Team 17

No. 4-422

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

AMANDA KOEHLER,
Respondent.

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

BRIEF OF PETITIONER

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ISSUES PRESENTED FOR REVIEW

1. Whether Border Agent Ludgate's manual search of respondent's laptop at a border station was a lawful search pursuant to the border search exception to the Fourth Amendment's warrant requirement when the search was routine and Agent Ludgate had reasonable suspicion?

2. Whether the use of the PNR-1 drone and the Doppler radar device constitute unlawful searches in violation of the fourth amendment when the drone lawfully observed the home from navigable airspace, the information received from the Doppler device could have been obtained another way, and the Doppler device is widely used by law enforcement personnel?

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The State of Pawndale borders Mexico, with its capital city, Eagle City, being one of the busiest and largest sites of entry into the United States. R. at 2. The Eagle City border station is a notorious site for criminals to cross the border both into the United States and into Mexico. *Id.* Because of this notoriety the United States Border Patrol has assigned extra border patrol agents to this station to secure this particular site. *Id.*

On August 17, 2016, Border Patrol Agents Christopher Dwyer and Ashley Ludgate were on duty at the Eagle City border station. *Id.* Because Agents Dwyer and Ludgate usually work the graveyard shift which sees less traffic at the border, they stop every car that attempts to cross the border, ask the driver standard questions, and look for any signs of criminal activity as part of routine investigation. *Id*. at 24. At about 3 o'clock in the morning on August 17, 2016, Scott Wyatt approached the Eagle City border station from Mexico, where Agents Ludgate and Dwyer stopped his vehicle for a routine investigation. *Id*. at 2. Once stopped, Mr. Wyatt identified himself verbally. *Id.* at 25. Agents Ludgate and Dwyer inquired as to what he was doing crossing the border. *Id.* at 25. Mr. Wyatt was "incredibly agitated and uncooperative": he would not make eye contact with the Agents, his fingers were fidgeting with the steering wheel, he was very pale, and he kept his answers to the Agents's questions brief. *Id.* Agent Ludgate then "gave him [their] routine questions and admonishments." *Id.* at 26. This included asking Mr. Wyatt is he was traveling with $10,000 or more in cash; he replied that he was not. *Id.* Agent Ludgate then "calmly" informed Mr. Wyatt of the routine nature of the stop, how the agents have the right to search the vehicle, and how this kind of stop is conducted on every vehicle. *Id.* at 2. Agent Dywer asked Mr. Wyatt to exit the vehicle so the agents could conduct their routine search, and asked Mr. Wyatt to open the trunk of the vehicle. *Id.* Once the trunk was open, Agent Dwyer

found $10,000 in $20 bills, and a laptop inscribed with the initials “AK” on it. *Id.* Agent Ludgate was suspicious of the contents given Mr. Wyatt’s previous behavior and statement that he was not carrying that much cash, and so she asked Mr. Wyatt if this was his laptop. *Id.* Mr. Wyatt responded that the initials on the laptop belong to his fiancé, respondent Amanda Koehler, and the two of them share the laptop. *Id.*

Agents Dywer and Ludgate then ran Ms. Koehler’s name through their border watch and criminal intelligence databases. *Id.* The databases indicated that Ms. Koehler is both a violent felon, and a person of interest is the recent kidnapping of John, Ralph and Lisa Ford, the three children of “billionaire biotech mogul,” Timothy H. Ford. *Id.* John, Ralph, and Lisa had been recently kidnapped in San Diego, and held for ransom at $100,000 each. *Id.* The FBI and the Eagle City Police Department (ECPD) had been working together on the investigation because they believed the children had been transported across state lines and into Eagle City. *Id.* Further, the kidnappers had recently traded a “proof of life” phone call in exchange for $10,000 cash in $20 bills—the same amount and denominations of the money Mr. Wyatt failed to declare. *Id.* The money was due at noon on August 18. *Id.*

