Team 2

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

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BRIEF FOR RESPONDENT

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STATEMENT OF THE FACTS

On August 17, 2016, U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate routinely stopped a car driven by Scott Wyatt at the United States / Mexico border crossing at approximately 3 AM. R. at 2, 24-25. It appeared to the agents that Mr. Wyatt was agitated and uncooperative, but in fact Mr. Wyatt identified himself, and when the Agents asked him to step out of the car and open the trunk, he complied with their orders. R. at 2, 25-26.

The agents found exactly $10,000 in the trunk of Mr. Wyatt's vehicle, and the record does not reflect that he was transporting more than $10,000. R. at 2, 26. The agents also found a laptop, with the initials A.K. inscribed on it, in the trunk of Mr. Wyatt's vehicle. R. at 2, 26. When the agents asked Mr. Wyatt whose initials were on the laptop, Mr. Wyatt answered that they were the initials of his fiancé, Ms. Amanda Koehler, the Respondent. R. at 2, 26. The agents ran Ms. Koehler's name in their database and found that she had felony convictions and was also named a person of interest in the recent kidnappings of the teenage children of billionaire Timothy Ford, who had recently paid the kidnappers exactly $10,000 for a phone call with his children. R. at 2, 26-27. Although the agent had time to obtain a warrant if necessary, she chose to conduct a search the contents of the laptop without attempting to obtain a warrant and without asking Mr. Wyatt for permission. R. at 2-3, 27.

Upon searching the contents of the laptop, which was not password protected, the agent found documents containing information about Mr. Ford as well as a lease agreement for Macklin Manor with the name "Laura Pope," an alias for Ms. Koehler. R. at 2-3, 28. Although neither the record nor Agent Ludgate's testimony indicated that Mr. Wyatt was transporting in excess of $10,000, and although Mr. Wyatt was only found to be transporting exactly $10,000, Agent Ludgate arrested him for "failing to declare his $10,000." R. at 3, 27.

Macklin Manor is a large, isolated estate, at the top of Mount Partridge on the outskirts of Eagle City. R. at 3, 32. Mount Partridge maintains nearly year-round cloud coverage, which has prompted planes and other aircraft to avoid it on their flight paths. R. at 3, 42. Macklin Manor was purchased by R.A.S., a Cayman Islands company owned by "Laura Pope", approximately six months ago, however, nobody has seen any residents at the property. R. at 3.

At approximately 4:30 A.M., Eagle City Police Department's (ECPD) Detective Perkins instructed Officers Kristina Lowe and Nicholas Hoffman to perform surveillance on Macklin Manor, specifically to ascertain the layout of the home and its residents. R. at 3, 32. Officer Hoffman patrolled the area on foot, while Officer Lowe, ECPD's technology expert, deployed the PNR-1 drone to conduct a search over the property at dawn. R. at 3, 32. ECPD is the only police department in Pawndale that deploys drones in police surveillance. The PNR-1 is capable of taking high-resolution photographs and video. It has a battery life span of 35 minutes and a storage capacity of about 30 photographs and 15 minutes of video. The PNR-1 is capable of flying as high as 2000 feet, but is preprogrammed with a maximum flight altitude of 1640 feet which is dependent upon network connectivity in order to maintain that flight restriction. R. at 4.

Officer Lowe parked two blocks from Macklin Manor and began her search with the PNR-1 drone. The PNR-1 required a 14 minutes round trip flight time to and from Macklin Manor, and hovered in place over the residence for 15 minutes. The drone took 22 photos and recorded three minutes of video of Macklin Manor. The information obtained provided the layout of Macklin manor, which included the large main house and adjacent patio. A pool is about 15 feet from the patio and a pool house about 50 feet from the main home. Additionally, one of the images captured a lone, young female crossing from the main home to the pool house.

Detective Perkins confirmed that the female was Amanda Koehler by comparing this image to known photographs recently acquired by ECPD. R. at 4.

Having identified Amanda Koehler with the drone search, Detective Perkins and Officer Hoffman covertly approached the main home on Macklin Manor and without a warrant, conducted a search of the home with a handheld Doppler radar device. R. at 4. The Doppler radar device emits a radio wave that detects movement and even breathing at a distance of 50 feet. The Doppler search performed by the officers revealed detailed information about the interior of the home, including that one individual was in the front room of the house, approximately 10-15 feet from the front door. The officers searched the interior of both the main house and the pool house with the Doppler. R. at 5, 34.

Only after having obtained this evidence from the combined warrantless searches using the drone and the Doppler device, the officers finally obtained a search warrant for the entire residence. R. at 5, 34. At 8:00 A.M., the three officers and a SWAT team conducted a no-knock and notice, entered the home and the pool house, captured four individuals, and freed the three children who had been tied to chairs in the pool house. R. at 5, 34.

