No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2017

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 RESPONDENT

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW vi

STATEMENT OF THE CASE 1

I. STATEMENT OF THE FACTS 1

II. PROCEDURAL HISTORY 2

SUMMARY OF THE ARGUMENT 3

STANDARD OF REVIEW 6

ARGUMENT AND AUTHORITIES 6

I. THE WARRANTLESS SEARCH OF MS. KOEHLER'S LAPTOP AT THE BORDER WAS UNREASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS NOT WITHIN THE SCOPE OF THE BORDER SEARCH EXCEPTION 6

A. This Court's Holding in *Riley* Was a Categorical Determination That Electronic Storage Devices Are Not to Be Treated as Traditional Containers, and Require a Warrant to Be Searched Lawfully 7

B. If the Court Chooses Not to Extend *Riley*, the Border Search of Ms. Koehler's Laptop Was Still Unconstitutional Because It Was a Nonroutine Search Conducted Without Reasonable Suspicion 10

II. THE TWIN SEARCHES OF MACKLIN MANOR USING A PNR-1 DRONE AND A HANDHELD DOPPLER DEVICE WERE BOTH UNREASONABLE UNDER THE FOURTH AMENDMENT BECAUSE THEY VIOLATED MS. KOEHLER'S REASONABLE EXPECTATION OF PRIVACY 13

A. Pawndale Police's Warrantless Use of a PNR-1 Drone to Observe the Curtilage of Macklin Manor Is a Violation of Ms. Koehler's Reasonable Expectation of Privacy Under the Fourth Amendment 14

B. In the Alternative, Drones Provide a Unique Threat to Privacy Which the Court Should Recognize by Requiring a Warrant to Use Them for Observing the Curtilage of One's Home 17

C. The Use of a Handheld Doppler Device to Penetrate the Walls of Ms. Koehler's Home and Reveal Information Within Is an Unreasonable Search Under the Fourth Amendment 19

D. The Exclusionary Rule Warrants the Exclusion of All Evidence Obtained from Ms. Koehler's Laptop, as Well as the Search of Macklin Manor 21

CONCLUSION...25

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Page(s)

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California v. Ciraolo,
476 U.S. 207 (1986) 14, 16

Commonwealth v. Oglialoro,
547 A.2d 387 (Pa. Super. Ct. 1988),
aff'd, 579 A.2d 1288 (Pa. 1990) 17, 19

District of Columbia v. Heller,
554 U.S. 570 (2008) 7

Florida v. Riley,
488 U.S. 445 (1989) 17, 18

Hester v. United States,
265 U.S. 57 (1924) 14

Illinois v. Gates,
462 U.S. 213 (1983) 6, 22

Katz v. United States,
389 U.S. 347 (1967) 6, 13, 14, 19

Kyllo v. United States,
533 U.S. 27 (2001) 21

Mapp v. Ohio,
367 U.S. 643 (1961) 21, 22

Ohio v. Robinette,
519 U.S. 33 (1996) 6

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466 U.S. 170 (1984) 13

Riley v. California,
134 S. Ct. 2473 (2014) .... *passim*

Silverman v. United States,
365 U.S. 505 (1961) 17, 19

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360 P.3d 1161 (N.M. 2015) 6, 8, 9, 10

United States v. Cotterman,
709 F.3d 952 (9th Cir. 2013) 6, 8, 9, 10

United States v. Dunn,
480 U.S. 294 (1987)....................14, 15

United States v. Flores-Montano,
541 U.S. 149 (2004)....................10, 11

United States v. Montoya de Hernandez,
473 U.S. 531 (1985)....................9, 10, 11, 12

United States v. Ramsey,
431 U.S. 606 (1977)....................8, 10, 11, 12

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232 U.S. 383 (1914),
overruled in part by Mapp v. Ohio,
367 U.S. 643 (1961)....................21

Wyoming v. Houghton,
526 U.S. 295 (1999)....................7

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U.S. Const. amend. IV 6

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3 Wake Forest J.L. & Pol'y 397 (2013)....................18

Thomas Mann Miller,
Digital Border Searches After Riley v. California,
90 Wash. L. Rev. 1943 (2015) 11

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Drones in the Homeland: A Potential Privacy Obstruction Under the Fourth Amendment and the Common Law Trespass Doctrine,
21 CommLaw Conspectus 365 (2013) 18

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Does the warrantless search of a laptop at the border violate a person's reasonable expectation of privacy when it falls outside the traditional scope of the border exception and was not reasonably related to the border stop?

II. Do the warrantless searches of a home's interior and curtilage through the use of a PNR-1 drone and a hand-held Doppler device violate the Fourth Amendment?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

The Border Search. Scott Wyatt, boyfriend of Respondent Amanda Koehler was stopped at the Pawndale border by Agents Ludgate and Dwyer when he attempted to reenter the country. R. at 2. During this stop, the agents inspected Mr. Wyatt's car and found $10,000 in cash and a laptop computer with the initials "AK" inscribed on it. *Id.* Mr. Wyatt informed the agents that he was dating Ms. Koehler, and that he shared the laptop with her. *Id.* The agents ran Ms. Koehler's name through a database, and found that she had previous convictions for violent crimes, and that she was a person of interest in the kidnapping of the Ford children. *Id.* After learning of this information, rather than obtaining, Agent Ludgate opened the laptop and began looking through the documents therein. *Id.* at 3. One of the documents Agent Ludgate found on the laptop was a lease agreement under an alias that Ms. Koehler sometimes uses for business. *Id.* The record is silent as to whether the documents were stored on the laptop itself, or if the laptop was accessing information stored elsewhere. Agent Ludgate immediately called Detective Perkins, lead detective on the Ford case, and informed him of her findings. *Id.*