Taking all of this information together, Agent Ludgate decided to open the laptop, which was not password protected, and she found several documents open. *Id*. at 3, 28. The documents contained a multitude of Timothy H. Ford’s personal information: his address, bank statements, his personal schedule, names of his staff members and their schedules, etc. *Id.* Agent Ludgate also found a lease agreement for a different address in Eagle City, with the name “Laura Pope” on it. *Id*. When Agent Ludgate ran “Laura Pope” through the criminal database she discovered that “Laura Pope” is an alias of Amanda Koehler. *Id.* at 28. Agent Ludgate then arrested Mr. Wyatt for failure to declare money in excess of $10,000. *Id.* at 3. She included her involvement

in the present case by reporting her findings to ECPD Detective Raymond Perkins, lead detective on the Ford kidnapping investigation. *Id*. at 3.

The address on the lease agreement matched a large estate atop Mount Partridge on the outskirts of Eagle City known as Macklin Manor. *Id*. Macklin Manor has been abandoned since the death of its former owner in 2015, but it was recently purchased by a company based in the Cayman islands: R.A.S. Further investigation revealed that R.A.S. is a shell company owned by Laura Pope (Amanda Koehler). *Id*. Detective Perkins was wary of approaching the estate without more information about its layout and possible residents, so he assigned Officers Kristina Lowe and Nicholas Hoffman to conduct loose surveillance on Macklin Manor. *Id*.

Officer Hoffman patrolled the area on foot, viewing what he could with a naked eye. *Id*. Officer Lowe deployed a PNR-1 brand drone to fly over the property and take aerial surveillance. *Id*. The PNR-1 drone is widely available and affordable compared to other drones. *Id*. The PNR-1 can run for about 35 minutes, and can hold 30 high-resolution photos and 15 minutes of high-resolution video. *Id*. The PNR-1 drone also has a pre-programmed maximum flight altitude of 1640 feet. *Id*. at 4. When Officer Lowe deployed the PNR-1 drone from her parked squad car, it took seven minutes to get to Macklin Manor, hovered above Macklin Manor for 15 minutes, took 22 photos and three minutes of video, and then took seven minutes to return to Lowe's car. *Id*.

The photos and video surveillance showed Macklin Manor's layout, which includes a large main house, an open pool and patio area, and a single-room pool house. *Id*. The large main house is directly adjacent to the patio area, and about 15 feet separate the house from the pool. *Id*. The pool house is on the other side of the pool, about 50 feet from the main house. *Id*. No

gates or fences surround the house. *Id*. The drone captured images of Ms. Koehler crossing from the main house to the pool house. *Id*.

After identifying Ms. Koehler on the premises, Detective Perkins was concerned for the lives and safety of any potential hostages. *Id*. This is when Detective Perkins performed a warrantless Doppler radar scan of the premises. *Id*. Doppler radar devices are popular among law enforcement agencies because they emit radio waves that can detect movement up to 50 feet away. *Id*. Doppler radar devices also zero in on a person's breathing, not just their movement, making it almost impossible to hide from them within 50 feet. *Id*. The Doppler radar device can determine how many people are inside a home and roughly where they are located. *Id*.

At Macklin Manor, the Doppler detected several people. *Id*. at 5. One person was located inside the front room of the main house. *Id*. Four people were located in the pool house; three were not moving, and the fourth was pacing back and forth as if standing guard. *Id*. After gathering this information, the officers obtained and executed a no-knock and notice warrant which allowed them to search the premises. *Id*. Upon execution of the warrant, the officers detained two individuals in the living room: Sebastian Little and Dennis Stein. *Id*. Ms. Koehler escaped out the back door but ultimately she was pursued and detained by Officers Lowe and Hoffman. *Id*. She had a Glock G29 handgun in her possession. *Id*. Finally, the officers entered the pool house where they found Jamison Erich standing guard over John, Ralph, and Lisa Ford who were restrained but otherwise unharmed. *Id*.

