establish a similar outcome.

The second issue before this Court concerns the reasonableness of warrantless advanced aerial drone surveillance and handheld Doppler scans of Amanda Koehler's private residence. Further, if the Court deems the searches unreasonable, they must then address whether the "fruits" of those warrantless searches aided in Amanda Koehler's indictment, and whether they should be suppressed accordingly.

The landmark case *Katz v. United States*, established a two-prong analysis for determining whether a search was reasonable under the Fourth Amendment. 389 U.S. 347, 357 (1967). First, was there a reasonable expectation of privacy; and second, would society agree that the expectation of privacy was reasonable. *Katz*, 389 U.S. at 361. Here, the Eagle City Police Department flew a drone over a private residence and hovered it there for 15 minutes while it took pictures and video. R. at 4. Amanda Koehler's reasonable expectation that drones would not spy on her private residence is bolstered by the Courts holding in *Ciraolo. California*

*v. Ciraolo*, 476 U.S. 2017, 213 (1986). *Ciraolo* stated that for aerial surveillance to be reasonable it must be done from navigable airspace, in a non-intrusive manner, and be similar to what a normal person flying in that airspace would see. 476 U.S. at 213. Unlike traditional aircraft, the drone used by the Eagle City Police Department intrusively hovered above navigable airspace, and was able zoom in close enough to positively identify Amanda Koehler on the premises. R. at 4. Society at large is not ready to accept hovering police drones eavesdropping above their homes without a warrant whenever it is convenient for the officers. The warrantless search conducted by the Eagle City Police Department fails to satisfy either of the Katz prongs and is therefore unreasonable under the Fourth Amendment.

The Police Department also violated Amanda Kohler's expectation of privacy when they employed an advanced handheld Doppler system to scan the residence of Amanda Koehler. The Court addressed the issue of using advanced technology to scan a home in *Kyllo v. United States*. 533 U.S. 27, 29 (2001). In *Kyllo* the Court determined that such a search is unreasonable if the information gathered was otherwise unobtainable, and the tool used was not common. 533 U.S. at 40. In the case of Amanda Kohler, the police violated the curtilage of the residence to scan the inside of the home for traces of breathing. They then trespassed into the backyard to scan more buildings associated with the home. The tool they used is employed by some police departments, but it is anything but common. R. at 33. The search of the home penetrated the walls of Amanda Koehler's home and was unreasonable under the *Kyllo* holding.

These warrantless searches violated Amanda Kohler's right to be free from unreasonable searches and seizures. The "fruits" of these searches resulted in a warrant that helped aid in her indictment. Since Amanda Koehler was prejudiced by these searches, and these searches were

unreasonable, the “fruits” of the searches and all associated evidence should be suppressed accordingly.

### **STANDARD OF REVIEW**

This Court reviews the suppression of evidence related to warrantless searches *de novo*. “Issues of law . . . such as determinations of reasonableness under the Fourth Amendment and the validity of consent, are reviewed *de novo*.” *United States v. Andrus*, 483 F. 3d 711, 716 (10<sup>th</sup> Cir. 2007).

### **ARGUMENT**

#### **I. THE SEARCH OF AMANDA KOEHLER’S LAPTOP WAS A VIOLATION OF THE DEFENDANT’S FOURTH AMENDMENT RIGHTS.**

The Fourth Amendment was violated when the border agents searched the laptop of Amanda Koehler without a warrant. The Court has been very clear on what powers the Fourth Amendment grants border patrol agents regarding their ability to search personal effects of individuals entering the United States. See *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (stating that “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 reasonable simply by virtue of the fact they occur at the border . . .”). While border searches are given exceptions to warrant requirements and probable cause requirements when compared to regular searches, there are still limitations. See *United States v. Seljan*, 547 F.3d 993, 1000 (9<sup>th</sup> Cir. 2008) (stating that it is not simply a matter of “anything goes”). Here, the search of the laptop clearly violated the Fourth Amendment because the search of the laptop was not a routine border search. Routine border searches require reasonable suspicion to be conducted. Second, even if the search was routine, once the border agents realized the laptop did not contain any

border related criminal activity, the border agents should have stopped the search and proceeded to obtain a warrant or ask for consent from the party who shared ownership of the laptop. Third, a search of a laptop should be given a heightened level of privacy due to the sensitive and voluminous information laptops may contain. Fourth, even with the suppression of evidence, the petitioner would not be unduly prejudiced. Here, the Court should err on the side of upholding the protections offered by the Fourth Amendment. For these reasons, the court should suppress the evidence discovered within Amanda Koehler's laptop.

