Team P15

No. 15-2714

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 UNITED STATES

Team P15
Department of Justice
Washington, DC 20530-0001

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QUESTIONS PRESENTED

1. Whether the existing, suspicionless standard for routine border searches applies to the personal inspection, by a border agent, of a laptop found in the trunk of a car during a border crossing.
2. Whether aerial surveillance by a drone, and use of a handheld Doppler radar device on a residence and a pool house detached from that residence, are searches within the meaning of the Fourth Amendment.

STATEMENT OF FACTS

On July 15th, 2016, at around 9:00 a.m., the three children of Timothy H. Ford - John, Ralph and Lisa - left their home in San Diego, headed for their school gym. R. at 44. They never arrived at school. *Id.* Two days later, Mr. Ford received a note demanding a ransom of $300,000: $100,000 for each of his children. R at 2, 44.

About a month afterwards, the kidnappers agreed to permit a phone call with one of the children in exchange for $10,000 in $20 bills, due at noon on August 18th. R at 2. At that point, the FBI, working together with the Eagle City Police Department (ECPD), believed that Mr. Ford's three children had been smuggled across state lines and were being held in Eagle City, on the border between the United States and Mexico. *Id.*

Around 3:00 a.m. on August 17, 2016, a day before the deadline, U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate stopped a black Honda Civic driven by Scott Wyatt. R. at 2, 25. Wyatt stated that he was the respondent, Amanda Koehler's, "fiancé". *Id.* As Wyatt was crossing the border, Koehler was holed up at Macklin Manor, a large estate on the outskirts of Eagle City, along with three of her accomplices and the kidnapped children. R. at 4-5. Koehler was listed in criminal and border watch databases as the main person of interest in the Ford kidnappings, and had multiple convictions for violent felonies. R. at 2, 31.

When the agents asked why Wyatt was crossing the border, he gave brief answers, refused to make eye contact, fidgeted with the steering wheel and was "very pale". R. at 26. He denied that he was transporting more than $10,000, in violation of 31 U.S.C. § 5136. R. at 2. Based on his demeanor, the agents asked him to step out of the vehicle and to open his trunk. R. 2, 26. Wyatt complied. *Id.* When he opened the trunk, the agents found $10,000 in $20 bills, matching the

kidnappers' demand, and a laptop with the initials "AK" on it. *Id.* Ludgate asked Wyatt if the laptop belonged to him, and Wyatt replied that "he shared the laptop with Koehler".[1] *Id.*

Dwyer and Ludgate had previously been briefed on the $10,000 demand, and they knew that Koehler was a person of interest in the kidnapping. R. at 2, 27. Based on this information, Ludgate opened the laptop and immediately discovered several open documents on the desktop, containing Mr. Ford's personal information. *Id.* Continuing her inspection, Ludgate found documents listing Macklin Manor's address and a lease agreement, made out to an alias of Koehler's. R. at 2-3, 27-28.

Wyatt was arrested, R. at 3, and Ludgate then referred the investigation to Detective Raymond Perkins at ECPD. R. at 3, 31. Perkins was already aware that Koehler had rented out Macklin Manor. R. at 32. At 4:30 a.m., shortly after Wyatt's arrest, Perkins authorized surveillance on the Manor, which included aerial surveillance by a PNR-1 drone. R. at 3, 32.

The PNR-1 took 22 photographs and about 3 minutes of video. R at 4. The photographs revealed the layout of the manor, which included a large main house, an open pool and patio area, and a single-room pool house. *Id.* The pool house is approximately 65 feet from the main residence. *Id.* The entire estate is unenclosed. *Id.* One of the photographs showed a woman outside the pool house. *Id.* A database search matched the photograph to Koehler. R. at 4, 33.

The legal height limit for drones in Pawndale is 1,640 feet. R. at 4, 39. During the 29 minute flight, the PNR-1 lost network connectivity with the police for 4-5 minutes. R. at 4, 41. Although

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[1] In Ludgate's deposition, she stated she "asked Wyatt who the initials belonged to," and that Wyatt only stated that the initials on the laptop were Koehler's. R. at 26. The District Court's statement of facts states that Wyatt "stated he shared the laptop" with Koehler. R. at 2. The District Court's account was undisputed on appeal. R at 15.

there is no evidence of this in the record, there is a possibility, listed as 60% by the drone manufacturer, that the drone exceeded the height limit during this time. R. at 41.

Following the drone surveillance, Perkins approached the manor surreptitiously with another officer and conducted two scans of Macklin Manor with a handheld Doppler radar. R. at 4, 33. The first scan took place at the main house, and the second at the pool house. R. at 4-5.

Handheld Doppler radars differ from the radar guns commonly used by law enforcement to detect speeding violations. When mounted on a wall or door, they detect movement inside a building by sending radio waves into the building. R. at 4, 33. They can detect the number of individuals in the building, but cannot reveal the building layout. *Id.* The Doppler scans showed one person inside the front door of the main residence and four people inside the pool house, three of whom were stationary (presumably the Ford children) and one who was moving. *Id.*

The police retreated, obtained a search warrant, and returned to Macklin Manor with a SWAT team at 8:00 a.m. R. at 5. The three Ford children were rescued, unharmed, in the pool house. *Id.* Koehler and her accomplices were arrested, and Koehler was indicted and subsequently convicted of three counts of kidnapping under 18 U.S C. § 1201(a) and one count of possession of a handgun by a felon under 18 U.S.C. § 922(g)(1). *Id.*

Following her indictment, Koehler filed a motion to suppress in the District Court for the Southern District of Pawndale on August 17, 2016, alleging that the laptop search, the aerial surveillance and the Doppler scans violated the Fourth Amendment. The District Court denied Koehler's motion on October 1, 2016. R. at 1.