On October 1, 2016, respondent was indicted by federal grand jury "on three counts of kidnapping under 18 U.S.C § 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1)." *Id*. Respondent filed a motion to suppress the evidence gathered on August 17, 2016 alleging that her Fourth Amendment rights were violated when Agent

Ludgate searched her laptop, and again when Officer Lowe and Detective Perkins conducted warrantless searches of Macklin Manor with a PNR-1 drone and a Doppler radar, respectively. *Id*. The United States District Court for the Southern District of Pawndale denied respondent's motion to suppress, reasoning that respondent's Fourth Amendment rights were not violated in either search. *Id*. at 6. Respondent then plead guilty, but reserved her right to appeal the District Court's ruling on her motion to suppress. *Id*. at 15. Respondent timely appealed, and the United States Court of Appeals for the Thirteenth Circuit reversed the District Court's ruling, holding that the District Court erred in denying respondent's motion to suppress, and remanded for further proceedings. *Id.* The United States of America then filed a petition for writ of certiorari, which this Court granted. *Id*. at 22.

II. SUMMARY OF THE ARGUMENT

Under the border search exception to the Fourth Amendment's warrant requirement, a border agent may conduct warrantless, suspicionless, routine searches of all persons who enter the United States, as well as their property. In contrast, non-routine searches require reasonable suspicion. In the present case, Agent Ludgate conducted a minimally invasive, routine search of respondent's laptop after she had reasonable suspicion of Mr. Wyatt's involvement in the Ford kidnappings. Further, *Riley v. California* does not extend to border searches, and thus does not increase the level of suspicion necessary for the search of technology at the border. Because this search was routine, Agent Ludgate had reasonable suspicion, and *Riley* does not extend to border searches, this court should reverse the Thirteenth Circuit's holding that the search violated respondent's Fourth Amendment rights.

Under current Fourth Amendment law, neither the use of the Doppler radar device nor the PNR-1 drone qualify as "searches." The drone observed an area that was not in the curtilage

of the home. In addition, under *California v. Ciraolo*, use of the PNR-1 drone was not a search because it was a nonintrusive search conducted in navigable airspace fully accessible to the public. The use of the Doppler radar device was permissible under *Kyllo v. U.S.* because the observations could have been made without use of the device, and the device is widely used by law enforcement personnel. Finally, if these were considered "searches" under the Fourth Amendment, their were no fruits produced from these searches, and the evidence therefore not be suppressed under the Fruit of the Poisonous Tree Doctrine.

III. STANDARD OF REVIEW

Motions to suppress are a mixed question of law and fact. *See United States v. Chaudry*, 424 F.3d 1051, 1052 (9th Cir. 2005). However, as the factual record in this case is undisputed on review, the lower court's rulings of law and application of the law to the facts are reviewed *de novo*. *United States v. Roberts,* 274 F.3d 1007, 1011 (5th Cir. 2001). This includes the determination of whether there was reasonable suspicion. *Id.*

IV. ARGUMENT

A. AGENT LUDGATE'S SEARCH OF RESPONDENT'S LAPTOP WAS REASONABLE PURSUANT TO THE BORDER SEARCH DOCTRINE BECAUSE THE SEARCH WAS ROUTINE AND SHE HAD REASONABLE SUSPICION.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures" U.S. Const. amend. IV. (emphasis added). The touchstone of the Fourth Amendment is reasonableness. *Florida v. Jimeno,* 500 U.S. 248, 250 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360, (1967)). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Searches without a warrant are

presumed unreasonable unless the Government can show that an establish exception to the warrant requirement applies. *Katz*, 389 U.S. at 357. The "border search" exception to the Fourth Amendment's warrant requirement allows government agents to conduct warrantless, suspicionless, searches of persons, their property, and their automobiles when entering the United States at a border. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). These warrantless "border searches" are reasonable because of the heightened Government interest at the border to prevent the entrance of unwanted persons and effects into the United States. *Id*. Not only is the expectation of privacy lowered at the border, but also the Fourth Amendment's analysis of reasonableness is "struck much more favorably to the Government." *United States v. Montoya de Hernandez*, 473 U.S. 531, 539-40 (1985).