**A. The Laptop Search Was Not a Routine Border Search Because It Was Beyond the Scope of The Border Agent's Purpose and It Was Not Related to Scott Wyatt's Original Offense.**

The laptop search was non-routine because the search did not further the border agent's mission to deter the importation of illegal items into the United States. In cases regarding border searches, the Supreme Court has always made clear that the purpose of these searches is to prevent illegal contraband from coming into the United States. *See generally United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985). The constitution has been interpreted to allow the government a certain leeway when dealing with border searches for this very reason. *Ramsey*, 431 U.S. at 619. However, anything beyond regular searches for illegal items requires the border agents to have reasonable suspicion. *See Montoya*, 473 U.S. at 541 (stating that anything "beyond the scope of routine customs search and inspection, is justified at its inception if customs agents considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband . . ."); *see generally also Ramsey*, 431 U.S. 606 (ruling that a border exception was acceptable in a drug smuggling operation). In the present case, there was nothing to suggest to the border agents that a smuggling operation was taking place. The border agents had found \$10,000 in U.S. currency

and a laptop. R. 2. There was no search for drugs or other contraband. *Id.* Once the border agents found the undeclared cash and the laptop, they should be considered to have completed the routine portion of the border search. Therefore, the warrantless search of the laptop was not a part of a routine border search.

The laptop search was also not a routine border search because the purpose for searching the laptop was based off the fact that a database query for the name Amanda Koehler revealed her to be a felon. R. 2. While cases have shown that criminals conducting smuggling operations can be held liable for their connection to the contraband, the suspicion is usually raised by a person who is present at the border stop. *See generally Montoya De Hernandez*, 473 U.S. 531 (where a routine search was based off the behavior of the traveler). Amanda Koehler was not with Scott Wyatt at the time of the border crossing. R. 2. The only connection Amanda Koehler shared with Scott Wyatt was based on Scott Wyatt's declaration that the laptop was shared between Scott Wyatt and Amanda Koehler, and that Scott Wyatt was Amanda Koehler's finance. R. 2. While an argument can be made for the evidence to be used against Scott Wyatt, the same cannot be said for Amanda Koehler. Since there is no connection from Amanda Koehler to the original border search, it is not routine.

**B. The Border Agents Did Not Have Enough Reasonable Suspicion to Justify the Search of Amanda Koehler's Laptop.**

Non-routine border searches are admissible without a warrant if there was reasonable suspicion that a crime has been committed. *Montoya De Hernandez*, 573 U.S. at 541. Reasonable suspicion has never been specifically defined by the courts because it is not possible to define. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). As the Supreme Court stated, it is "common sense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians,

act””. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983); quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). However, we know that reasonable suspicion is to be determined by the totality of circumstances. See *Ornelas* at 696 (stating that “[t]he principal components of a determination of reasonable suspicion . . . will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion. . .”). While the Petitioner would suggest that Scott Wyatt was exhibiting signs of uncooperativeness, nothing in the facts would affirm that claim. Not making eye contact, fidgeting, and giving brief answers does not amount to criminal activity. This can all be explained by the fact that Scott Wyatt was being questioned by overzealous border agents. Scott Wyatt wasn’t refusing to answer or being aggressive, and his actions would not have given the border agents a reason to conclude that there was a crime being committed.

Even if Scott Wyatt made the border agents suspicious, the suspicion should have ended when border agents found the cash. Routine searches of vehicles do not require reasonable suspicion, and therefore the discovery of the U.S. currency did not violate the Fourth Amendment. *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) citing *Carroll v. United States*, 267 U.S. 132, 154 (1925) (stating that “travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in.”). Therefore, the laptop would not have created any separate suspicion in relation to the currency violation. There was no need for the border agents to continue searching the laptop, as they were not authorized to look for other crimes that Scott Wyatt may have been committing absent probable cause or a warrant. Even if Scott Wyatt was suspected of having a



deeper connection to a crime, with the discovery of the money, a simple warrant or consent would have alleviated any legal issues resulting from a search. For these reasons, the laptop search was not based on the reasonable suspicion of Scott Wyatt's actions.