SUMMARY OF THE ARGUMENT

The Fourth Amendment of the U.S. Constitution generally prohibits unreasonable searches without a warrant. Warrantless searches, as conducted here, are presumptively unreasonable, but there are a number of well-established exceptions. However, even when a warrantless search falls under one of the exceptions, this Court has nonetheless established limitations on the government in conducting the search.

Because, in this case, these warrantless searches exceeded the reasonable scope justified by the exceptions under which they were conducted, this Court should affirm the Court of

Appeals in finding that the District Court erred in denying Respondent's motion to suppress the evidence obtained from searching the contents of Respondent's laptop, flying the PNR-1 drone to view property not visible from navigable airspace, and using the handheld Doppler radar to view the details of the interior of the home.

I. The Warrantless Search of the Laptop Should be Suppressed as Unreasonably and Unnecessarily Personal and Intrusive.

One of the established exceptions to the requirement for a warrant is the border search exception. Under this exception, this Court has permitted warrantless searches of the person and property of a citizen at border crossings and international entry points that would not be permitted within the interior of the United States. The justification for allowing these extensive searches has been the need for the sovereign to protect itself from the entry of unwanted and dangerous items, as well as the need to prevent destruction of evidence. A similar exception to the warrant requirement is the search incident to arrest, which is permitted for similar reasons, to protect the officers and others from potentially dangerous items that the arrestee may be carrying, as well as to prevent destruction of evidence within the immediate control of the arrestee.

However, this Court has restricted the scope of the warrantless search incident to arrest, specifically in the case of a search of the digital contents of a cellular phone carried by the arrestee. While the government is permitted to inspect the physical characteristics of the phone to ensure that it cannot be used as a weapon, the government is not permitted to search the content of the phone without a warrant, in spite of the phone being carried by the arrestee at the time of the arrest. In *Riley*, this Court held that, because the digital contents of a cell phone are so extensive and personal, and because the digital contents of the cell phone taken from an arrestee can be neither used as a weapon nor destroyed by the arrestee, a search of the digital

contents of the cellphone may not be conducted without first obtaining a warrant based on a finding of probable cause.

The considerations in *Riley* are even more directly applicable to the current matter. As in *Riley*, the contents of the laptop could not have been used as a weapon nor destroyed by Mr. Wyatt once the laptop had been taken from his possession. The additional justification for the border search exception, the need of the sovereign to prevent unwanted entry of goods, is even less applicable, because far more digital content is undetectably imported into the United States via the Internet than could ever be imported on the hard drives of one or more laptops. Here, the border search exception was merely used an excuse to snoop and rummage through the personal digital contents of the laptop.

Therefore, on the same basis as *Riley* prohibits the extension of the search incident to arrest into the personal digital content of a cell phone without probable cause and a warrant, the Court here should prohibit the extension of the border search exception as a pretext for the warrantless search of the personal digital content of the laptop.

II. The Evidence Obtained using the PNR-1 Drone to View Property from Non-Navigable Airspace Should be Suppressed as an Unreasonable Warrantless Search.

Although this Court has found that there is no reasonable expectation of privacy in what can be seen from the navigable airspace above one's home, here the clouds and fog above Macklin Manor prevent visualization of the curtilage from navigable airspace. Amanda Koehler reasonably expected privacy from government intrusion in the back yard of her home, a constitutionally protected area not visible from navigable airspace.

III. The Evidence Obtained using the Handheld Doppler to View the Details of the Interior of the Home Should be Suppressed as an Unreasonable Warrantless Search.

When it comes to the Fourth Amendment, the home has no equal. In *Kyllo*, this Court found that government's targeted and purposeful use of technology not in general public use to obtain detailed information from within the home that would otherwise have required physical intrusion constituted an unreasonable search. Here, the information obtained from the Doppler radar about the interior of the home was far more intimate and intrusive than the heat signature of the outside of the house viewed in *Kyllo*. For exactly the same reason this Court invalidated the technological invasion of the home in *Kyllo*, there can be little doubt that the warrantless use of the Doppler radar device to view the intimate details of the interior of Respondent's home violated her Fourth Amendment rights, and therefore the evidence and information thereby discovered must be suppressed.

IV. All of the Evidence Derived from the Warrantless Searches of the Laptop, the Property, and the Interior of the Home Should be Suppressed as Fruit of the Poisonous Tree.