The District Court found that the border search exception applied to the laptop search, that the laptop could be searched without a warrant, that reasonable suspicion existed for the search, and that a search would have been permitted regardless of whether the search was routine or non-

routine under *United States v. Flores-Montano*, 541 U.S. 149 (2004). R. at 6-8. Following *United States v. Dunn*, 480 U.S. 294 (1987), it analyzed whether the pool and pool house were within the curtilage of Macklin Manor. R at 9-10. It concluded that "Koehler had no reasonable expectation of privacy from the air," and that the use of the PNR-1 drone was a "valid search under the Fourth Amendment" under *California v. Ciraolo*, 476 U.S. 207 (1986), and its progeny. It found that the Doppler scans were a valid search under *Kyllo v. United States*, 533 U.S. 27 (2001), and that because probable cause existed after the laptop was searched, the officers did not need to obtain a warrant. R. at 10-12.

Koehler reserved her right to appeal the District Court's ruling. Following her conviction, the Court of Appeals for the Thirteenth Circuit reversed. *Koehler v. United States*, No. 125-1-7-720 (13th Cir. July 10, 2017). Although the Thirteenth Circuit held that a digital border search of a laptop fell "outside the scope of the border search exception," R. at 15, it then concluded that the search was non-routine and required reasonable suspicion, on the basis that *Riley v. California*, 134 S. Ct. 2473 (2014) was "directly applicable" to a border laptop search. R. at 18. It held that the PNR-1 surveillance was a search and that a court must consider whether "the aerial flight itself violated any laws and whether aircraft routinely flew in that given area". R. at 19. It also held that the Doppler scans violated the Fourth Amendment, on the basis that the information obtained through the scans could not be obtained without actually entering the building, and that handheld Doppler radars are not "*generally* in common use". R. at 20 (emphasis in original). Finally, it held that because probable cause following the laptop search did not exist, all evidence retrieved pursuant to that warrant were fruits of the unlawful aerial surveillance and Doppler scans. R. at 21.

This Court granted certiorari. No. 4-422 (2017).

SUMMARY OF ARGUMENT

I. The border search exception rests on different justifications from the search incident to arrest exception. Border searches are justified by the national prerogative for self-protection. As recognized in this Court's precedents, border agents in their exercise of their authority can both search *for* information, and search *through* protected private information. The search in this case was a manual device search conducted by a single officer. It was minimally invasive, and the scope of such a search is self-limiting. Suspicionless search is the correct standard.

In the alternative, the Court should apply the avoidance doctrine and defer applying *Riley* to a later case. No other Circuit has had the opportunity to consider the application of *Riley* to a border search, nor would they hold that this minimally intrusive search requires a different standard. The Court should avoid the question, and hold that Wyatt consented to the search.

II. The Thirteenth Circuit should not have held that a court may consider the frequency of air traffic or the weather above Macklin Manor. A court may consider only the general frequency of air traffic at a given altitude. With respect to the claimed height violation by the drone, the record does not support it. Even if there was a violation, it reduced the degree of intrusion on Macklin Manor. Drone technology is less intrusive than a plane, and raises less privacy concerns.

The Doppler scan of the pool house took place outside the curtilage of Macklin Manor, in open fields. *Kyllo* was based on the core Fourth Amendment protection granted to the home, and its standards should be relaxed here.

III. Both the District Court and the Thirteenth Circuit failed to apply deferential review to the magistrate's determination of probable cause when the warrant was issued. A substantial basis supporting that determination existed, and this Court should not disturb it.

STANDARD OF REVIEW

On review of a motion to suppress, the determination of historical facts – the events leading up to the challenged stop or search – is reviewed for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Determination of whether reasonable suspicion or probable cause existed justifying a warrantless search is *de novo*. *Id*.

With respect to a warrant, the traditional standard for review of a probable cause determination is that "so long as the magistrate has a 'substantial basis for . . . [concluding]' that a search would uncover evidence of wrongdoing," the warrant will be upheld. *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (alteration in original) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). Doubtful or marginal cases should be largely resolved in favor of the validity of the warrant. *Id.* at 236, n. 10 (citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

ARGUMENT

I. SUSPICIONLESS SEARCH OF KOEHLER'S LAPTOP SATISFIED THE FOURTH AMENDMENT

Riley v. California, 134 S. Ct. 2473 (2014), is, first and foremost, a case about a search incident to arrest. It was only through consideration of the justifications for that specific exception to the warrant requirement, and the manner in which a digital search impacted those justifications, that *Riley* reached its historic result.

This case concerns a laptop search under the border search exception. That search consisted of an opening and activation of the device, followed by an additional, manual inspection, conducted by a single agent. The manual inspection took place only after the agent's observation of files in plain view on the desktop. The device was not separately detained, and no further machine-aided inspection took place. The Thirteenth Circuit's conclusion that this minimally

intrusive search was non-routine runs counter to the three other Circuits which have considered the question.[2]

When the Thirteenth Circuit held that *Riley* was "directly applicable to the [sic] Agent Ludgate's search," R. at 18, it disregarded the analysis this Court employed to determine whether the unique characteristics of digital data "untether the rule from the justifications" underlying the exception under consideration. *Riley,* 134 S. Ct. at 2485 (citing *Arizona v. Gant,* 556 U.S. 332, 343 (2009)). Because it did not attempt to assess the underlying justifications for the border search exception in light of *Riley*, the Thirteenth Circuit's opinion was wrongly reasoned.