The Search of Macklin Manor. The information led Detective Perkins to Macklin Manor, a large estate atop Mount Partridge. *Id.* Because of the consistent fog and cloudy skies surrounding Macklin Manor, aircraft largely avoid the mountain whenever possible. *Id.* Detective Perkins assigned Officers Lowe and Hoffman to conduct surveillance of Macklin Manor because of the information received from the laptop. *Id.* Officer Hoffman patrolled the area on foot. *Id.* Officer Lowe, without first obtaining a warrant, deployed a PNR-1 drone to fly over Macklin Manor. *Id.* This drone is known to have connectivity problems, and violates airspace laws around 60% of the time. *Id.* at 41. During this flyover, Officer Lowe learned the

layout of Macklin Manor, and saw Ms. Koehler walking to the pool house. *Id.* Afterwards, Officer Hoffman and Detective Perkins snuck up to the front door, and used a hand-held Doppler device to scan the inside of the manor. *Id.* at 4. This device operates by emitting a radio wave into the home and measuring how long it takes the wave to return to the emitter. *Id.* This allows officers to detect the presence of and location of any person within 50 feet, even through the walls of a home. *Id.* From the front door of Macklin Manor, the Doppler device revealed a single individual inside the main house of the manor. *Id.* The officers then walked around the curtilage of the home, and scanned the pool house which revealed three individuals inside. *Id.*

Using the information obtained from the search of Ms. Koehler's laptop, PNR-1 flyover, and the internal scans of Macklin Manor, the officers obtained a warrant to search the manor, and arrested Ms. Koehler. *Id.*

II. PROCEDURAL HISTORY

The United States District Court for the Southern District of Pawndale denied Ms. Koehler's motion to suppress the evidence obtained from the border search, the PNR-1 drone, and the Doppler device. *Id.* at n.1.

The United States Court of Appeals for the Thirteenth Circuit properly reversed the district court's ruling. *Id.* at 14. The court held that a digital intrusion into Ms. Koehler's laptop that was not suspected to have further evidence of the crime Mr. Wyatt was being arrested for, was a nonroutine search which went beyond the scope of the border exception to the Fourth Amendment. *Id.* at 15. Additionally, the court held that using technology to enter Ms. Koehler's property and see inside of her home was a violation of her reasonable expectation of privacy under the Fourth Amendment. *Id.*

This Court granted Petitioner's petition for certiorari to answer two questions: first, was the government's search of Respondent's laptop at a border station a valid search pursuant to the border search exception to the warrant requirement? *Id.* at 22. And second, did the use of a PNR-1 drone and handheld Doppler radar device constitute a search in violation of Respondent's Fourth Amendment rights? *Id.*

SUMMARY OF THE ARGUMENT

I.

Agents Ludgate and Dwyer's search of Ms. Koehler's laptop at the border constitutes an unreasonable search under the Fourth Amendment. The Fourth Amendment requires that searches of a person, their house, papers, or effects, be within the scope of a warrant, and backed by probable cause. Warrantless searches are presumptively unreasonable, unless an exception applies. In the present case, the government contends that the search of Ms. Koehler's laptop at the border falls within the border search exception to the warrant requirement. This exception generally allows for routine searches of a person and their effects to occur at the border without a warrant. Non-routine searches, such as the search of Ms. Koehler's laptop, require individualized suspicion. However, this Court's ruling in *Riley v. California* made it clear that the vast amounts of intimate data which may be stored on digital devices sets them apart from their analog counterparts, and requires that a warrant be used to search them, even in light of previously recognized exceptions. In *Riley*, the Court held that the proper test for determining whether to exempt a given type of search from the warrant requirement is to assess the intrusiveness of the search against the necessity of the search for furthering the purpose of the exception. In *Riley*, the Court recognized that a search of electronic storage is uniquely intrusive because such a search can reveal the most intimate details of every facet of a person's life. The asserted purpose of the

Cotterman border exception is to ensure that unwanted individuals and contraband do not enter the country. There is no link between keeping unwanted persons and effects out of the country, and searching Ms. Koehler's laptop. Ms. Koehler was already in the country, and there is no indication that information on the laptop was not also already in the country. Therefore, the search of Ms. Koehler's laptop was unreasonable, because it was a warrantless search that did not serve the narrow purpose of the border exception.

In the alternative, the search of Ms. Koehler's laptop was a nonroutine search which required Agents Ludgate and Dwyer to have reasonable suspicion before conducting the search. Despite the wide latitude given to agents at the border, a nonroutine search is only constitutional if the conducting officers have reasonable suspicion that a specific crime occurred. A nonroutine search is one that invades the personal privacy of the individual in a manner that is unrelated to the scope and circumstances of the stop. In the present case, Mr. Wyatt was stopped because he was entering the country. Ms. Koehler's laptop had no bearing as to whether Mr. Wyatt would be an unsuitable person to enter the country, and is not itself contraband; therefore, searching the laptop was beyond the scope of the initial reason for the stop of Mr. Wyatt.

II.

The warrantless search of Macklin Manor's curtilage with a PNR-1 drone was unreasonable under the Fourth Amendment. Each person has a reasonable expectation of privacy in their home and curtilage. The areas surveyed by the PNR-1 drone are within the curtilage of Macklin Manor because they are closely connected to the home, and are typically used for purposes which one would not intend to show to the public. Police use of the PNR-1 drone to survey the curtilage of Macklin Manor was unreasonable because there was no warrant permitting the search, and the drone itself more likely than not was not at a legal vantage point to

view the curtilage. Due to connectivity errors, the PNR-1 drone used by Pawndale police is known to violate airspace laws 60% of the time, and the drone used during the search of Macklin Manor had connectivity issues for almost one third of its flight time. R. at 41. The State has offered no other evidence to suggest that the drone stayed at the legal altitude while making observations. As such, this Court should conclude that the use of the drone was unreasonable because the state failed to prove that it had a legal vantage point from which to make its aerial observations.