a. <u>Agent Ludgate's search of respondent's laptop was routine.</u>

A routine search is one that does not seriously invade an individual's right to privacy. *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). "Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or a warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). In contrast, non-routine searches *do* require a showing of reasonable suspicion. *United States v. Roberts*, 274 F.3d 1007, 1012 (5th Cir. 2001). Whether a search is routine or not depends on the level of invasiveness or intrusiveness. *United States v. Braks*, 842 F.2d 509, 511 (1st Cir. 1988). To determine the invasiveness of a search, Courts have evaluated: whether one must disrobe or show intimate parts of their body, whether physical contact occurs between the agent and the suspect, whether the agent uses force, whether the search causes pain or danger to the suspect, the overall manner in which the search is conducted, and whether any reasonable expectations of privacy are abrogated. *Id.* at 512 (internal citations omitted). Although this Court has not given a

definitive answer on what constitutes a routine versus a non-routine search, in light of these factors, this Court, as well as other Circuit courts, has suggested that the term "non-routine" applies only to an intrusive search of a *person*, not their property. *See Flores-Montano,* 541 U.S. 149 (2004) (holding that taking apart defendant's gas tank does not require reasonable suspicion); *see also United States v. Braks*, 842 F.2d 509 (1st Cir. 1988) (holding that when defendant voluntarily lifted up her skirt to show border agent the drugs she was carrying, it was routine and did not require any suspicion); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (holding that the detention of a passenger for over 16 hours and conducting a body cavity search to confirm she was smuggling balloons of cocaine in her alimentary canal exceeded the scope of a routine search and required reasonable suspicion).

Prior to this case only two Circuit Courts have addressed when a digital border search is "routine": the Fourth Circuit and the Ninth Circuit. In *United States v. Ickes*, border agents stopped Ickes at the Canada-United States border, and searched his vehicle. *United States v. Ickes,* 393 F.3d 501, 502-3 (4th Cir. 2005). During this search border agents found a computer and approximately 75 disks. *Id.* at 503. When they manually searched the computer during the search they found child pornography. *Id.* Ickes moved to suppress the evidence found on the computer, but the Fourth Circuit held that the manual search of the computer was routine and did not require suspicion, as computers and computer files are just like any other "cargo" that border agents are allowed to search. *Id.* at 504-6.

The Ninth Circuit has examined the issue of digital border searches in more detail. In *United States v. Arnold*, when Arnold arrived at an international airport, border officers turned on Arnold's laptop and began clicking through folders, where they discovered what they believed was child pornography. *United States v. Arnold,* 523 F.3d 941, 943 (9th Cir. 2008).

Agents questioned Arnold for hours, ultimately releasing him, but keeping his laptop. *Id*. The Ninth Circuit held that the search of a laptop, or any other piece of property, did not require reasonable suspicion, interpreting *Flores-Montano* to create a categorical rule that searches of property can never implicate a privacy interest akin to an intimate search of the body. *Id.* at 946. The Court did acknowledge the language in *Flores-Montano* that left open the possibility that certain border searches of property could be unreasonable because of the "particularly offensive manner" in which they are carried out. *Id.*

The Ninth Circuit again addressed the issue of a digital border search in *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013). In *Cotterman*, the initial border search of Cotterman's laptop did not turn up any incriminating material, so the border agents had the laptop shipped 170 miles away for a forensic digital search, which could recover deleted files and would make a copy of Cotterman's harddrive. *Id.* at 957-58. In examining how intrusive the *forensic* search of a harddrive is, the Ninth Circuit ruled that a forensic digital search is non-routine, and thus required reasonable suspicion. *Id*. at 962.