Furthermore, any suspicion that prompted the search of the laptop, was based on running Amanda Koehler's name in a federal database. Since Amanda Koehler was not at the scene, there was no reasonable suspicion. *See generally Montoya De Hernandez*, 473 U.S. at 532 (where an individual was exhibiting signs of smuggling drugs and therefore created reasonable suspicion.); *see generally also United States v. Sokolow*, 490 U.S. 1, 3 (1989) (where an individual was showing signs that led the DEA officers to have reasonable suspicion). The reasonable suspicion was raised in regard to Scott Wyatt, which resulted in his vehicle being searched. Once Scott Wyatt was searched, shown to have violated the law, and detained, the search should have ended. Amanda Koehler's name alone was not enough probable cause to initiate a search of the laptop. A search for anything related to Amanda Koehler required probable cause. While an argument could be made that Scott Wyatt also owned the laptop, Scott Wyatt's crime had already been established and Scott Wyatt was arrested. Even if it the search was an extension of Scott Wyatt's crime, it should only last until the opening of the laptop, when border agents were alerted to the fact that the possible crime was not related to their duties as border agents. For this reason, the warrantless laptop search was not based on reasonable suspicion.

**C. Even if There Was Reasonable Suspicion for the Initial Search, Once Border Agents Realized It was Not a Crime that Was Related to The Border Agent's Purpose, A Warrant Should Have Been Obtained.**

Even if reasonable suspicion was found for the initial search of the laptop, which there was not, the border agents should have obtained a warrant upon finding that the information was

beyond the scope and purpose of their search. Reasonable suspicion is required to justify a search when it is not routine. *See generally Sokolow*, 490 U.S. at 3 (Where the DEA had reasonable suspicion that travelers were transporting drugs and therefore the search was found to be legal). The reverse should be held true; namely, reasonable suspicion does not continue after the search is completed. In the case of the laptop, once the border agents discovered that the information is not related to the importation of illegal substance, then there is no more reasonable suspicion that a border violation is being committed. Scott Wyatt had been arrested, and Amanda Koehler was not located at the scene. R. 3. It would have been simple enough for border agents to obtain a warrant or ask for consent to search the laptop. However, the border agents continued to search the laptop, knowing that the information contained inside was not related to the border search. *Id.* Therefore, the border agents violated the Fourth Amendment when they did not obtain a warrant to search the laptop.

The border agents could have also have tried obtaining a warrant based on the fact Scott Wyatt had been legally arrested. Scott Wyatt was in custody for violating a U.S. currency import limit. A warrant request based on probable cause would have possibly been granted by a magistrate. However, the border agents did not attempt to do so even when they admit that they had enough time to obtain the warrant. R. 28. Moreover, the border agents could have tried obtaining consent from Scott Wyatt because he is a partial owner of the laptop. *See generally Ill. v. Rodriguez*, 497 U.S. 177, 179 (1990) (ruling that the consent of the third party who has common authority, or appeared to have common authority, over an object may consent to a search.). The border agents failed to seek a warrant or obtain consent. Therefore, the search of the laptop was beyond the scope and purpose of the initial stop and a violation of Amanda Koehler's Fourth Amendment rights.

**D. Searches of Digital Containers Should be Given More Protection Due to the Private Nature of the Information Stored on Them.**

The search of laptops and other informational containers are afforded a heightened level of protection when compared to traditional information containers. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (stating that a search of a digital device cannot be compared to traditional search because of the “quantitative and qualitative properties” the technology provides; the court insisted that a warrant be sought for such searches in all but the most extreme circumstances). Laptops, like cellphones and other digital storage devices, are used to carry information that can be sensitive and privileged. It is not the purpose of the government to overrule the Fourth Amendment warrant requirements. While we agree that, in some instances, the government may be allowed to conduct laptop searches, this is not one of those instances. If this Court rules that laptop searches are reasonable simply because it was part of a border search, then thousands of travelers each day will be subjected to having their cellphones, laptops, and other technology searched based on nothing more than trivial behavior quirks and a failure to make eye contact. This is something the Court should not allow, and therefore should affirm the Motion to Suppress the evidence.