The use of a handheld Doppler device to obtain information from within Macklin Manor was an unreasonable search under the Fourth Amendment. The interior of the home is the most protected place under Fourth Amendment jurisprudence; any intrusion into a home without a warrant is presumptively unreasonable. Detective Perkins's use of the handheld Doppler device emitted a signal into Macklin Manor which constitutes a physical intrusion into the home without a warrant. Because the Doppler device intruded into Macklin Manor without a warrant, its use was unreasonable. In the alternative, should the Court not wish to recognize the intentional emission of radio waves into a private residence for the express purpose of obtaining information to be a physical intrusion, it is still a search made possible by sensory-enhancing technology that obtained information from inside the home which could not be otherwise obtained without trespassing. As such, under the rule set out by this Court in *Kyllo*, the use of the Doppler device is unreasonable under the Fourth Amendment. In any case, because each succeeding search in this case was based on information from a prior search, if the Court finds that any one of the searches in this case were unreasonable under the Fourth Amendment, then the exclusionary rule requires all evidence from that search as well as its successors to be excluded.

STANDARD OF REVIEW

Because this Court is reviewing the legal holdings of the court below, a de novo standard is proper. *Illinois v. Gates*, 462 U.S. 213, 214 (1983). Under a de novo review, the Court gives no deference to the lower courts in reviewing legal conclusions. *Id.*

ARGUMENT AND AUTHORITIES

I. THE WARRANTLESS SEARCH OF MS. KOEHLER'S LAPTOP AT THE BORDER WAS UNREASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS NOT WITHIN THE SCOPE OF THE BORDER SEARCH EXCEPTION.

The issue is whether searching the contents of Ms. Koehler's laptop at the border is a violation of her Fourth Amendment right against unreasonable searches and seizures by the government. The Fourth Amendment states that "[t]he 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 . . . ." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is reasonableness. *Ohio v. Robinette*, 519 U.S. 33, 35 (1996). Unless an established exception applies, a search is constitutional only if it is performed within the scope of a valid warrant that is backed by probable cause. *Katz v. United States*, 389 U.S. 347, 357 (1967). This means that a search conducted without a warrant is presumptively unreasonable. *Id.* One established exception to the Fourth Amendment warrant requirement is the border exception. *United States v. Cotterman*, 709 F.3d 952, 962 (9th Cir. 2013). The border exception allows for routine searches of persons, their vehicles, and effects at any international border or point of entry, without a warrant, probable cause, or personalized suspicion. *Id.* Despite the wide latitude given to law enforcement at the border, even searches that fall into the exception must be reasonable, and nonroutine searches require individualized suspicion. *Id.* at 974. In *Riley v. California*, this Court held that electronic storage devices should receive more

protection than ordinary containers due to the unprecedented amount of information that can be stored within. 134 S. Ct. 2473, 2485 (2014). In the present case, searching Ms. Koehler's laptop at the border was unconstitutional despite the exception because the agents who arrested Mr. Wyatt had no individualized suspicion to believe there would be additional evidence of the crime for which he was being arrested on the laptop, and the search was unreasonable.

A. This Court's Holding in *Riley* Was a Categorical Determination That Electronic Storage Devices Are Not to Be Treated as Traditional Containers, and Require a Warrant to Be Searched Lawfully.

Riley represents a watershed moment in Fourth Amendment jurisprudence when this Court recognized that the ever-advancing capacity of modern technology to track individuals and store information does not come with it an ever-diminishing expectation of privacy on behalf of the public. *Id.* This is reflective of the Court's holdings in other constitutional precedent that regardless of advances in technology, the Court's interpretation of the Constitution may never decrease the protection provided by a constitutional right. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). In *Riley*, this Court held that "[a]bsent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" 134 S. Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). *Riley* was a consolidated case where, in one instance, a man's smart phone was searched incident to a lawful arrest, and, in the other, a flip phone was searched using the same exception. *Id.* at 2480–81. In *Riley*, the Court held that the rationale of protecting an arresting officer that supports allowing warrantless searches of a person and their physical possessions incident to a lawful arrest is not appropriate in the digital context. *Id.* at 2484. This is in part because unlike

physical containers which may contain weapons, or a means of escape, digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. *Id.* at 2485. The Court also recognized that due to the capacity of the modern smart phone, and the intimate data which one can expect to be found through a search, smart phones are categorically different from a search of containers and, absent exigent circumstances, require a warrant to search. *Id.* at 2484.

The digital search of a laptop is just as intrusive into individual privacy as a cell phone search. Like the search-incident-to-arrest exception in *Riley*, the border exception is well established in Fourth Amendment jurisprudence. *See United States v. Ramsey*, 431 U.S. 606, 621 (1977). Even still, courts have rejected an "anything goes" approach to border searches, and require such searches to be reasonable. *Cotterman*, 709 F.3d at 957. Unlike the search incident to arrest in *Riley*, the purpose for the border exception is not officer safety, but to prevent the entry of unwanted persons and effects into the country. *Id.* at 960. This means, in addressing the scope of the border exception, the Court should weigh the intrusiveness of a laptop search against the extent to which such a search is needed to ensure no unwanted person or effect enters the country. *Riley*, 134 S. Ct. at 2484. In *Riley*, the Court recognized that cell phones are such an insistent part of daily life "that the proverbial visitor from Mars might conclude they were an important feature of human anatomy," noting that many Americans live most of their lives within reach of their cell phones. *Id.* Similarly, laptops are often within reach of those who own them, providing the same infinitude of access to information as a cell phone, with none of the storage or capability limitations that are inherent to one. This Court rejected the assertion that the search of all digital data stored on a device is "materially indistinguishable" from a search of physical items, stating: "That is like saying a ride on horseback is materially indistinguishable