The present case falls in line with *Arnold* and *Ickes.* This Court should hold that Agent Ludgate's search was routine, because it was in the course of a routine border search, and it only consisted of a manual technology search, and that manual search only examined files that were already open, on the laptop that did not have a password on it. Further, looking at the factors in *Braks*: the search did not require Mr. Wyatt to remove clothing; it did not require force or any other physical contact between Mr. Wyatt and the agents; it did not present any danger or pain to Mr. Wyatt; it was overall not invasive to Mr. Wyatt's person; and it did not invade privacy as the only files looked at were open, not password protected, and it was in the course of a routine search. This minimally invasive type of search cannot be said to invade privacy rights in the way

a forensic digital search would have in *Cotterman,* nor the way a personal search of the body would, and therefore, should be considered routine.

However, in the present case the Thirteenth Circuit took a different approach to the border search doctrine in the wake of this Court's holding in *Riley v. California,* 134 S. Ct. 2473 (2014). In *Riley*, this Court recognized the difficulties that evolving technology poses for warrantless searches. *Id.* This Court held that a warrantless search of a cell phone seized under a search incident to arrest is a violation of the Fourth Amendment because of the vast amount of information that can be stored within a cell phone. *Id*, at 2485. The Thirteenth Circuit expanded *Riley* to encompass not only a search incident to arrest, but also a minimally invasive search at the border. The flaw in this extension is that searches incident to arrest and border searches have different purposes, and thus require different analyses. Law enforcement officers are allowed to conduct warrantless searches incident to lawful arrest for protection of officers and prevention of destruction of evidence. *See id.* at 2484. Because neither of these risks are associated with the search of a cell phone, *Riley* forbids their warrantless search incident to arrest. *Id.* at 2585.

In contrast, border agents are allowed to conduct warrantless, suspicionless searches of anyone who attempts to cross the border for the protection of the United States of America, to enforce the collection of duties, and to prevent the entry of contraband. *Montoya de Hernandez*, 473 U.S. at 537 (citing *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977)). Where a cell phone, or comparable technology, does not present a risk to officer safety or destruction of evidence as described in *Riley*, it can certainly contain contraband that border agents want to prevent from entering the United States. *See, e.g., Roberts,* 274 F.3d 1007 (border agents found child pornography on laptop and diskettes in defendant's possession). This is true regardless of the amount of storage or personal files one has on said technology. Further, the government has a

strong interest in the search of technology at the border, and the reasonableness analysis at the border is struck in favor of the government. Therefore, this Court should hold that a manual digital search at the border does not require a higher level of suspicion than any other search of property, and find that Agent Ludgate's search of respondent's laptop did not violate respondent's Fourth Amendment rights.

b. Agent Ludgate had reasonable suspicion to search respondent's laptop.

Even if this Court finds that Agent Ludgate's search was non-routine, this Court should find the search was reasonable because Agent Ludgate had reasonable suspicion to search the laptop. Reasonable suspicion is "a particularized and objective basis" for suspecting a crime has been committed. *Johnson*, 991 F.2d at1291. A reasonable suspicion inquiry asks, if taking the totality of the circumstances in a particular case, "whether the border official ha[d] a reasonable basis to conduct the search." *United States v. Irving*, 452 F.3d 110,124 (2d Cir. 2006) (quoting *United States v. Ashbury*, 586 F.2d 973, 976, (2d Cir. 1978)(internal quotations omitted)(alteration in original). In *Irving*, the Second Circuit set forth factors that the court may consider is assessing whether there was reasonable suspicion in the context of a border search. *Irving,* 452 F.3d at 124. These include: unusual conduct of the person stopped, discovery of incriminating information during a routine search, propensity to commit relevant crimes, and a suspicious itinerary. *Id.*