This Court has noted that the only effective way to protect the Fourth Amendment prohibition of unreasonable searches is to exclude the evidence obtained as a result of the search, as well as any other evidence derived indirectly, from use in criminal trials. Here, because it was information from the unreasonable and unjustified search of the digital contents of the laptop that led the government to Macklin Manor, all of the evidence obtained from the laptop and all of the evidence related to Macklin Manor must be suppressed. Further, even after the government had been led to Macklin Manor by the invalid search of the contents of the laptop, the government still did not have probable cause upon which to base its application for a warrant until it had conducted the additional unreasonable technological searches of the interior of the home and

curtilage with the drone and Doppler radar. Therefore, because the probable cause for the warrant was based on these forbidden searches, the fruits of the entry based on the warrant must also be suppressed.

Therefore, if either the search of the laptop or the surveillance of the home and curtilage are suppressed, all of the evidence against Respondent must be suppressed as Fruit of the Poisonous Tree, and the reversal of Respondent's conviction must be affirmed.

STANDARD OF REVIEW

Consideration of a Motion to Suppress is a "mixed question of fact and law." *United States v. Thomas*, 818 F.3d 1230, 1239 (11th Cir. 2016). Questions of law are reviewed de novo, and questions of fact are reviewed for clear error. *Id.*

ARGUMENT

The Fourth Amendment to the U.S. Constitution, made applicable to the States through the Fourteenth Amendment, prohibits government actors from conducting unreasonable search or seizure in the absence of a warrant issued by a judicial officer upon a showing of probable cause that both a crime has been committed and that evidence of the crime will be found in the place to be searched. U.S. Const. amends. IV[1], XIV. Whether a warrantless search is permitted turns on the reasonableness of the proposed search, considered with respect to the totality of the circumstances, and taking into account concerns for officer safety, destruction of evidence, mobility of evidence, and other special considerations. *Katz v. United States*, 389 U.S. 347, 357

[1] The Fourth Amendment reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(1967) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); *Id.* at 361 ("the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.") (Harlan, J., concurring).

Several specific exceptions to the warrant requirement and the requirement for probable cause have been identified in the jurisprudence of this Court on the basis of their reasonableness, including an exception for the search of an arrestee and his immediate surroundings incident to his arrest, and an exception for the search of the person and property of any individual entering the sovereign territory of the United States at either a border crossing or other international entry point. *Id.* at 362 ("warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions"); *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004) (border searches); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (search incident to arrest); *Rios v. United States*, 364 U.S. 253, 261 (1960)

The basis for each of these exceptions has always been reasonableness, as only unreasonable searches are prohibited by the Fourth Amendment. As a direct corollary to the requirement for reasonableness is that each of these exceptions will only apply when, and to the extent that, the reasons for the exception apply to the present case. For example, in *Robinson*, the Court found that, in the case of a search incident to arrest, a completely unrestricted search of the person was reasonable. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Nonetheless, in *Chimel*, the Court invalidated a "search incident to arrest" of the entire house of the defendant, as exceeding the permitted scope for a search that should be limited to the area within the immediate control of the defendant. *Chimel*, 395 U.S. at 768. As another example, in *Gant*, this

Court invalidated the search of defendant's vehicle when he had already been removed and the offense was a traffic offense where additional evidence of that offense would not have been found within the vehicle. *Arizona v. Gant*, 556 U.S. 332, 351 (2009). Where the reasons for the exception do not apply to a search in a specific case, or where they do not apply to the extent of the search, the exception will not permit the search, and the search may only be conducted following issuance of a warrant upon the showing of probable cause. Where a search that may only be conducted following issuance of a warrant is nonetheless conducted without a warrant, this Court has found that suppression of the use of all evidence obtained in the search, as well as suppression of the use of all evidence derived indirectly from the search, is the only practical or appropriate remedy to the government's impermissible behavior. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

I. THE WARRANTLESS SEARCH OF THE LAPTOP SHOULD BE SUPPRESSED AS UNREASONABLY PERSONAL AND INTRUSIVE.

A. The Government Carries the Burden of Rebutting the Presumption that a Warrantless Search is Invalid.

Any search conducted without first obtaining a warrant based on probable cause is presumed invalid, and that presumption can only be rebutted by a showing by the government that the circumstances and extent of the search are justified by the reasons identified by this Court for specific exceptions to the warrant requirement, considering the totality of the circumstances surrounding the search. *Katz v. United States*, 389 U.S. 347, 357 (1967). Even when the officers have probable cause which would justify the issuance of a warrant, probable cause itself, without a warrant, cannot justify a search, because otherwise "the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones v. United States*, 357 U.S. 493, 498 (1958). Because the warrantless search is presumed

invalid, the government carries the burden of proof that the warrantless search was nonetheless reasonable and required by the circumstances. *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("the burden is on those seeking the exemption").