from a flight to the moon." *Id.* at 2488. The Court went on to state that unlike a search of physical items, which have a necessary limitation on their level of intrusiveness, the incredible storage capacity of cell phones, coupled with their capacity to access information stored elsewhere, leaves the potential intrusiveness of such a search practically limitless. *Id.* Like a cell phone, the information accessible with within a laptop can reveal "the sum of an individual's private life . . . through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet." *Id.* Also like a cell phone, the information contained within a laptop may date back to its purchase, far beyond the scope of information that even the most invasive physical searches could reveal. *Id.* Indeed, this Court recognized that many Americans keep on their person a digital record of nearly every aspect of their lives—"from the mundane to the intimate." *Id.* This rich and intimate digital record is just as accessible from a laptop as it is from a cell phone, if not more so. This means that a search of one's laptop is one of the most intrusive searches available to law enforcement.

With the intrusiveness of a laptop search well established, the analysis turns to whether such a deep intrusion is warranted to protect the nation from unwanted visitors and effects. As this Court has held, the intrusiveness of a search at the border must be "balanced against the sovereign's interest." *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). The asserted interest of the government is to keep out unwanted people and effects. *Id.* One of the few courts to address this balancing test regarding the search of an electronic device is the Ninth Circuit in *Cotterman*. 709 F.3d at 961. In *Cotterman*, a man's laptop was searched at the border without a warrant because he previously been convicted of possessing child pornography. *Id.* When nothing was found at the border, agents sent his computer off for a forensic search. *Id.* The Ninth Circuit upheld the reasonableness of the border search, stating that the search of a laptop

was indistinguishable from the search of a package. *Id.* However, the court held that a nonroutine search requires reasonable suspicion. *Id.* at 962. The first holding was unequivocally overruled by *Riley* when this Court recognized that the extensive depth of a digital information on modern electronic devices distinguishes them from the search of a purely physical object, and requires a warrant to search them. 134 S. Ct. at 2484. Because *Cotterman* failed to recognize the distinction between physical and digital searches, its use of the balancing test is not instructive to this Court's decision in the present case. Like in *Riley*, where this Court recognized that digital information had no reasonable bearing on officer safety, there is no indication that a digital search of a laptop has any effect on the national interest of keeping unwanted persons or effects out of the country. 134 S. Ct. at 2486. Anything digitally contained within the laptop can be presumed to already exist on the other side of the border, and there is no reasonable expectation that a computer file found during a routine search would disqualify someone from entering the country. In the present case, the officers provided no link between the search of Ms. Koehler's laptop and the government interest of keeping out unwanted people and effects that underlies the exception they were invoking. R. at 2; *see also* R. at 26–27. This Court should maintain its ruling in *Riley*, that electronic devices are materially distinguishable from their physical counterparts, and that no exception to the Fourth Amendment permits the routine searching of digital devices without a warrant, or exigent circumstances.

B. If the Court Chooses Not to Extend *Riley*, the Border Search of Ms. Koehler's Laptop Was Still Unconstitutional Because It Was a Nonroutine Search Conducted Without Reasonable Suspicion.

If the Court chooses not to extend *Riley* to the context of laptops, then the border exception applies normally. The Court has defined the border search exception in three primary cases: *United States v. Ramsey*, *United States v. Montoya de Hernandez*, and *United States v. Flores-*

Montano.[1] In *Ramsey*, this Court recognized the border search exception when it was tasked with determining whether the Fourth Amendment permitted the warrantless search of several envelopes. 431 U.S. at 611. Because of how the envelopes were packed, the Court held that the investigating agent had reasonable suspicion to search them. *Id.* However, the Court emphasized that while the government interests involved permit a physical examination of packages at the border, a warrant is still required to read the content of any letters in an envelope. *Id.* at 623. In *Montoya de Hernandez*, the Court distinguished routine and nonroutine searches, holding that the latter require at least reasonable suspicion, even at the border. 473 U.S. at 541. In *Montoya de Hernandez*, the Court held that with reasonable suspicion that a woman was smuggling drugs, it was acceptable to detain her for 16 hours at the border while waiting for her to produce a monitored bowel movement. *Id.* The Court also held that searches at the border must be "reasonably related in scope to the circumstances which justified it initially." *Id.* at 542. The Court notably refused to comment on whether an intrusive body cavity search would be permissible based solely on reasonable suspicion. *Id.* This leaves the door open for the requirement of probable cause, or a warrant for intrusive border searches. While *Montoya de Hernandez* affirms that nonroutine searches are permissible at the border with reasonable suspicion; the permissibility of such searches is still grounded in the lowered expectation of privacy at the border. *Id.* In *United States v. Flores-Montano*, the Court held that the disassembly and search of a gas tank is not a nonroutine search because it was no more an intrusion into one's privacy than is a search of the passenger compartment. 541 U.S. 149, 152 (2004). Taken together, these precedents establish that at a minimum, reasonable suspicion is required for a nonroutine border search, and that a nonroutine border search is that which invades the personal

[1] *See* Thomas Mann Miller, *Digital Border Searches After* Riley v. California, 90 Wash. L. Rev. 1943, 1954 (2015).