Moreover, this is not a case of foreign nationals smuggling goods or contraband into the United States. Amanda Koehler is an American citizen who must be afforded the protection of the Fourth Amendment. This is especially true when Amanda Koehler was not at the scene of the crime. A warrant could have been easily obtained, but was not. R. 28. The government should not be awarded the use of this evidence when such a violation occurs.

**E. The Suppression of the Evidence Will Not Result in a Significantly Different Result Because of Witness Testimony and Other Physical Evidence.**

Lastly, even if the evidence was suppressed, there is other evidence the government can use to support their case in chief. There is still evidence that can be gathered from different sources. It is unlikely that there would be any drastic differences in the outcome of the case if the evidence was suppressed. Therefore, it is in the best interest of justice for this Court to err on the side of upholding the values of the Fourth Amendment and suppress the evidence in question.

**II. THE COURT SHOULD AFFIRM THE DECISION TO SUPPRESS THE EVIDENCE GATHERED BY THE ADVANCED PNR-1 AERIAL DRONE AND THE HIGH-POWERED DOPPLER SYSTEM USED BY POLICE TO CONDUCT AN UNREASONABLE WARRANTLESS SEARCH OF THE DEFENDANT'S PROPERTY.**

The Thirteenth Circuit Court of Appeals' appropriate suppression of the evidence was based on the fact that use of advanced aerial drone systems, and high-powered Doppler systems to survey a private home were unreasonable under the Fourth Amendment. *See* U.S. Const. amend. IV. The lower court swiftly determined that the use of such tools, absent a warrant, by police officers to survey a private home violated a citizen's expectation of privacy, were inherently unreasonable, and resulted in the *poisonous fruit* that led to Amanda Koehler's indictment. R. at 21. Therefore, because the searches conducted by the Eagle City Police Department were unreasonable, the warrant issued was unreasonable, all fruits of those searches must be suppressed.

**A. The Warrantless Use of An Advanced Aerial Drone by the Eagle City Police Department to Survey Amanda Koehler's Private Residence Was Impermissible Because Amanda Koehler Had a Reasonable Expectation of Privacy.**

The Fourth Amendment gives citizens of the united states the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. The Court has held that whether a person has a reasonable expectation of privacy is the crux of any Fourth Amendment analysis. *Katz v. United States*, 389 U.S. 347, 357 (1967). In *Katz*, Justice Harlan offered a two-prong test

to aid in determining whether a person's right to be free from unreasonable searches and seizures had been violated. *Katz*, 389 U.S. at 361. First, did the individual have an expectation of privacy; and second, is society at large prepared to objectively view that expectation as reasonable. *Id.* Here, the use of a drone by the Eagle City Police Department to survey a private residence fails on both counts.

The use of a drone for the purposes of aerial surveillance over Macklin Manor cannot satisfy the criteria the Court has established for making aerial surveillance reasonable. The court has addressed the issue of a private residence being surveyed from the air in the past, most notably in *California v. Ciraolo* and *Florida v. Riley*. 476 U.S. 207, 213 (1986); 488 U.S. 445,464 (1989). These cases held that aerial surveillance could occur if (1) the search occurred from a vehicle operating within navigable airspace; (2) the surveying was done in a non-intrusive manner; and (3) any person flying in the same airspace would have been able to see the what the surveillance vehicle saw. *Ciraolo*, 476 U.S. at 213. The Court in *Florida v. Riley* expanded on the perimeters set by *Ciraolo*, holding that operating in navigable airspace alone does not meet the requirements of a search under the Fourth Amendment, and that whether planes typically operate in that airspace should be a factor. *Riley*, 488 U.S. at 451.