B. The Border Search Exception to the Warrant Requirement is Justified by the Needs for Officer Protection and Prevention of Importation of Dangerous and Unwanted Items.

The border search exception has been validated by this Court on the basis both of officer safety and on the basis of the need of the sovereign to prevent entry of unwanted or dangerous items. *United States v. Ramsey*, 431 U.S. 606, 620 (1977). sAt the border, the traveler subjectively understands that he may be subjected to a search by Customs Agents, and society insists that such searches are permitted in order to protect society from the entry of unwanted items. These considerations together have justified the border search exception to the warrant requirement.

However, courts have refused to support the "anything goes" attitude of the government toward searches at the border. *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013); *United States v. Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008). The touchstone of the Fourth Amendment's prohibition of unreasonable searches has always been reasonableness, and even at the border, only those warrantless searches that are reasonable, and conducted for reasonable purposes, are permitted. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Kentucky v. King*, 563 U.S. 452, 459 (2011). This situation is precisely analogous to the exception for warrantless search incident to arrest considered in *Riley*.

C. The Considerations in *Riley* Prohibiting the Warrantless Search of a Cell Phone Apply with even Greater Force Here.

Like the border search exception, the exception for search incident to arrest has traditionally been very broad. Indeed, because contraband in the possession of an arrestee brought into custody can pose ongoing danger to officers and others, an extremely invasive search of the person, including strip search, has been authorized incident to arrest, because the reasons for allowing invasive searches in this setting are compelling. *Florence v. Bd. of Chosen Freeholders of Burlington*, 566 U.S. 318, 339 (2012). However, even in this situation, where the most invasive searches are permitted, in *Riley* the Court prohibited warrantless search of the digital contents of a cell phone. The Court observed that the capacity of the cell phone for storing personal information about the intimate details of the life of the owner introduced an important consideration to be included in the totality of the circumstances. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014). The Court also noted that the contents of the cell phone were not, in themselves, dangerous to officers or others, and that by removing the cell phone from the possession of the arrestee, any danger of destruction of evidence while a warrant was being obtained could be eliminated. *Id.* at 2485-87. As a result, the reasons for the warrantless search incident to arrest simply did not apply to the search of the digital contents of the cell phone.

In *Riley*, the Court gave great consideration to the amount of information contained in a cell phone, as well as the intensely personal nature of that information. Individuals typically have photographs of themselves extending years into the past, as well as their schedule, their messages, their emails, and their documents. *Riley*, 134 S. Ct. at 2489. In the past, it was not possible for an individual to carry such a volume of information with them, and they could keep the information private by keeping it at home. *Id.* The Court pointed out that the information in the cell phone is not absolutely protected, but rather, upon showing of probable cause to a

magistrate, a warrant specifying with particularity the information sought could be obtained, and the search for that information could then be conducted. *Id.* at 2495.

Each of these considerations, applied in *Riley* to the exception for search incident to arrest, applies with even greater force in the present case to the search of the digital contents of a laptop brought into the country at the border. As in *Riley*, the digital contents of the laptop pose no danger to the officers or others, and if the officer believes she has probable cause to search the digital contents of the laptop, she can remove the laptop from the possession of the individual to prevent the destruction of any evidence contained therein while her probable cause can be presented to the magistrate and, if justified, a warrant is obtained. In this case, Officer Ludgate testified that it is very straightforward and simple to obtain a warrant when needed, and her only justification for not doing so was that she did not believe that the warrant requirement applied at all at the border.

This would not be the first time this Court recognized the difference between information and physical objects brought through the border. In *Ramsey*, the Court permitted the inspection of letter class international mail without a warrant, but only for the heroin the envelopes contained. *United States v. Ramsey*, 431 U.S. 606, 624 (1977). The Court noted that the inspectors were prohibited from reading any of the correspondence the envelopes contained without a judicial warrant, both by statute and by regulation. *Id.* The identical reasoning applies here: warrantless searches for physical contraband are permitted at the border, but searches of the information brought across the border must only be conducted pursuant to a warrant.

D. A Citizen has a Reasonable Expectation of Privacy in the Digital Contents of her Laptop.

Just as the Court found a reasonable expectation of privacy in the digital contents of the cell phone in *Riley*, here the Respondent and Mr. Wyatt have a reasonable expectation of privacy in the digital contents of their laptop.

Under the *Katz* framework, when an individual has a subjective expectation of privacy, and society is prepared to recognize that expectation as reasonable, a search may not be conducted without a warrant. Certainly, with all of the detailed information stored in a laptop, an individual expects that information will be kept private, and society has recognized that expectation. Therefore, it was completely reasonable for Respondent to expect privacy in the contents of her laptop, and the warrantless search must not be permitted.