privacy of the individual in a manner that is unrelated to the scope and circumstances of the stop. In the present case, Mr. Wyatt was stopped at the border based solely on routine. R. at 2. While he was stopped, Agents Ludgate and Dwyer asked him some questions, and proceeded to search his vehicle. *Id.* During this search they came across a laptop, searched it, and read its contents. *Id.* at 3. *Ramsey* tells us that if Mr. Wyatt had an envelope in the back of his car rather than a laptop, Agents Ludgate and Dwyer would have needed a warrant to read its contents. 431 U.S. at 611. Petitioner argues that this absurdity is the proper construction of reasonability under the Fourth Amendment. It is not. Even without expanding this Court's ruling in *Riley* to require a warrant in all instances of border searching a laptop, this Court's analyses of the separation between the intrusiveness of searching physical documents and searching a digital library of information can still be instructive; specifically, it should lead this Court to hold that the search of a virtually endless digital data cache is nonroutine and requires, at a minimum, reasonable suspicion to conduct. This prophylactic rule would not grant laptops the categorical protection provided to cell phones in *Riley*, but it would ensure that the government cannot use a mere border crossing as a pretext to investigate the intimate lives of its citizens.

Agents Ludgate and Dwyer lacked reasonable suspicion to search Ms. Koehler's laptop, as the search was not "reasonably related in scope to the circumstances which justified it initially." *Montoya de Hernandez*, 473 U.S. at 541. Agents Ludgate and Dwyer stopped Mr. Wyatt because they stop every car entering through the checkpoint. R. at 25. After searching his car, they found $10,000 that he failed to declare, and a laptop. *Id.* at 3. The agents had no suspicion that additional evidence of a failure to declare was present in the laptop, but they searched it anyway. Just like the officer in *Riley*, who knew what he would find when searching a cell phone—data—and knew that it couldn't relate the interest underlying the arrest, Agents Ludgate and Dwyer

knew they would find data, and were under no illusions that it would be connected to a failure to declare. 143 S. Ct. at 2485. This means that the search was beyond the scope of the circumstances which justified it initially, and was therefore unreasonable. Because the agents' search of Ms. Koehler's laptop was unreasonable, this Court should exclude any evidence obtained in the search of the laptop from evidence.

In conclusion, the investigating agents violated Ms. Koehler's Fourth Amendment right to be free from unreasonable searches when they read the contents of her laptop without a warrant, or even reasonable suspicion. This Court should extend the holding of *Riley* to the context of laptops so that digital information is protected at least as much as its physical counterpart. If, however, the Court doesn't expand *Riley*, it should still find the search of the laptop unreasonable, because it was not connected to the purpose for which Mr. Wyatt was stopped. As this brief will explore later, the result of this illegal search should be an exclusion of all evidence obtained from the laptop from trial, as well as the resulting search of Macklin Manor.

II. THE TWIN SEARCHES OF MACKLIN MANOR USING A PNR-1 DRONE AND A HANDHELD DOPPLER DEVICE WERE BOTH UNREASONABLE UNDER THE FOURTH AMENDMENT BECAUSE THEY VIOLATED MS. KOEHLER'S REASONABLE EXPECTATION OF PRIVACY.

The issue is whether the warrantless use of a PNR-1 drone and a handheld Doppler device to obtain information from inside Macklin Manor and the surrounding curtilage is a search in violation of the Fourth Amendment. As stated above, the touchstone of the Fourth Amendment is reasonableness. *Katz*, 389 U.S. at 360. A search's reasonableness depends on whether the person being searched has a subjective expectation of privacy which society is willing to recognize as objectively reasonable. *Id.* at 361. Generally, a person has such an expectation of privacy when conducting activities within the curtilage of his or her home. *Oliver v. United States*, 466 U.S. 170, 173 (1984). However, it is reasonable for an officer to make observations of one's curtilage

from a legal vantage point, even if that vantage point is in the air. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). There is no reasonable expectation of privacy in areas of one's backyards that may be characterized as open fields. *Hester v. United States*, 265 U.S. 57, 59 (1924). In the present case, the question of whether the search conducted with the PNR-1 drone violated the Fourth Amendment depends upon whether the areas it observed were curtilage to Ms. Koehler's home, and whether the drone was in a legal position to observe those areas. Whether the search of Ms. Koehler's home with the handheld Doppler device depends on whether the information gained by the device was reasonable could not otherwise be obtainable without entering the house. *Katz*, 389 U.S. at 361.

A. Pawndale Police's Warrantless Use of a PNR-1 Drone to Observe the Curtilage of Macklin Manor Is a Violation of Ms. Koehler's Reasonable Expectation of Privacy Under the Fourth Amendment.

The parts of Macklin Manor observed by the PNR-1 drone are curtilage. In *United States v. Dunn*, this Court created a four-factor test for determining whether an outside area of the home is to be considered curtilage, and therefore, an area wherein society recognizes an objectively reasonable expectation of privacy. 480 U.S. 294, 301 (1987). The test looks at 1) the proximity of the area to the home; 2) whether the area is within an enclosure surrounding the home; 3) the nature and uses to which the area is put; and 4) the steps taken by the resident to protect the area from observation from passersby. *Id.* at 294. In *Dunn*, the defendant attempted to assert a Fourth Amendment right to privacy in his barn which was 180 feet away from his home, and 150 feet away from the fence surrounding his home. *Id.* at 295. The Court found it especially significant that the investigating officers possessed objective data that the barn was not being used for the purposes of a home, such as the barn being used for chemical storage. *Id.* Lastly, there was no privacy fence around the barn area of the defendant's home, which signaled that little effort was