A. *Riley* Did Not Alter the Existing Standard for Border Searches

1. *Ramsey* Authorizes Searches and Seizures of Information

The division *Riley* drew between the digital and the physical in the search incident to arrest context was grounded in the reasoning that, in an arrest, "the law is in the act of subjecting the body of the accused to its physical dominion." 134 S. Ct. at 2388 (quoting *People v. Chiagles,* 142 N.E. 583, 584 (1923)). Border searches, however, are not solely concerned with control over the physical body of the accused.

Although this Court's border search precedents have focused on searches for physical contraband, the authority to conduct border searches derives from the Foreign Commerce Clause. *United States v. Ramsey*, 431 U.S. 606, 619 (1977). The power deriving from that clause authorizes searches for more than physical contraband. It includes searches for obscene materials

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[2] See *United States v. Stewart*, 729 F.3d 517, 527 (6th Cir. 2013) (routine, suspicionless search of two laptops); *United States v. Cotterman* 709 F.3d 952 (9th Cir. 2013) (non-"forensic" searches are routine and require no suspicion); *United States v. Ickes*, 393 F.3d 501, 505-507 (4th Cir. 2005) (routine, suspicionless search of computer).

and child pornography; searches to look for and exclude undocumented aliens; searches for evidence of financial crimes, including money laundering; searches for evidence of copyright and trademark violations, including pirated music and software; and searches for evidence relevant to foreign policy objectives, including embargo violations, trade secrets, evidence of espionage, arms shipments, terrorism and materials advocating insurrection.[3] Such plenary authority is based on "the longstanding right of the sovereign to protect itself, by stopping and examining persons and property coming into this country." *Ramsey,* 431 U.S. at 616.

Pursuant to this authority, a border search may target both physical and electronic contraband, including documents and computer files.[4] Furthermore, border searches are not restricted to locating contraband, but may target evidence of law violations by a traveller.[5]

Informational searches and seizures are thus, intrinsically, part of a border search. In *United States v. Ramsey*, 431 U.S. 606 (1977), the Court authorized border searches of international mail – that is, a search through a person's "papers" - in order to locate narcotics. Although the

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[3] See, e.g., *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 365 (1971) (citing 19 U.S.C. § 1305) (obscenity); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (illegal immigration); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 240 (2008) (Kennedy, J., dissenting) (citing 31 U.S.C. §§ 5316-5317) (money laundering); *Miss Am. Org. v. Mattel, Inc.*, 945 F.2d 536, 538-539 (2nd Cir. 1991) (citing 17 U.S.C. § 602-603) (trademark violations); *United States v. Aljouny*, 629 F.2d 830, 835 (2nd Cir. 1980) (citing 22 U.S.C. § 401(a) (arms smuggling); *United States v. Boumelhem*, 339 F. 3d 414 (6th Cir. 2003) (terrorism); *United States v. Jae Shik Kim*, F.Supp.3d 32 (D.D.C. 2015) (embargo violations); *Heidy v.United States Customs Serv.*, 681 F.Supp. 1445 (D. Cal. 1988) (citing 19 U.S.C. § 1305) (treason, insurrection).

[4] See, e.g., *United States v. Levy*, 803 F.3d 120 (2nd Cir. 2015) (physical documents); *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (computer files).

[5] See, e.g. *United States v. Gurr*, 471 F.3d 144, 149 (D.D.C. 2006) (citing *United States v. Schoor*, 597 F.2d 1303, 1306 (9th Cir. 1979)).

search in that case did not target information, *Ramsey* illustrates the principle that any border search may incidentally impinge on the informational privacy of a traveller.

A border search of international mail invariably, though incidentally, exposes the private correspondence of the target to the searching officer. The "potential presence of correspondence," however, does not invalidate an otherwise constitutionally permissible search. *Ramsey*, 431 U.S. at 623. The Court cautioned that officers should not read private correspondence and should only check for contraband. *Id.* This cannot be an absolute prohibition, because if a certain amount of incidental reading were not permitted, searches could not take place at all. [6] But regardless, the principle that searches incidentally impinging on private information are permitted is not restricted to the mail: it applies regardless of whether the letters are mailed into the country or carried (as in a digital device) on the traveler's person. [7] *Id.* In the case of paper documents, customs officials routinely perform cursory inspections of documents carried by a traveller, in which the incidental impingement occurs through a cursory examination of - a glance at - the *document itself* to determine if actual reading will be necessary.[8]

For most practical purposes, there is no difference in the informational content in an

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[6] Accord, *United States v. Seljan*, 547 F.3d 993, 1004 (9th Cir. 2008); *Id.* at 1011 (Callahan, J., concurring). But see *id.* at 1014 (Kozinski, J., dissenting).

[7] We assume the files in Koehler's laptop were physically located on the laptop itself. As *Riley* recognized, cloud files are remotely stored, and might not be regarded as crossing the border at all. *Riley*, 134 S. Ct. at 2490. The record does not show that any files on the laptop were in the cloud, and we concede that such files could not be searched without suspicion.