In *Riley*, the court held that a “naked-eye” police search of a private home from a helicopter was valid under the Fourth Amendment because helicopters operating in the area were not “sufficiently rare.” *Id.* The court also noted that even though the search was deemed valid “an inspection of the curtilage of a home will [not] always pass muster under the Fourth Amendment simply because the plane is operating within the navigable airspace specified by law.” *Id.*

Here, the Eagle City police officers chose to fly a drone with known connectivity issues. R. at 40. These technical concerns allowed the drone to operate above navigable airspace. *Id.* Further, although the airspace above Macklin Manor was technically navigable, it was seldom used. The location of the manor was far from the city center, and even further from the nearest airport. R. at 32. Its location on top of Mount Partridge meant that the airspace around the manor was often foggy and treacherous. R. at 3. It was well known by the locals, and by the residents of Mount Pleasant that airplanes avoided the area. *Id.*

The operation of the PNR-1 drone was conducted in an inherently intrusive matter. We concede that planes could occasionally, however rarely, pass over Macklin Manor, and people in those planes could look down and catch a glimpse of the property if it were a rare, clear day. However, that is not what happened here. The PNR-1 Drone hovered above the property for a full 15 minutes while taking video and photos of the residence. R. at 4. A casual passerby in an airplane would not have been able to intrude upon Amanda Koehler's right to privacy in the same way that the PNR-1 drone operated by the Eagle City police did.

The use of drone technology differs greatly from the use of traditional aircraft. The Court here must also consider the fundamental differences between traditional aircraft and the drone used to survey Amanda Koehler's property, and how the precedent set here will impact future cases. When the court in *Ciarolo* was considering aerial surveillance, there was very little risk that aerial surveillance would become overused or ubiquitous in police departments because of the limitations inherent in traditional aircraft. A small plane or helicopter requires a trained pilot, clearance from an air-traffic controller or some sort, expensive maintenance, high fuel costs, storage facilities, and access to a landing strip or helicopter pad. A drone, like the one use by the Eagle City Police Department simply requires the upfront cost of \$4000, and minimal training.

R. at 46. The built-in costs associated with traditional aerial surveillance ensured that it would only be used in the worthiest of scenarios. A holding that use of advanced drones for police aerial surveillance are reasonable, coupled with their extremely low cost of operation, would open the flood gates for their usage by law enforcement. It would no longer be cost prohibitive to use a drone to catch people jay walking, speeding, or to check a person's back yard to see if their dog has the appropriate tags. This would move aerial surveillance well into the realm where society could no longer accept it as reasonable, just as Justice Harlan warned against. *Katz*, 389 U.S. at 361.

Since the surveillance was not done from navigable airspace, nor were the images collected what a normal airplane passenger would have been able to capture, and the fact that a hovering drone is inherently intrusive, the warrantless drone search conducted by the Eagle City Police Department was unreasonable.

**B. The Use of a High-Powered Doppler System to Survey Inside of Amanda Koehler's Private Property Was Unreasonable Because the Information Gathered Was Otherwise Unobtainable Without the Use of Advanced and Uncommon Technology.**

The warrantless use of high powered Doppler technology to scan Amanda Koehler's private residence was unreasonable because the police used advanced and uncommon technology to gain information it could not otherwise obtain. Further, the use of the Doppler system took place after the police had already violated the curtilage of the home and trespassed onto Amanda Koehler's property.

The home is afforded the highest level of privacy in laws governing searches and seizures. *Silverman v. United States*, 365 U.S. 505, 511 (1961). A person's home is fundamental to their privacy, and one of the few places a person can be free from "government intrusion." *Silverman*, 365 U.S. at 511. The Court has held that the Fourth Amendment "draws a firm line at the

entrance of the house.” *Payton v. New York*, 445 U.S. 573, 590 (1980). While it is true that the physical walls of the home were not violated by the police officers themselves, the police used a tool that went past the curtilage, through the walls and into protected living space. The court has addressed the use of uncommon and exotic technology to scan homes in the past, most notably in the landmark case *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

In *Kyllo*, police officers parked their squad car across the street of a man suspected of growing marijuana. 533 U.S. at 29. They then used a thermal imaging scanner to search the home for halide lamps often used in the cultivation of marijuana. *Id.* at 30. Although the imager could not see into the home directly, it could penetrate the walls of the house and detect heat signatures created by infrared radiation. *Id.* The search detected what the officers believe to be heat lamps; the police then used this information for the issuance of a search warrant. *Id.* The Court held that such a search was unreasonable and developed a two-prong analysis to guide courts going forward: first, could the information gained be otherwise obtainable without entering the home, and second was the device used in common usage. *Id.* at 40.