made to keep the property private. *Id.* On the first factor, the PNR-1 drone flew over Macklin Manor, and observed the pool area, as well as the pool house. R. at 6. The pool is 15 feet from the home, and the pool house is just on the other side of it, 50 feet from the main home; this is a third of the distance between the defendant's home and barn in *Dunn*. *Id.* To the second factor, unlike *Dunn*, where there was no surrounding structures to provide privacy, the pool area wherein Ms. Koehler was filmed and photographed is abutted on both sides by buildings, the pool house and the main home. The record is silent as to the home's exact configuration, but any prying eyes would have to make a trespassory walk around the sizable manor to obtain a view from either of the unprotected sides. Unlike *Dunn*, where investigators had objective facts that suggested that the barn was not being used for a home, officers in the present case knew nothing of the pool house's use prior to making their flyover. What is known, is that backyard pools are often host to intimate gatherings of friends and family in attire that many would hesitate to wear publicly. Lastly, like *Dunn*, there was no privacy fence surrounding Macklin Manor; however, unlike *Dunn*, this should not signal to the Court a lack of interest in privacy. *Id.* Macklin Manor is described by the lower court as being on the outskirts of Eagle City, on the side of a mountain that is avoided by planes, surrounded by "perpetual fog and clouds." *Id.* at 19. The record makes no mention of neighbors, or passersby against whose prying eyes a resident of Macklin Manor would need to build a fence to protect. Some places are inherently private. This Court has never held that each of the *Dunn* factors must weigh in favor of an individual for the area surrounding their home to be considered curtilage, and the ultimate test is still reasonableness. Accordingly, this Court should hold that the patio and pool area of Macklin Manor—used for intimate family gatherings, abutted by two large structures on its sides, positioned on a perpetually foggy

mountain that planes actively avoid, which has no neighbors—is curtilage of the manor wherein Ms. Koehler has reasonable expectation of privacy.

This Court addressed the legality of observing curtilage from an aerial viewpoint in *Ciraolo*. 476 U.S. at 207. In *Ciraolo*, police received an anonymous tip that the defendant was growing marijuana in his back yard. *Id.* Based on this tip, the police secured a private airplane and conducted a flyover of the defendant's home within legally navigable airspace. *Id.* During the flyover, the police determined with the naked eye that the defendant had marijuana plants growing in his back yard within the curtilage of his home. *Id.* This Court held that the flyover search was reasonable under the Fourth Amendment, because although one's right to privacy extends to one's curtilage, police are permitted to make naked eye observations from any lawful viewpoint. *Id.* at 215. The present case is distinguishable from *Ciraolo* in two major respects; first, the PNR-1 drone most likely was not traveling within navigable airspace; and second, the investigating officers did not make their observations with the naked eye. R. at 41, 39. Due to connectivity issues, the PNR-1 drone has a tendency to exceed the legal 1640-foot altitude limit. *Id.* at 41. The police department's own expert stated that this happens during 60% of the drone's flights. *Id.* For 4–5 minutes while hovering over Macklin Manor, roughly one third of the time the drone was above the manor, the police could not tell at what altitude the drone was hovering. *Id.* The expert knew that the PNR-1 drone tended to exceed the legal altitude prior to using it to observe Macklin Manor. *Id.* This means that Pawndale police knowingly employed a method of surveillance that had a 60% chance of being illegal, and cannot verify whether the legal altitude was breached. The police are the only party which has the capacity to determine whether their search was legal, and they have failed to provide the Court with sufficient evidence to make a determination; therefore, the Court should hold that the use of the drone was unreasonable under

the Fourth Amendment. Furthermore, also unlike *Ciraolo*, the Pawndale police made their observations with the aid of a DSLR camera that has zoom feature which is apparently strong enough to allow police to identify Ms. Koehler from up to 1640 feet in the air. This is a far cry from the naked eye observation of *Ciraolo*'s backyard, and is practically a downward facing telescope. If the Court allows the warrantless zoom-enhanced search of Ms. Koehler's curtilage in the present case, then no precedent would stand in the way of a similar search by satellite. Because the use of the PNR-1 drone was more likely than not illegal, and because it was more intrusive into Ms. Koehler's privacy than a search with the naked eye, this Court should hold that its use was unreasonable.

B. In the Alternative, Drones Provide a Unique Threat to Privacy Which the Court Should Recognize by Requiring a Warrant to Use Them for Observing the Curtilage of One's Home.

Even if the Court does not find the *Ciraolo* distinctions to be independently persuasive, Respondent urges that the Court make a categorical *Riley*-like holding that distinguishes the use of small unmanned drones for the surveillance of civilians from other methods. Some courts have recognized a distinction between fixed wing planes like that used in *Ciraolo*, and helicopters, because the latter is capable of searches of extended duration, are uniquely intrusive, and permit observation not possible on fixed-wing crafts. *State v. Davis*, 360 P.3d 1161, 1170 (N.M. 2015) (holding that the physical intrusiveness of a helicopter's downwash distinguished it from a fixed-wing aircraft like the one used in *Ciraolo*); *see also Commonwealth v. Oglialoro*, 547 A.2d 387, 392 (Pa. Super. Ct. 1988), *aff'd*, 574 A.2d 1288 (Pa. 1990) (holding that the extended 15-minute duration of a naked-eye helicopter search was unreasonable under the Fourth Amendment). Indeed, even this Court could not manage a majority ruling on whether a naked-eye search from a helicopter flying within navigable airspace was reasonable. *Florida v. Riley*,

488 U.S. 445, 448 (1989). Each of the Fourth Amendment concerns regarding helicopters are present, and intensified in the case of drones.[2] In her dissent, Justice O'Connor expressed her dissatisfaction with the plurality's refusal to recognize the potential invasiveness of surveillance by rotary aircraft by recalling a passage from George Orwell's *1984*, perhaps the most well-known and widely regarded treatise on the universal fear of government overreach:

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. . . . In the far distance, a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.