The totality of the circumstances in the present case support the District Courts finding that Agent Ludgate had reasonable suspicion to search respondent's laptop. First, regarding unusual conduct: Mr. Wyatt was agitated and cooperative, fidgeting his fingers on the steering wheel, refused to make eye contact with the agents, was extremely pale, and kept his answers to questions to a minimum. All of this conduct is unusual. Second, regarding incriminating matters

and propensity to commit relevant crimes: Agent Ludgate discovered that Mr. Wyatt was engaged to a violent felon who was a person in interest in a high profile kidnapping; she discovered that Mr. Wyatt was carrying cash in the same amount and denominations that the kidnappers requested to provide a proof of life phone call with the children; and Agent Dwyer discovered a laptop with said person of interest's initials "AK" engraved on it. Finally, regarding suspicious itinerary, Mr. Wyatt was at the Eagle City border station, in the same city the children we suspected to be in, in the middle of the night, a day before the cash was due to the kidnappers for the proof of life phone call. All of those facts together show that Agent Ludgate had reasonable suspicion to believe that Mr. Wyatt was involved in the kidnapping, and thus was able to search the laptop that he stated he shared with his fiancé. Therefore, this Court should reverse the Thirteenth Circuit, and hold that Agent Ludgate's search did not violate respondent's Fourth Amendment rights.

B. THE USE OF THE DRONE AND DOPPLER RADAR DEVICE WERE PERMISSIBLE USES OF TECHNOLOGY BECAUSE NEITHER CONSTITUTES AN UNLAWFUL SEARCH UNDER FOURTH AMENDMENT PRECEDENT, AND NO FRUITS WERE GAINED FROM THE USE OF THESE DEVICES.

The Fourth Amendment protects a person's reasonable expectation of privacy. *Katz* 389 U.S. at 360. Justice Harlan's concurrence in *Katz* outlines a two-prong test to determine whether the government has intruded upon a person's reasonable expectation of privacy: (1) did the individual have a subjective expectation of privacy, and (2) is society prepared to objectively accept that expectation as reasonable. *Id.* at 361. It is well established under fourth amendment precedent that police officers may enter and search an open field without a warrant—this is known as the open fields doctrine. *Oliver v. United States*, 466 U.S. 170, 173 (1984). In addition, police officers may use anything that they can see from a public vantage point in establishing

probable cause or requesting a search warrant; this is known as the plain view doctrine. *See Katz* at 361.

However, open areas that extend the intimate activity associated with the sanctity of the home and the privacy of life are considered curtilage, and are protected under the fourth amendment. *Oliver*, 466 U.S. at 180. If the area is considered curtilage, then a person carries a reasonable, subjective expectation of privacy within that area. *Oliver*, 466 U.S. at 180. If the area is curtilage, the question then becomes: is the use of a drone to conduct a search from navigable airspace a reasonable search that doesn't require a warrant? *See generally California v. Ciraolo,* 476 U.S. 207 (1986). Under *Ciraolo*, nonintrusive searches conducted in navigable airspace fully accessible to the public are reasonable and do not require a warrant, even if the curtilage of the home is observed. 476 U.S. 207.

In addition, the use of the handheld Doppler radar device is a novel issue that previous courts have declined to decide. *See United States v. Denson*, 775 F. 3d 1214, 1218 (10th Cir. 2014). At the time of *Denson*, the tenth circuit did not have enough information to make an informed decision regarding the Doppler radar device. *Id*. With the additional information that has come to light since *Denison*, and by relying on the Supreme Court's reasoning in *Kyllo v. United States*, 533 U.S. 27 (2001) this court can find that Ms. Koehler's fourth amendment rights were not violated by the use of the Doppler radar device.

a. Use of the PNR-1 drone was not a search under the fourth amendment.