[8] See *Seljan*, 547 F.3d at 1004; U.S. Customs and Border Protection, Procedures for Examining Documents and Papers, CBP Directive No. 3340-006A § 6.4 (2000) (https://foiarr.cbp.gov/streamingWord.asp?i=11).

electronic document and a physical document carried across the border. Child pornography remains child pornography, whether it is stored on super 8mm film or an iPhone. Customs officials should, accordingly, search for both. Therefore, at least with respect to a small number of electronic documents, *Ramsey* directly controls and an electronic search should require no alteration at all to the existing, constitutional, suspicionless standard governing physical document searches. For the majority of the electronic searches currently performed at the border – that is, non-exhaustive, manual searches by a single officer – suspicionless search is entirely appropriate.

2. Suspicionless Search is the Correct Standard

Current Customs and Border Protection and Immigrations and Customs Enforcement directives governing border searches of electronic devices describe searches on an escalating scale of digital intrusiveness. A physical inspection of a digital device, including turning it on or off, is not a border search at all. The next level involves an on-site, cursory inspection of the device by an officer. Finally there is a detention of the device, which requires supervisory approval. During such device detentions, the contents of the device may be copied, and forensic searches, within the meaning of *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), may also be approved. [9]

The search of Koehler's laptop was, at most, a cursory search. It began with an opening and

[9] U.S. Customs and Border Protection, Border Search of Electronic Devices Containing Information, CBP Directive No. 3340-049, §§ 3.4, 5.1, 5.3-5.4 (2012) (https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf); Immigration and Customs Enforcement, Border Searches of Electronic Devices, ICE Directive No. 7-6.1, §§ 6.1, 8.3-8.5 (2012) (https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf).

powering up of the laptop. R at 2. A physical inspection does not implicate *Riley*. 134 S. Ct. at 2485 ("[O]fficers remain free to examine the physical aspects of a phone to ensure it will not be used as a weapon"). Powering up the device might be a search, but even if it were, it implicates no informational privacy and under *United States v. Flores-Montano*, 541 U.S. 149 (2004), requires zero suspicion.

Following the activation, Agent Ludgate opened the laptop and looked through the desktop. R. at 3, 28. That desktop viewing is the only level of search reasonably raised by this case because, at that point, Ludgate saw several documents on the desktop. Those documents were in plain view. They did not even need to be opened, nor the filenames inspected.[10] Probable cause to seize those documents existed: the agents had been briefed on the kidnapping, and Ludgate knew the documents were linked to the crime. *Arizona v. Hicks*, 480 U.S. 321, 326-327 (1987).

Reasonable suspicion to search the entirety of the laptop undoubtedly existed after that plain view seizure. The search of Koehler's laptop therefore is unconstitutional only if Ludgate's initial, minimally intrusive search, up to the point of viewing the desktop – without opening any files at all - required reasonable suspicion which did not exist, or if a warrant requirement is imposed. Neither position is tenable.

Customs and Border Patrol processed 390,281,983 travellers in 2016.[11] In the first six months

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[10] Cf. *United States v. Stabile*, 633 F.3d 219, 241-242 (3rd Cir. 2011); *United States v. Carey*, 172 F. 3d 1268, 1273 (10th Cir. 1999).

[11] U.S. Customs and Border Protection, *CBP Facilitates Record Level of Travellers and Modernizes Trade Systems in FY 2016*, CBP.gov (Jan. 12, 2017) (https://www.cbp.gov/newsroom/national-media-release/cbp-facilitates-record-level-travelers-and-modernizes-trade-systems).

of 2017, CBP conducted digital searches of 14,993 travellers – approximately 0.008%, i.e., 1 in 10,000, of travellers crossing the border.[12] These are mostly cursory, manual searches because there simply is no time to search. Ludgate testified that most criminal activity occurs at "peak traffic hours, when there are so many cars that we can't possibly stop all of them, but few enough for cars to drive by quickly without being noticed." R. at 25.

One purpose of imposing a reasonable suspicion standard would be to graft a *post facto* judicial review of the reasonableness of a search onto a border search. But in the case of physical searches, this Court determined, in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), that such judicial review was a hindrance except in the most extreme cases of bodily intrusion, or for an extended detention. It may well be that the division drawn in *Montoya de Hernandez* and *Flores-Montano*, grounded as it was in a pre-digital distinction between the body and the physical possessions of the accused, calls for an analogous digital standard. But whatever that standard might be, it should not reach a cursory search. See, e.g., *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013). After all, at least since *Ramsey*, border searches constitutionally have included documents.

Granted, in a digital device there are *more* documents. *Riley*, 134 S. Ct. at 2489. But a cursory search is self-limiting, and does not raise this concern. The brevity of the inspection naturally constrains the depth of the incidental intrusion into a traveller's privacy. The Court's concerns in *Riley* about difficult line-drawing exercises based on the type of file, or the areas of the device

[12] U.S. Customs and Border Protection, *CBP Releases Statistics on Electronic Device Searches*, CBP.gov (Apr. 11, 2017) (https://www.cbp.gov/newsroom/national-media-release/cbp-releases-statistics-electronic-device-searches-0)

searched, 134 S. Ct. at 2491-2493, are absent here. Requiring reasonable suspicion for all searches strikes the wrong balance, and suspicionless search is the appropriate standard.