E. A Warrant Could not have been Obtained Here Because there was no Probable Cause.

Respondent does not argue that a search of the digital contents of a laptop may never be conducted. Rather, the search of a laptop may only be conducted on the basis of probable cause, presented to a magistrate, and upon issuance of a warrant. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014). However, here Agent Ludgate had no probable cause to expect that any specific evidence would be found on the laptop. R. at 27.

The basis for probable cause "is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). It has been defined as the situation where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" a crime has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

Here, those facts and circumstances did not exist. At the time of the search, the only evidence Agent Ludgate had was that Mr. Wyatt was associated with Respondent and that he was carrying cash in an amount of $10,000, an amount whose importation is legal and which does not need to be declared (only cash IN EXCESS OF $10,000 need be declared). 31 U.S.C. § 5136; 31 C.F.R. § 1010.340. Even if carrying $10,000 in cash were illegal, Agent Ludgate certainly could not have expected to find additional cash in the digital contents of the laptop. And even if she did, in *Riley* this Court declined to extend *Gant* to allow the warrantless search of a cell phone for evidence of the crime of arrest. *Riley v. California*, 134 S. Ct. 2473, 2492 (2014). Agent Ludgate would not have been able to obtain a warrant for the search of the digital contents of the laptop, as she did not have any probable cause. Rather, Agent Ludgate testified that she believed she had unbridled authority to search anything in Mr. Wyatt's possession merely because he was bringing it into the country. Agent Ludgate's perusal of the contents of the laptop was nothing more than a fishing expedition.

Therefore, because considerations identical to those in *Riley* apply to the warrantless search of the digital contents of a laptop in spite of its being brought into the country, this Court should affirm the Thirteenth Circuit in suppressing the fruits of that unreasonable search.

II. THE EVIDENCE OBTAINED USING THE PNR-1 DRONE TO VIEW PROPERTY FROM NON-NAVIGABLE AIRSPACE SHOULD BE SUPPRESSED AS AN UNREASONABLE WARRANTLESS SEARCH.

Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States*, 269 U.S. 20, 33 (1925), because the Constitution demands "that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police." *Wong Sun* v. *United States*, 371 U.S. 471, 481.

This case is not about "open fields," which provide diminished privacy interest and expectation, but about curtilage, which is the outdoor area immediately surrounding the home, which was considered under the common laws to be part of the home itself.

Here, the police intruded on Amanda Koehler's constitutionally protected expectation of privacy when they conducted an unreasonable aerial surveillance of her home and its curtilage, and photographed and video-taped her in the privacy of her own backyard without a warrant. The fruits of their unjustified search must be suppressed.

A. A Fourth Amendment Search Requires an Invasion of a Privacy Interest or an Intrusion into a Constitutionally Protected Area.

This Court has held that the Fourth Amendment deserves its greatest respect in the context of searches of the home. With respect to residential searches, the Fourth Amendment applies not only to the structure itself but also to the "curtilage", which incorporates the area immediately adjacent to a home, such as the porch and the front and back yard areas close to the house. The common law definition of curtilage is the area where intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd v. United States,* 116 U.S. 616, 630 (1886), and deserves the same Fourth Amendment protection as the home itself.

In *Dunn,* this Court held that the curtilage may be defined with reference to the following four factors: (1) the proximity of the area to the home, (2) whether the area is included within an enclosure, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn,* 480 U.S. 294, 301 (1987). However, the Court added "these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's `umbrella' of Fourth Amendment protection." *Id.*

1. The Pool and Pool House were in Close Proximity to the Home.

In *Oliver*, this Court has held that the area immediately surrounding a house or dwelling is curtilage if it harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States,* 466 U.S. 170, 180 (1984). The pool house was a mere 50 feet from the house; by way of comparison, in *Dunn*, the Court noted that a barn, approximately 60 yards from the home and 50 yards outside of the fence that surrounded the home, was outside the home's curtilage. *Dunn*, 480 U.S. at 302. In *Jardines*, the Court found that the front porch is part of the curtilage, and that a police dog may not be brought to sniff for marijuana on the front porch of a home without a warrant. *Florida v. Jardines*, 569 U.S. 1, 4 (2013). In *Ciraolo*, the Court noted that, although a garden in the backyard was within the curtilage of the home, obtaining evidence by observing that garden from navigable airspace did not constitute a search. *California v. Ciraolo*, 476 U.S. 207, 209 (1986).

Here, the area surveilled was Respondent's intimate, private backyard, patio, and pool. Technology may have advanced to a point that allows law enforcement to be technological voyeurs, but the suggestion that a backyard, pool and pool house, no more than 50 feet from the edge of the home, are not within a home's curtilage defies logic.