The Court has also addressed the use of handheld Doppler technology directly by stating that “It’s obvious to us and everyone else in this case that the government’s warrantless use of such a tool to search inside homes poses a grave Fourth Amendment questions.” *United States v. Denson*, 775 F.3d 1214, 1218 (10<sup>th</sup> Cir. 2014). The Eagle City search is unable to satisfy either prong of the *Kyllo* analysis and has birthed the “grave Fourth Amendment questions” predicted in *Denson*.

The information gathered by Detective Perkins and Officer Hoffman would not have been otherwise obtainable without entering the home. If it were obtainable without entering, it is unlikely that the officers would have employed such an exotic tool in the first place. The officers



were able to detect the breathing, and location of everyone in the home. Nothing short of entering the home or the use of another advanced scanner could have achieved the same results.

Second, the holding in *Kyllo* asks us to consider whether the tool used was commonly used by the general public. To answer that the esteemed judges must only ask themselves if they, or anyone they know owns and carries a hand-held Doppler scanner. The answer is surely no.

Further, the search of the home occurred only after Detective Perkins and Officer Hoffman had already violated the curtilage of the home. In *Florida v. Jardines*, the court held that a home does not just consist of what is inside the four walls of the building but it extends areas “immediately surrounding and associated with the home.” 569 U.S. 1,6 (2013). A person has a reasonable expectation of heightened privacy in areas that are “intimately linked to the home, both physically and psychologically.” *Ciraolo*, 476 U.S. at 213.

Here Detective Perkins and Officer Hoffman walked in front of the home to conduct their first warrantless search with the Doppler device. R. at 4. This search revealed a single person in the front room of the home. One person in a front room of a house did not fit the officer’s narrative, so the officers chose to trespass into the backyard and pool area of Amanda Koehler’s property in order to conduct additional warrantless searches. The porch, the yard, and the pool house are all “immediately surrounding, and associated with the home” of Amanda Koehler, as defined by *Jardines*. 569 U.S. at 6. The officers violated Amanda Koehler’s home, not once, not twice, but at least three times throughout their search.

Since the warrantless use of the Doppler system revealed information otherwise unobtainable, the tool used was uncommon, and the officer’s violated the curtilage of the home in order to conduct at least one of the searches, this search is inherently unreasonable.

**C. The Eagle City Police Officers Were Able to Secure a Warrant Based on Two Unreasonable Searches Conducted at the Macklin Manor; The “Fruits” of Those Searches Should Be Suppressed Accordingly.**

There was not enough probable cause to issue a search warrant without either of the two unreasonable searches. The government contends that the warrantless searches were conducted for agent safety, yet the officers wasted potentially valuable time conducting additional searches if, as the government says, there was already enough probable cause to issue a warrant. The actions of the Eagle City police officers simply do not line up with the idea that there was adequate probable cause for a warrant prior to the searches.

Search warrants are only to be issued in cases where there is adequate probable cause. See *Illinois v. Gates* 462 U.S. 213, 232 (1983). The Court in *Brinegar v. United States*, stated that probable cause is simply the practical and factual considerations that would cause a reasonable person to conclude a crime has been committed. 338 U.S. 160, 176 (1990). The Court has also been explicit that evidence seized in violation of the Fourth Amendment cannot be used in the conviction of a citizen. *Mapp v. Ohio*, 367 U.S. 643, 649 (1961). “[C]onviction by means of unlawful seizures . . . should find no sanction in the judgements of the courts, and such evidence shall not be used at all.” *Mapp*, 367 U.S. 643 at 648.

Here, the government had a laptop with initials and documents showing that Macklin Manor was owned by a company with relation to one of Amanda Koehler’s aliases. These facts were simply not enough to establish probable cause linking Macklin Manor to the assumption that Amanda Koehler was involved in the kidnapping of the Fords. The officers involved were not even aware that Amanda Koehler was on the premises before the they used warrantless searches to bolster their cause for a warrant.

Since there was inadequate probable cause for a warrant without the evidence gathered by the warrantless drone and Doppler searches, and those searches were impermissible under the Fourth Amendment, any evidence gathered from the warrant should be suppressed under as “fruits” of an invalid search.

### **CONCLUSION**

Respondents respectfully ask this Court to affirm the decision of the Thirteenth Circuit Court of Appeals and grant the motion of suppression on the grounds listed above.