Florida v. Riley, 488 U.S. at 466 (quoting George Orwell, *1984*, at 4 (1949)). Justice O'Connor then asked: "Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?" *Id.* at 467. But, unlike Orwell's *1984*, the American government is not so generous as to inform its citizens when it is watching. If the Court refuses to recognize the unreasonableness of warrantless drone searches, there will be no mustachioed faces bearing down on those suspected of guilt, no terrifying buffeting of helicopter rotors, nor a large shadow upon the land below—just the almost inaudible buzz of a drone and the ever-present threat of police intervention. Although drones don't physically disrupt the surface of one's property, they can be far more intrusive to privacy.[3] The record is clear that the PNR-1 drone likely exceeded the maximum legal altitude, but it is silent as to how low the drone

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[2] *See* Ajoke Oyegunle, *Drones in the Homeland: A Potential Privacy Obstruction Under the Fourth Amendment and the Common Law Trespass Doctrine*, 21 CommLaw Conspectus 365, 393 (2013) (stating that drones present potential for simultaneous violations of the *Jones* and *Katz* rules to an extent beyond any helicopter case).

[3] *See* Philip J. Hiltner, *The Drones Are Coming: Use of Unmanned Aerial Vehicles for Police Surveillance and Its Fourth Amendment Implications*, 3 Wake Forest J.L. & Pol'y 397, 413 (2013) (stating that modern Fourth Amendment jurisprudence leaves the aerial surveillance capabilities of the state practically unbounded, and offers no protection to individuals).

flew. R. at 41. Nothing stops a drone from hovering above one's curtilage at a height of roughly six feet. This means that to an even greater extent than helicopters, drones have the capability to obtain information that would otherwise only be obtainable through police trespass. Like Orwell's nightmarish fiction, a drone could travel from window to window searching for open blinds or pulled drapes making legal observations of those things which the occupant, perhaps unknowingly, has exposed to the public. *See Katz*, 389 U.S. at 351. This is a level of intrusion that far exceeds that which prompted the New Mexico Supreme Court enough to distinguish helicopters from fixed-wing aircraft. *Davis*, 360 P.3d at 1170. And, the 15-minute duration of the drone search of Macklin Manor matches what the Pennsylvania Supreme Court recognized as being unreasonable for a helicopter in *Oglialoro*. R. at 4; *see also* 547 A.2d at 388. Just like this Court's recognition that failing to distinguish digital storage from physical storage is "like saying a ride on horseback is materially indistinguishable from a flight to the moon," failing to distinguish a naked-eye observation made with a fixed-wing aircraft from a zoom-capable camera lens that can spend fifteen minutes hovering at eye level over one's curtilage would be a tremendous failure of the law. *Riley v. California*, 134 S. Ct. at 2488. This case is the perfect vehicle for the Court to hold that drone searches pose a unique threat to privacy, and may only be used to view the curtilage of one's home after obtaining a warrant.

C. The Use of a Handheld Doppler Device to Penetrate the Walls of Ms. Koehler's Home and Reveal Information Within Is an Unreasonable Search Under the Fourth Amendment.

The handheld Doppler device that Detective Perkins used to obtain information from within Ms. Koehler's home was an unreasonable search under the Fourth Amendment. This Court has repeatedly held, "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."

Silverman v. United States, 365 U.S. 505, 512 (1961). This means that "any physical invasion of the structure of the home, by even a fraction of an inch," constitutes an unreasonable search under the Fourth Amendment. In *Silverman*, police suspected that the defendant was operating an illegal gambling operation out of his home. *Id.* at 505. To confirm their suspicions, police deployed a microphone into the defendant's wall so that they could overhear his conversations. *Id.* at 506. This Court firmly rejected the trial court's holding that because the intrusion was unactionable as trespass, there was no violation of the Fourth Amendment. *Id.* The Court held that any warrantless intrusion into a constitutionally protected area is a search in violation of the Fourth Amendment. *Id.* In the present case, Detective Perkins used a handheld Doppler device from the doorstep of Macklin Manor, and later the pool house, to determine the number of people inside. R. at 4. The operation of the Doppler device is not in controversy; it emits a radio signal into the home, and measures the time it takes for the signal to return to the emitter. *Id.* Using this measurement, the device determines how many people are within its range, and at what distance each of them is from the emitter. *Id.* Just like the microphone in *Silverman*, the Doppler device obtained its measurement by intruding into Ms. Koehler's home. Unlike the microphone in *Silverman*, which protruded only a fraction of an inch into the defendant's home, the Doppler device used to search Macklin Manor sends a frequency into the home at a range of fifty feet. *Id.* Because the warrantless use of the Doppler device effectuated a substantial physical intrusion into Macklin Manor, this Court should hold that it was an unreasonable search under the Fourth Amendment.

If the Court does not want to recognize the emission of directed radio waves as an physical intrusion by its operation, then the Court should hold that it constitutes a search insofar as it obtains information from within the home otherwise unobtainable without trespass. This Court

held that the warrantless use of sense-enhancing technology to obtain information from within someone's home is an unreasonable search in *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The defendant in *Kyllo* was suspected of growing marijuana in his home. *Id.* at 27. To confirm their suspicions, police conducted a scan of the defendant's home with thermal imaging device that obtained an "off the wall" reading of the heat of the defendant's home. *Id.* The device "emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house" and "did not show any people or activity within the walls of the structure." *Id.* at 28. Despite the lack of physical intrusion into the home, this Court held that the use of the thermal imaging device violated the defendant's reasonable expectation of privacy because the information which it garnered could not have otherwise been obtained without physical intrusion into the constitutionally protected area of the home. *Id.* Similarly, in the present case, the Doppler device obtained information from inside Macklin Manor, which could not have otherwise been obtained without a physical intrusion. R. at 4. Unlike *Kyllo*, the Doppler device does emit something into the home, radio waves. *Id.* Because Detective Perkins' warrantless use of the Doppler device obtained information from within Macklin Manor which could not have been otherwise obtained without a physical intrusion, this Court should hold that he conducted an unreasonable Fourth Amendment search.