B. The Court Should Apply the Avoidance Doctrine and Defer Application of *Riley*

This case is the wrong vehicle to apply *Riley* to the border search exception. It presents a search involving no device detention, copying or post-detention retention of data, and no machine-aided search. No federal court besides the Thirteenth Circuit has yet seen fit to "directly apply" *Riley* to a search so minimally invasive that it is even debatable, under *Riley* itself, whether a digital search took place at all. In fact, post-*Riley* cases involving border searches have not even had time to reach the other Courts of Appeal,[13] and not a single District Court case has held that *Riley* reaches a cursory search.[14]

"Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable." Ruth Bader Ginsburg, *Speaking in a Judicial Voice,* N.Y.U. L. Rev. 1185, 1198 (1992). The unique procedural posture of this case presents two of the less-invoked components of the avoidance doctrine, as set out by Justice Brandeis in *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 346-347 (1936). The Court should not "anticipate a question of constitutional law in advance of the

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[13] A representative sampling of District Court cases from different Circuits include *United States v. Wanjiku,* No. 16-CR-296, 2017 WL 1304087 (N.D. Ill. 2017); *United States v. Mendez,* 240 F.Supp.3d 1005 (D. Ariz. 2017); *United States v. Feiten,* No. 15-20631, 2016 WL 894452 (S.D. Mich. 2016); *United States v. Jae Shik Kim,* F.Supp.3d 32 (D.D.C. 2015); *United States v. Escarcega,* No. P-15-CR-275, 2015 U.S. Dist. LEXIS 185466 (W.D. Tex. 2015); *United States v. Blue,* No. 1:14-CR-244-SCJ-ECS, 2015 U.S. Dist. LEXIS 43281 (N.D. Ga. 2015).

[14] The only District Court case which has purported to modify the border search exception is *United States v. Jae Shik Kim,* F.Supp.3d 32 (D.D.C. 2015). But *Jae Shik Kim* applied this Court's analysis from *Riley* to facts involving a much more intrusive search – the copying of a laptop hard drive - and at most made a minor adjustment to *United States v. Cotterman,* 709 F. 3d at 952 (9th Cir. 2013) (forensic searches require reasonable suspicion).

necessity of deciding it", and the Court should refrain from "formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (quoting *Liverpool, N.Y.C. & Phila. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)).

Even if the Court mandates reasonable suspicion, it will not dispose of this case because, as we show, reasonable suspicion existed. The Court's action would thus be broader than is required by the facts. It would also be premature, since only the Thirteenth Circuit has considered this issue. The Court should defer applying *Riley*, and hold that Wyatt waived Koehler's Fourth Amendment rights through consent.

Waiver was not expressly discussed below. However, this Court may consider it. It is encompassed by the District Court's decision, which considered the problem of shared control and access. R. at 8 ("Mr.Wyatt (or at least the owner of the laptop)"). This Court may decide an issue not raised in argument below, but which a court below nevertheless passed upon. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010). Secondly, the statement of the question in the Court's grant of certiorari "comprises every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a). Waiver is presented on the face of these facts. It is encompassed in the question of whether a "valid search took place," and is "predicate to an intelligent resolution of the question presented". *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (citing Sup. Ct. R. 14.1(a); *Vance v. Terrazas*, 444 U.S. 252, 258-259, n. 5 (1980)).

1. Reasonable Suspicion Existed for the Search

We first establish that reasonable suspicion existed. Reasonable suspicion requires a "particularized and objective basis for suspecting the *particular person stopped* of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981) (emphasis added). This determination is based on the totality of the circumstances. *Id.*

The search of Wyatt's car, and the uncovering of the $10,000, required no suspicion at all. *Flores-Montano*, 541 U.S. at 154. Once the money was uncovered, specific and articulable facts, taken separately and together, connected Wyatt to the kidnapping. Wyatt stated he was Koehler's fiancé, Koehler's initials were on the laptop, and Koehler was a person of interest in the crime. Furthermore, the money corroborated Wyatt's involvement, since the amount and denomination of the bills matched the kidnappers' demands. Likewise, the above facts, and inferences from those facts, support reasonable suspicion with respect to Koehler herself.

The only constraint on the scope of a search conducted under reasonable suspicion is that it be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Koehler was a suspect in the kidnapping. Once material evidence connecting Wyatt to Koehler was discovered, it was no longer an "inchoate and unparticularized suspicion or 'hunch'," *Id.* at 27, that evidence might be found on the laptop. Precision as to specific evidence expected to be found on the laptop was not required.

2. Wyatt Waived Koehler's Fourth Amendment Rights

The undisputed record establishes that Wyatt claimed joint control over the laptop with Koehler. R. at 2. A waiver of Fourth Amendment rights can be made by a party who shares common authority over, and access to, the property. Joint ownership is not necessary. *United States v. Matlock*, 415 U.S. 164, 170-172 (1974). Furthermore, good-faith reliance on apparent authority is permitted, if reliance is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

Koehler may contest Wyatt's actual authority over the laptop, since Ludgate did not explicitly state in her deposition that Wyatt said he used the laptop himself. R. at 26. Challenges to a trial court's findings of fact are reviewed for clear error. *Ornelas v. United States*, 517 U.S. at 699. But even if Koehler establishes clear error, Wyatt nevertheless had apparent authority, and the

agents' good-faith reliance on it was reasonable.