The use of the PNR-1 drone was proper because the area was not curtilage, and even if the area was curtilage, the use of the drone was a nonintrusive search conducted in navigable airspace. *See United States v. Dunn*, 480 U.S. 294; *See also California v. Ciraolo* 476 U.S. 207. To determine if an area is curtilage, the Supreme Court articulated a four-factor test including (1)

the proximity of the area to the dwelling, (2) whether there are enclosures surrounding the area, (3) how the area is used, and (4) how hard the area is being protected. *United States v. Dunn*, 480 U.S. 294, 301 (1987). Using these factors, the area that was photographed by the drone was not within the cartilage of Macklin Manor.

First, the pool area is not close to the main house; the pool area is at least 50 feet away from the main house, and the pool house is an entirely separate building separated from the main house by a patio and a pool. R. at 4. Second, there are no enclosures surrounding the pool area or the main house or shielding any of the areas from aerial observation. *Id*. Third, the pool are and pool house are completely separate from the main house and are not used with any regularity. *Id*. Finally, the pool house and pool area are not protected; there are no enclosures protecting the area and no other indications that the area is private such as signs or security cameras. *Id*. Taken together, this shows that the area observed by the drone is not curtilage; it is not so intimately tied to the home itself that it should be placed under the home's Fourth Amendment Protection.

Since this is not curtilage, Ms. Koehler did not have a reasonable expectation of privacy in the area surrounding the home; the officers' use of the PNR-1 drone did not require a warrant. *See Oliver*, 466 U.S. at 180. Even if the area is curtilage, this does not bar all police observation. *Ciraolo* 476 U.S. 207 at 213. The officers would still not need a warrant because they conducted a nonintrusive search from navigable airspace. *Id*. A legal, nonintrusive search, conducted in navigable airspaces from a vantage point that any member of the public can access is valid under the Fourth Amendment. *See Cirolo* 476 U.S. 207 at 213*; Florida v. Riley* 488 U.S. at 451. The facts in this case therefore indicate a valid use of the drone under the 4th amendment.

First, the drone was not violating any laws and it flew over Macklin Manor in navigable airspace. *See* R. at 4. Ms. Koehler may argue that the drone was violating laws by flying higher

than the navigable airspace because of some connectivity issues. R. at 19. However, nothing on the record indicates that the drone flew above the navigable airspace when it suffered from connectivity issues. R at 19. Ms. Koehler may also argue that the airspace above Macklin manor was not navigable because there was so much fog there, and as a result planes paths only rarely crossed this airspace. R. at 3. However, poor visibility does not make the airspace any less navigable; it simply makes it a less favorable choice for aircraft. This is not a no-fly zone, and all records indicate that the PNR-1 drone stayed under the 1640 foot limit imposed by eagle city.

Next, the search was nonintrusive; the drone merely flew over the property, took some pictures, and then flew back to Officer Lowe. The drone did not break any barriers or look through any walls. Just like in *Ciraolo*, where the court found that the search was nonintrusive and valid under the Fourth Amendment, any member of the public flying over Macklin Manor could see what the PNR-1 drone saw. Because this was a legal, nonintrusive search, over navigable airspace that anyone could have access to, this search was legal under the established Fourth Amendment precedent. *See Ciraolo* U.S. 207 at 213*; See also Riley* 488 U.S. at 451.

b. Use of the Doppler radar device is permissible under *Kyllo*.

Use of the handheld Doppler device presents a question regarding the proper use of new technology under the Fourth Amendment. The Doppler radar device is analogous to the thermal imaging device used in *Kyllo. Kyllo* 533 U.S. 27. The court in *Kyllo* articulated a two-prong test for determining whether the use of these devices violates the Fourth Amendment: (1) whether the information the device gained could have been obtained without entering the house, and (2) whether the device is in common use. *Kyllo* 533 U.S. at 40.