2. Privacy Does Not Depend on a Physical Enclosure.

The fact that there was no fence is not dispositive as to the expectation of privacy. A "[y]ard or lawn is within curtilage protected from unlawful search and seizure, and the mere absence of a physical barrier such as a fence, gate, or hedge is not conclusive." *Everhart v. State,* 274 Md. 459, 477 (1975). Here, the District Court relied on the fact that there were no fences or signs to conclude that there was no expectation of privacy, ignoring the fact that Macklin Manor was positioned on top of a mountain, which itself is a geographic barrier.

3. The Nature of the Use of the Pool and Pool House evidence Respondent's Expectation of Privacy

In *Jardines*, the Court specifically named a front porch as a prime example of curtilage; even though Girl Scouts or salespersons can knock on the front door, they must leave immediately if there is no answer. *Jardines*, 569 U.S. at 3. Similarly, a bathhouse adjacent to dwelling was part of curtilage of home and within protection against unreasonable search and seizures. *Wakkuri v. United States*, 67 F.2d 844, 845 (6th Cir. 1933). A person's backyard, pool and pool house are locations of intimate use that should be afforded the protection from unreasonable and unwanted search.

4. Protection from Observation of the Curtilage Indicates Respondent's Expectation of Privacy.

The *Jardines* Court noted that, while police can stop a person on an open highway, they cannot peer into the windows of a home from the front porch, without probable cause. *Jardines*, 569 U.S. at 3.

This Court recognized in *Boyd* that the essence of a Fourth Amendment violation is "not the breaking of doors, and the rummaging of his drawers, but rather the invasion of indefeasible right of personal security, personal liberty and private property." *Boyd*, 116 U.S.at 630. Respondent purchased a home at the top of a mountain that is typically cloaked in fog and cloud cover, which effectively prevented observation from navigable airspace, a fact which can be reasonably taken to indicate her subjective expectation of privacy from the air.

B. Officer Lowe's Use of the PNR-1 Drone was an Unreasonable Search.

In *Katz v. United States*, this Court departed from its trespass-oriented structure to the Fourth Amendment, previously established in *Olmstead*. *Olmstead v. United States*, 277 U.S. 438, 456–57 (1928). Under the *Katz* rule, trespass was no longer required to find a Fourth

Amendment violation. Instead, the court held that in order to decide whether a violation of the Fourth Amendment took place, it is necessary to establish (1) whether a person had a subjective expectation of privacy and (2) whether society is prepared to objectively view it as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967).

1. Amanda Koehler's Subjective Expectation of Privacy was Violated by Officer Lowe's Use of the PNR-1 Drone.

The days of building a fence for privacy are over. While the Fourth Amendment does not "require law enforcement officer to shield their eyes when passing by a home on public thoroughfares," *California v. Greenwood*, 486 U.S. 35, 41 (1988); a person's "[p]rivate activities which are closely associated with and occur nearby the home should not be invaded by inquisitive law enforcement officers without warrants." *Oliver,* 466 U.S. at 178.

Here, the Respondent's property is located at the top of a mountain, secluded from its surrounding neighbors and covered in fog and clouds such that it cannot be viewed from aircraft passing overhead. The privacy that this manor affords is significant. Respondent has demonstrated a reasonable expectation of privacy in acquiring and maintaining a residence in such a secluded location. The drone passed over the home and the curtilage of the home, and not over an open field, and in contrast to *Ciraolo*, it obtained information that, due to the clouds and fog of Macklin Manor, would not have been obtainable from navigable airspace. *Ciraolo*, 476 U.S. at 213. The observations from this non-public area constitute an unreasonable search.

2. Society Objectively Expects Privacy from Unreasonable Searches.

This Court has never held that all collectable information capable of being learned by others has been "knowingly expose[d] to the public," and therefore devoid of constitutional protection. *Katz*, 389 U.S. at 351. The government's suggestion that, "when the police make

observations of matters in public view, the assistance of technology does not transform the surveillance into a search," does not fairly address the issue presented in this case. *Id.* With advances in technology, what law enforcement is able to see from public place borders on the edge of limitless. Now, we are dealing with camera zoom lenses that can capture vivid close up images from a great distance, and while the drone's visual capabilities are well documented, drones can also listen and take thermal-sensitive pictures. In fact, the higher-end, more sophisticated drones are capable of intercepting electronic communications, track GPS information, and use facial recognition technology.[2] The Court and the people are no longer dealing with the naked eye.