Wyatt consented to a search of the trunk of his car, and the laptop inside, by cooperating with the agents' request that he open the trunk. Wyatt's consent need not be knowing or intelligent; it need only have been voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). Voluntariness is a case-specific, objective question, to be determined from the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). When Wyatt was stopped, he was seized: a reasonable person would have understood he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). However, that did not render Wyatt's subsequent consent ineffective. *United States v. Watson*, 423 U.S. 411, 424 (1976). Nor did the assertion of authority by the border agents constitute coercion: there was no show of force, and the agents informed Wyatt that the stop was routine. *Id.* Even if seized, an individual may freely refuse a request and permit a search to proceed without his cooperation, *Florida v. Bostick*, 501 U.S. 429, 437 (1991), and Wyatt did not refuse: he cooperated.

Wyatt thus made a valid consent, while seized, by affirmatively cooperating with the agents' request to open the trunk of his car. Finally, Wyatt did not expressly limit the scope of his consent, and that consent extended to a search of all objects inside the trunk, including the laptop. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

II. THE DRONE SURVEILLANCE AND THE TWO DOPPLER SCANS DID NOT VIOLATE THE FOURTH AMENDMENT

A. The Drone Surveillance Was Not a Search

We begin with a correction. Both the Thirteenth Circuit and the District Court discussed the "reasonableness" of a presumptive aerial "search". R. at 9, 19. To the contrary, this Court's precedents hold that aerial surveillance of curtilage is "not a search subject to the Fourth

Amendment" at all, provided that a defendant's expectation of being free of aerial surveillance is not one which society is "willing to recognize . . . as reasonable." *California v. Ciraolo,* 476 U.S. 207, 211 (1986).

The significance of this antecedent consideration is that, because its constitutionality is rooted in the common law, visual surveillance avoids the presumption that a warrantless "search" is presumptively unconstitutional. *Kyllo v. United States,* 533 U.S. 27, 32 (2001). Instead, the Court inquires into the objective reasonableness of the defendant's expectation of privacy to determine if a "search" happened at all. *Katz v. United States*, 389 U.S. 347, 361 (1986) (Harlan, J., concurring). That assessment should account for the fact that changing technology alters societal expectations of privacy. *Kyllo,* 533 U.S. at 31. But it is not a one-way ratchet: changing expectations may be resolved *against* a defendant. *Id.*, at 34 (citing *Ciraolo*).

There is nothing about the drone surveillance in this case which suggests that the principles laid down in *Ciraolo* should be changed. The plane in *Ciraolo,* or the helicopter in *Florida v. Riley*, 488 U.S. 445 (1989), differs from the PNR-1 in that the PNR-1 drone is smaller. R. at 46. Smaller size, however, reduces the potential intrusion on privacy and interference with property rights. A PNR-1 has a lower risk of causing injury if it crashes, and the potential for dust, wind or noise impinging on property is lower. Cf. *Florida v. Riley*, 488 U.S. at 452. Furthermore, *Kyllo* suggests that general public use mitigates *against* finding a search, *Kyllo,* 533 U.S. at 34, and there is a sizable community of drone enthusiasts in Pawndale. R. at 46.

We next consider the Thirteenth Circuit's criterion that a court must consider "whether aircraft routinely flew in [the] given area [above Macklin Manor]." R. at 19. *Florida v. Riley*, the controlling case here, was a plurality opinion, with four Justices in the plurality and Justice O'Connor concurring in the judgment. For a plurality opinion, "the holding of the Court may be

viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

Both the plurality opinion and the concurrence in *Florida v. Riley* agreed that regulations applying to planes do not exclusively determine the reasonableness of aerial surveillance. Regulations relevant to the technology in question, i.e. drones, should be used. Compare 488 U.S. at 451 with 453 (standard is for a helicopter, not a plane). From that point on, the opinions diverge. The plurality states that compliance with flight regulations are given weight in the reasonableness determination, but it is unclear whether the concurrence would do so. Compare 488 U.S. at 451 with 453. The plurality would find surveillance unreasonable if "intimate details" of the home or curtilage were observed, or if the surveillance created a physical invasion of the property; the concurrence does not mention this. Compare 488 U.S. at 449 with 452. The plurality considered airspace to be a public thoroughfare. The concurrence argued that legally traversed airspace and a public thoroughfare are "not necessarily comparable". Compare 488 U.S. at 449 with 454.

Both opinions, however, agreed on one critical point: the reasonableness of aerial surveillance does not depend upon the frequency of air travel over a specific location. Reasonableness is determined by reference to "whether the public can *generally* be expected to travel over residential backyards at an altitude of 400 feet," 488 U.S. at 455 (O'Connor, J., concurring) (emphasis added), whether "there is considerable public use of airspace at altitudes of 400 feet or above," *id.*, or whether "helicopters flying at 400 feet are sufficiently rare *in this country*." *Id.* at 451 (plurality opinion) (emphasis added).

The argument in *Florida v. Riley* was not about whether there was a public thoroughfare

above Riley's yard (or Koehler's pool). The argument was about how the Court should decide when a low helicopter overflight is unreasonable. The plurality thought it unreasonable only if "intimate details" were observed, if there was a physical trespass, or if there was a nuisance. 488 U.S. at 452. The concurrence believed the standard should be whether the public, generally, travels at that particular altitude. *Id.* at 455. Both sides agreed that the reference point is what is *generally done*. This standard naturally follows if one considers that, in an aerial surveillance case, the Court is not determining the "intrusiveness" of a particular "search" at all; the Court is, in actuality, serving as arbiter of the precedent question of the objective reasonableness of a societal expectation of privacy. *Kyllo*, 533 U.S. at 31-32.