On the first prong of this test, the Doppler radar device simply obtained information about how many individuals were inside the house. R. at 5. This information and more (such as

who was in the home) could have been obtained from further surveillance and observation of the house. The detectives could have continued to watch from plain view, or continued to perform aerial surveillance with the PNR-1 drone. Opposing counsel may argue that the exact location of individuals within the home and pool house could not have been obtained without the use of the radar. However, this is not true. Eventually all of the individuals would have left the home, and any officers observing on foot or by drone could have seen what part of the house they left from and went into. With continued surveillance, all of this information could have come to light.

In addition, the Doppler device is in common use; it is widely used among law enforcement personnel for this same purpose. R. at 4. It has become increasingly popular amongst law enforcement agencies in recent years. *Id*. Ms. Koehler may argue that this is not in common use, because it is only commonly used by law enforcement agencies, and not commonly used by the general public. However, an item is always only going to be commonly used by a group that has a need for it; ordinary people have no use for a Doppler radar device. Ordinary use should be interpreted to mean widely used by the target market of a particular device. The Doppler radar device was clearly designed for use by law enforcement personnel, and it has become increasingly popular among that group. Therefore, the use of the Doppler Radar device was not an unlawful search under *Kyllo* and the Fourth Amendment.

c. Any evidence obtained through "searches" would not be suppressed under the Fruit of the Poisonous Tree doctrine.

Even if the use of the PNR-1 drone, the Doppler radar device, or both are found to constitute unlawful "searches" under the Fourth Amendment, the evidence obtained after the warrant would not be suppressed due to the Fruit of the Poisonous Tree doctrine. Under this doctrine, evidence obtained illegally would only be suppressed if it were fruitful for the

detectives. In this case, Detective Perkins had adequate probable cause for a search warrant before the information acquired by the PNR-1 drone and the Doppler radar device. The evidence obtained by these devices provided the detectives with the knowledge to safely execute the no-knock and notice warrant, but the results of the PNR-1 drone and Doppler radar were not needed to obtain the warrant.

A search warrant is issued on a showing of probable cause. *Illinois v Gates*. 462 U.S. 213, 232 (1983). Probable cause is a fluid concept that turns on the assessment of probabilities in particular factual concepts. *Gates* 462 U.S. at 232. Probable cause cannot be reduced to a neat set of legal rules. *Id*. Probable cause is determined by the totality of the circumstances. *Id*. at 230. The principal components of probable cause are: (1) the events leading up to the search, and (2) whether these facts, viewed by an objectively reasonable police officer, resulted in probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. *United States v. Sokolow*, 490 U.S. 1, 10 (1989).

Here, the events before the use of the PNR-1 drone and Doppler radar device would give rise to probable cause. Mr. Wyatt was stopped at a known border crossing for criminals, he was stopped at 3:00 A.M., and he had $10,000 in $20 bills (the exact ransom requested for the Ford children). R. at 12. Mr. Watt had Ms. Koehler's laptop, and the laptop had several incriminating documents on it and the lease for Macklin Manor. *Id*. Finally, it was discovered that Macklin Manor was owned by R.A.S., a shell company owned by one of Ms. Koehler's aliases.

Under the totality of the circumstances, an objectively reasonable officer would believe that probable cause existed to search Macklin Manor. The information obtained by the PNR-1

drone and the Doppler radar device was not needed to establish probable cause. Even if these are found to be "searches" in violation of the Fourth Amendment, Ms. Koehler fails to show fruits resulting from this search and therefore is not entitled to relief.

V. CONCLUSION

For the reasons set forth in this brief, the Petitioner respectfully asks this Court to reverse The United States Court of Appeals for the Thirteenth Circuit. The United States District Court for the Southern District of Pawndale properly denied Ms. Koehler's motion to suppress because Agent Ludgate engaged in a routine border search and had reasonable suspicion to search Ms. Koehler's laptop. The use of technology did not constitute "searches" in violation of the Fourth Amendment, and even if it did, the evidence would not be suppressed under the Fruit of the Poisonous Tree doctrine.

Respectfully submitted.

TEAM 17
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