In *Ciraolo*, the Court noted that the test of legitimacy is "not whether the individual chooses to conceal 'private activity,' but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 211-212. The Court ruled in *Ciraolo* that the Fourth Amendment does not protect an individual's private property **as long as an aircraft is in navigable airspace**; in that case, the altitude was 1,000 feet. *Id.* at 213 (emphasis added). "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 218. Although the PNR-1 drone had a statutory maximum permissible flight altitude of 1640 feet, it likely exceeded that altitude during its flight. R. at 40.

Here, the government desires to narrow the scope of the Fourth Amendment because technology makes it easy to collect information individuals reasonably prefer and intend to keep private.

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[2] *A legal victory for drones warrants a Fourth Amendment discussion.* https://constitution center.org/blog/a-court-victory-for-drones-warrants-a-fourth-amendment-discussion. (last visited Oct. 18, 2017).

The Fourth Amendment prohibits police activity, which, if left unhindered, would jeopardize individuals' sense of security or would too heavily burden those who wished to guard their privacy. And "for the police habitually to engage in such surveillance—without a warrant—is constitutionally intolerable." *Dunn*, 480 U.S. at 319. Amanda Koehler's expectations of privacy in her home, yard, and pool house "are expectations society would regard as reasonable," and the failure to uphold these expectations and "sanctioning the police behavior at issue here does violence to the purpose and promise of the Fourth Amendment." *Id.*

III. THE EVIDENCE OBTAINED USING THE HANDHELD DOPPLER TO VIEW THE DETAILS OF THE INTERIOR OF THE HOME SHOULD BE SUPPRESSED AS AN UNREASONABLE WARRANTLESS SEARCH.

Justice Douglas noted in his concurrence in *United States v. United States Dist. Court*, "[w]e have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing." *United States v. United States Dist. Court*, 407 U.S. 297, 333 (1972).

The warrantless use of the handheld Doppler Radar by Detective Perkins to view the details of the interior of the home was a warrantless and unreasonable search.

A. A Citizen's Home is Entitled to the Greatest Protection Under the Fourth Amendment.

The Fourth Amendment expressly provides that "[t]he right of the people to be secure in their houses . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Additionally, the primary purpose of the Fourth Amendment is "to secure the citizen in his right of unmolested occupation of his dwelling." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). This Court has consistently held that homes deserve amplified constitutional protection

from searches and seizures. "The right of the person to retreat into the home and be free from unreasonable governmental intrusion is at the very core of the Fourth Amendment." *Silverman v. United States.* 365 U.S. 505, 511 (1961).

The question before the Court, while not simple in interpretation, is simply stated. If the use of Doppler radar device, also known as Ranger-R, to measure movement in a home is a search, then evidence obtained from that unreasonable and warrantless search must suppressed.

B. Doppler Radar Devices: Law Enforcement Weapon or Aid.

The handheld Doppler radar works similar to motion detectors, using radio waves to view movements as minor as a human breathing from a distance of more than 50 feet. These devices can detect whether anyone is inside a house, where they are and whether they are moving.[3]
In *Denson*, the Tenth Circuit held that officers' use and search of a home with a radar device did not lead to a Fourth Amendment violation, because in that case the information derived from that search was independently available via other means. *United States v. Denson*, 775 F.3d 1214, 1218 (10th Cir. 2014). The Denson court declined to rule on the constitutionality of this device, but noted that significant Fourth Amendment problems would have arisen if the evidence the radar device revealed had been crucial to the government's case. *Id*. at 1219. There, the court stated, "[i]t's obvious to us and everyone else [] that the government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions." *Id*. at 1218.

New technologies bring with them not only new opportunities for law enforcement to catch criminals but also new risks for abuse and new ways to invade constitutional rights. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33-35 (2001) (holding that using warrantless thermal imaging to show activity inside a home violated the Fourth Amendment).

[3] *RANGE-R Theory of Operation*, RANGE-R THROUGH THE WALL RADAR, http://www.range-r.com/tech/theory.htm (last visited Oct. 18, 2017).

C. The *Kyllo* Standard Confirms that Detective Perkins' Use of the Doppler Radar Device Violated Amanda Koehler's Fourth Amendment Rights.

This case bears eerie resemblance to *Kyllo*, *w*here agents used a thermal scanner on Kyllo's home. *Kyllo,* U.S. 27 at 29-30. The scan revealed that the garage, the garage roof, and the side wall of Kyllo's home were warmer than the rest of the home. *Id.* This information confirmed the suspicion that Kyllo was growing marijuana in his home. *Id.* As a result, Kyllo was indicted for manufacturing marijuana. *Id.* Kyllo moved to suppress the evidence based on the agents' use of the thermal imaging device, and this Court agreed that the use of that technology to view the interior of the home constituted a warrantless search of Kyllo's home. *Id* at 31.