The Thirteenth Circuit erred when it considered the weather above Macklin Manor and the frequency of air traffic. It wrongly cited the *dissent* in *Florida v. Riley* to support its assertion that "of importance is . . . whether aircraft routinely flew in that given area." R. at 19 (citing *Florida v. Riley*, 488 U.S. at 464 (Brennan, J., dissenting)). Justice Brennan's dissent stated that "a majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations". *Id.* The dissent was correct there, even though *Marks* says nothing about overlap between a dissent and a concurrence. But the dissent erred in asserting that a majority agreed that Riley's (or Koehler's) expectation of privacy depends on "the extent of public observation of his [Riley/Koehler's] backyard." *Id.*

This Court has never held that the frequency of flights over a given location determines a defendant's expectation of privacy against aerial surveillance. If Macklin Manor is navigable airspace, and the public generally expect overflights at a given altitude (specifically, 1,640 feet), then aerial surveillance from that altitude is not a search. Flights over Macklin Manor are not banned: Macklin Manor is navigable airspace and plane flights around Mt. Partridge are simply

infrequent. R. at 42. The Court should set aside all facts concerning the visibility or the frequency of plane traffic above Macklin Manor, and consider only whether it is generally reasonable for a drone to fly at a height of 1,640 feet above a residential property. And we know that it is: the legal height limit for drones in Pawndale is 1,640 feet. R. at 4.

We are left with the issue of the PNR-1 potentially exceeding its legal maximum altitude. Officer Lowe stated that "there is no way of telling whether the drone exceeded the 1,640 feet [maximum height] limit or just hovered at the height it was at when we lost track of it." R. at 41. There is thus no confirmation that the drone even exceeded the height limit at all. But even if there was a violation, any violation *reduced* the intrusiveness of the search because the drone was higher, making surveillance more difficult, and the drone would have been in airspace for passenger aircraft: a location from which aerial surveillance would unquestionably have been permitted under *Ciraolo* and its progeny.

Amongst the 22 photographs and 3 minutes of video taken by the PNR-1 drone, one photograph revealed Koehler crossing from the main residence to the pool house. We argue next that this area where Koehler was photographed was not within the curtilage of Macklin Manor. But even if it were, the fact "[t]hat the area is within the curtilage does not itself bar all police observation". *Ciraolo*, 476 U.S. at 213. Aerial surveillance of curtilage is not a search within the meaning of the Fourth Amendment, and no search took place here.

B. The Handheld Doppler Scans Satisfied the Fourth Amendment

The two handheld Doppler scans in this case differ in terms of the privacy interests implicated. The first scan was of the main residence: an area subject to the highest degree of Fourth Amendment protection. *Payton v. New York*, 445 U.S. 573, 590 (1980). The second scan, however, was of the pool house. We argue that the pool house was not within the curtilage of

Macklin Manor, that the open fields doctrine applied, and that there was no search, within the meaning of the Fourth Amendment, when Officer Perkins scanned it.

The District Court did not expressly find that the pool house at Macklin Manor was not within the curtilage. It analyzed "whether what the PNR-1 drone observed was within the curtilage of Macklin Manor". R. at 9. Following an analysis using this Court's four-part test in *United States v. Dunn*, 480 U.S. 294, 302-303 (1987), the court concluded that "[t]hese factors show Ms. Koehler had no reasonable expectation of privacy from the air …". R. at 10.

In the context of aerial surveillance, neither an observation of curtilage nor an observation of an "open field" is a search. It was thus not necessary for the District Court to make a curtilage determination to rule that Koehler had no reasonable expectation of privacy. Nevertheless, a curtilage determination was implied. The sentence containing the court's conclusion is at the end of a paragraph applying the *Dunn* test, in which the District Court construed every *Dunn* factor in favor of the Government. It would be very odd for a court to announce that it was conducting a curtilage analysis, resolve every factor of that analysis in favor of the Government, and not have intended to reach a conclusion.

The District Court's finding thus poses the issue of what level of deference, if any, this Court should give to the District Court's determination. Under *Ornelas*, review of factual findings is for clear error, but reasonable suspicion and probable cause determinations are "a mixed question of law and fact," *Ornelas*, 517 U.S. at 696, and are reviewed *de novo.* The Circuits are split on this question, but in the years since *Ornelas* a clear majority have determined that review is *de novo*, with the 3rd Circuit standing alone, in a case preceding *Ornelas,* in requiring clear

error review.[15]

A mixed question of law and fact can be subject to deferential review. See, e.g., *Miller v. Fenton*, 474 U.S. 104, 113-115 (1985). This Court has not decided that *Ornelas* has any applicability beyond a reasonable suspicion or probable cause determination. Curtilage determinations are highly fact-specific and should not be "mechanically applied". *Dunn*, 480 U.S. at 335. But should the Court conclude that *de novo* review applies, we argue that, upon plenary review, the District Court's conclusions were nevertheless correct.

Taking each *Dunn* factor in turn, the pool house is approximately 65 feet away from the main residence. R. at 4. This is greater than the 50 feet between the barn and the house in *Dunn*, and the distances are comparable, since both Macklin Manor and the residence in *Dunn* were in rural areas. There is no suggestion that the pool house and the main residence are part of the same enclosed area. With respect to the third factor, *Dunn* is unclear on whether, in determining the "nature of the use to which the area is put," 480 U.S. at 302, a Court should consider the actual use being made or the beliefs of the searching officers. The actual use of the pool house was certainly illegal - it housed kidnapped children – and the officers possessed prior "objective data," *id.*, indicating that illegal activity was taking place. Finally, there is no showing that Koehler took any measures to protect the pool house from observation at all.

The Court should conclude that the pool house was not within the curtilage. As such, the

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[15] See *United States v. Breza*, 308 F.3d 430, 435 (4th Cir. 2002); *United States v. Cousins*, 455 F.3d 1116, 1121 (10th Cir. 2006) (overruling *United States v. Swepston*, 987 F.2d 1510 (10th Cir. 1993)); *United States v. Diehl*, 276 F.3d 32, 37-38 (1st Cir. 2002); *United States v. Johnson*, 256 F.3d 895, 911-914 (9th Cir. 2001) (per curiam) (Kozinski, J.) (majority concurring in Part III, holding review is *de novo*). But see *United States v. Benish*, 5 F.3d 20, 23-24 (3rd Cir. 1993).

open fields doctrine applies, *Oliver v. United* States, 466 U.S. 170 (1984), and the officers could conduct observations from outside the building. *Id.* at 304.

Dunn does hold that the interior of the pool house is still protected by the Fourth Amendment, and that the officers could not enter into it. 480 U.S. at 303. The officers did use sense-enhancing technology to obtain information from the inside of the pool house. But the concern in *Dunn* was that the officers would enter and seize the contraband inside. No entry took place here. The officers discovered less information here than they would have if they looked inside a window, as the officers did in *Dunn*. The fact that a crime was taking place in the pool house reduces, or eliminates, any expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 122 n. 22 (1984). *Kyllo* disavowed any negative inferences based on the use of "through-the-wall" technology such as Doppler radar, 533 U.S. at 36., and *Kyllo's* prohibition of sense-enhancing technology rests largely on the core protection the Fourth Amendment provides to the home. In a case where a building is being used for illegal activity, and neither the home nor its curtilage is implicated, the protections of *Kyllo* should be relaxed.

With respect to the scan of the main residence, we argue, following the District Court, that although the scan did reveal information concerning the interior of the home, the information obtained was simply that people were "present inside the house", and that this information could have been obtained through surveillance from the street.

III. THE MAGISTRATE HAD A SUBSTANTIAL BASIS TO FIND PROBABLE CAUSE, AND EXCLUSION SHOULD NOT BE ORDERED

The searches that Koehler challenges took place prior to ECPD obtaining a search warrant. That warrant involved a determination, by a neutral and detached magistrate, that probable cause existed. The warrant stands between Koehler and the exclusionary remedy: a remedy which is

not directed towards the judiciary, but towards the illegal actions of law enforcement. *United States v. Leon*, 468 U.S. 897, 916-917 (1984).

Of course, good-faith police reliance on the warrant does not preclude exclusion. Exclusion can be ordered if police conduct was not objectively reasonable. *Leon*, 468 U.S. at 919. Perkins believed that his actions were justified because he had probable cause, but that belief was not objectively reasonable: warrantless searches violating the Fourth Amendment are not permitted unless an exception applies, or no search occurred at all.

The record does not disclose what evidence the police attested to when they applied for the search warrant. We assume that the officers included everything. Allowing, without conceding, that any evidence in the warrant affidavit gathered by the PNR-1 drone and the Doppler searches was illegally obtained, the warrant nevertheless stands.

Firstly, ECPD's reliance on the laptop search was objectively reasonable. They relied on Customs and Border Patrol, who in turn relied on their own procedures, formulated in reliance on this Court's precedents, R. at 27, and exclusion is barred for good-faith warrantless searches conducted in reliance on precedent. *Davis v. United States*, 564 U.S. 229 (2011).

Secondly, the District Court and the Thirteenth Circuit reviewed the question of whether probable cause existed after the laptop search *de novo*. That was not the correct standard. The warrant stands if the magistrate had a substantial basis for finding probable cause. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). A "substantial basis" means that "sufficient information must be presented to the magistrate to allow that official to determine probable cause." *Id.* at 239.

This Court should not engage in a determination of probable cause at all. The Court need only determine if *sufficient evidence* was presented to the magistrate to make a probable cause determination. That determination did not require a preponderance of the evidence: probable

cause requires only "a fair probability that contraband or evidence of a crime will be found," *Gates*, 462 U.S. at 238. The magistrate was presented with enough evidence to make that basic determination. He knew that, the day before the kidnappers' demand, money exactly matching the demand was found on a man claiming to be the main suspect's fiancé, who was shown to have bought Macklin Manor under an alias. Even if the Court considers this a doubtful or marginal case, it should resolve the matter in the Government's favor. *Gates*, 462 U.S. at 238, n. 10.

The laptop search, the PNR-1 drone surveillance and the two Doppler scans were constitutional. Should any of them be held unconstitutional, we assert that the surviving searches, taken together, are an independent source supporting the warrant, *Murray v. United States*, 487 U.S. 533 (1988), and that the issuance of the warrant was itself an intervening circumstance between any illegality and the fruits of that illegality. *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

TEAM P15

October 20, 2017