In recognizing that "the Fourth Amendment draws 'a firm line at the entrance to the house,'" the Court thought it best that the "line . . . must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." *Id* at 40. Moreover, the Court noted that "[i]n the home, [the Court's cases] show *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id* at 37.

Justice Scalia wrote, "[w]hile the technology used in the present case was relatively crude, the rule [the Court] must adopt must take account of more sophisticated systems that are already in use or in development." *Id* at 36. Further, anticipating technologic advancement and upholding the inviolability of the home, the Court held "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id* at 40. Thus, in *Kyllo*, the agents' use of the thermal imaging device was an unlawful search. *Id*.

1. Could Police Have Obtained This Information Without Entering the Home?

Simply stated…No! The Thirteenth Circuit stated, "there is no conceivable way for a person to know how many people are inside a building and exactly where they are positioned inside the building without actually entering the building." R. at 20. Respondent agrees.

2. Is the Device in Common Use?

Under *Kyllo*, law enforcement officers undertake a Fourth Amendment search when they use "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion" and this search is "presumptively unreasonable without a warrant." The common use element is not a comparison between law enforcement and governmental agencies. It was meant as a comparison of its commonness and availability among that of general society. "And are the radar devices popular amongst the public?" Detective Perkins said, "I don't believe so. . . I don't see any reason why the average citizen would own one." R. at 35.

But even if infrared cameras, like the one used in *Kyllo*, were now so popular that their use is no longer considered a Fourth Amendment search, police Doppler radars still clearly fall under *Kyllo*'s prohibition. Radars used to detect human movement or breathing are not in general public use and realistically have no general use application for the average citizen. Here, the warrantless use of the Doppler radar by the Police should be prohibited, and the information derived from that unauthorized search be suppressed.

At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Boyd*, 116 U.S. at 626-630. This Court has never held that a federal officer may without warrant and without consent

physically entrench into a man's home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard. *Silverman*, 365 U.S. at 511.

This Court has commented that the Fourth Amendment plays a robust role as our primary protection against "a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). The Court's responsibility in this balancing is through enforcement of the warrant requirement. *See Katz,* 389 U.S. at 362. As this Court has acknowledged, "[r]equiring a warrant will have the salutary effect of ensuring that use of [new technology] is not abused." *United States v. Karo*, 468 U.S. 705, 717 (1984).

Therefore, under a *Kyllo* analysis, the use of the Doppler radar device on Macklin Manor was an unlawful search because the detailed and intimate information obtained through the use of the Doppler device could not have been otherwise obtained except through entering the home, and the device, while perhaps commonly used by law enforcement, it not one of common public use. The Court should affirm the Thirteenth Circuit Court's ruling in suppressing information obtained and derived from that unreasonable search.

IV. ALL OF THE EVIDENCE DERIVED FROM THE WARRANTLESS SEARCHES OF THE LAPTOP, THE PROPERTY, AND THE INTERIOR OF THE HOME SHOULD BE SUPPRESSED AS FRUIT OF THE POISONOUS TREE.

This Court has noted that the only effective way to protect the Fourth Amendment prohibition of unreasonable searches is to exclude the evidence obtained as a result of the search, as well as any evidence derived indirectly from the evidence obtained as a result of the search, from use in criminal trials. *Wong Sun v. United States*, 371 U.S. 471, 484, 487–88 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Here, because it was information from the unreasonable and unjustified search of the digital contents of the laptop that led the government to Macklin Manor, all of the evidence obtained from the laptop and all of the

evidence related to Macklin Manor must be suppressed. Further, even after the government had been led to Macklin Manor by the invalid search of the contents of the laptop, the government still did not have probable cause upon which to base its application for a warrant until it had conducted the additional unreasonable technological searches of the interior of the home and curtilage with the drone and Doppler radar. R. at 5, 34. Therefore, because the probable cause for the warrant was based on these forbidden searches, the fruits of the entry based on the warrant must also be suppressed.

Therefore, if either the search of the laptop or the surveillance of the home and curtilage are suppressed, all of the evidence against Respondent must be suppressed as Fruit of the Poisonous Tree, and the reversal of Respondent's conviction must be affirmed.

CONCLUSION

This Court should affirm the Court of Appeals, find that the District Court erred in denying Respondent's motion to suppress the evidence obtained from searching the contents of Respondent's laptop, flying the PNR-1 drone to view property not visible from navigable airspace, and using the handheld Doppler radar to view the intimate details of the interior of the home, reverse the judgment entered against Respondent, and remand the case for further proceedings.

Respectfully Submitted,

Team 2

Counsel for Respondent