D. The Exclusionary Rule Warrants the Exclusion of All Evidence Obtained from Ms. Koehler's Laptop, as Well as the Search of Macklin Manor.

In *Weeks v. United States*, this Court first held that the fruits of a search conducted in violation to the Fourth Amendment must be excluded from use at trial. 232 U.S. 383, 391 (1914), *overruled in part by Mapp v. Ohio*, 367 U.S. 643, 657 (1961). In *Mapp v. Ohio*, the court held that the exclusionary rule is incorporated to the states through the Fourteenth Amendment. 367 U.S. 643, 657 (1961). With few exceptions, evidence provided from a search must be excluded

from the record if the search was not backed by probable cause and a warrant. *Id.* In the present case, four independent searches occurred: the border search, the drone search, the Doppler search, and the SWAT team entry into the pool house that was supported by a warrant. R. at 3–6. Each of these searches violates the Fourth Amendment for different reasons, and thus must have their fruits excluded from the record.

The first warrantless search occurred at the border and was unreasonable under the Fourth Amendment because warrantless searches are presumptively unreasonable, and reading the information on Ms. Koehler's Laptop goes beyond the scope of the border exception. Several pieces of information were gathered from this search: First, officers discovered that Mr. Wyatt had $10,000 in cash. R. at 2. Second, they learned that he was dating Ms. Koehler. *Id.* Third, they learned that Mr. Wyatt was carrying Ms. Koehler's laptop. *Id.* Fourth, they learned that the laptop contained information about Mr. Ford. *Id.* at 3. And Fifth, they learned that Ms. Koehler owned Macklin Manor through a shell corporation under a pseudonym which she uses to conduct business. *Id.* The State contends that the information learned in the laptop search provided sufficient probable cause for the entry of the SWAT team into Macklin Manor. *Id.* at 20. Probable cause is an objective finding that, based on the facts and circumstances available to law enforcement at the time, there was a fair probability that a specific crime had been committed. *Gates*, 462 U.S. at 232. Ms. Koehler was not a suspect in this case, but a person of interest. R. at 2. This means that police had no reason to believe that she was directly linked with the commission of the kidnapping, but wanted to speak with her about the case. Without the information from the laptop, police would not have known that Ms. Koehler owned Macklin Manor. R. at 3. This means that neither the subsequent drone search, nor the Doppler search would have occurred. Furthermore, even if police were aware that Ms. Koehler owned the

manor, finding Mr. Wyatt with $10,000 in cash on his person is not sufficient evidence to suggest that Ms. Koehler had committed the specific crime of kidnapping the Ford children, or that either she, or they, could be found there. This means that if this Court holds the border search to be unreasonable, the results of the SWAT intervention at Macklin Manor must be excluded from evidence, as well as the results of the drone and Doppler searches. In the alternative, even if the Court holds that the warrantless search of Ms. Koehler's laptop was reasonable, the lower court was correct in holding that the information obtained from that search is not sufficient to warrant probable cause for the SWAT team to enter Macklin Manor. R. at 20. Prior to the drone and Doppler searches, police had no indication that Ms. Koehler was using this property for her personal residence. R. at 3. All that the border search revealed is that Ms. Koehler owned Macklin Manor through a shell corporation under a pseudonym. *Id.* The lower court correctly held that police had no evidence to link Macklin Manor to the kidnappings until after the drone search. *Id.* Because the drone and Doppler searches were dependent upon information gathered from the unreasonable search of Ms. Koehler's laptop, and because those searches are what granted probable cause for the SWAT team to enter Macklin Manor, this Court should hold that the Fourth Amendment requires the exclusion of all information obtained from Ms. Koehler's laptop, as well as that information obtained from the three successive searches.

The second warrantless search was conducted with the aid of the PNR-1 drone flying over Macklin Manor. This search was unreasonable because it observed the curtilage of Ms. Koehler's home from a vantage point that the record shows most likely illegal. R. at 43. The PNR-1 drone search informed police that Ms. Koehler was on the property at Macklin Manor. *Id.* at 3. Learning of Ms. Koehler's presence prompted detectives to conduct the Doppler search, and later served to aid in obtaining a warrant for the SWAT team. *Id.* at 4. As such, because the

PNR-1 search was unreasonable, the exclusionary rule requires the exclusion of the pictures and video of Ms. Koehler taken at Macklin Manor. And, because these were used to obtain the SWAT warrant, the exclusionary rule demands exclusion of all evidence obtained by the SWAT intrusion.

Detective Perkins conducted the third warrantless search with the aid of the handheld Doppler device. This search violates the Fourth Amendment, because the police used the Doppler device to physically intrude into the protected area that is Ms. Koehler's home, and obtained information which would not otherwise be obtainable without physical trespass. It was the use of the Doppler device which suggested to police that the Ford children were in the pool house. *Id.* at 5. Were it not for the presence of additional people suspected of being the children, police would not have had reason to raid the home, because Ms. Koehler was only a person of interest, and not a suspect. *Id.* at 3–5. Even if the Court finds the previous searches to be reasonable, the warrant that permitted SWAT intervention at Macklin Manor would not have been granted without the evidence obtained from the Doppler search; as such, both the awareness of the children's presence and the SWAT intervention are fruits of the unreasonable use of the Doppler device, and should be excluded from evidence.

In conclusion, each of the three warrantless searches in this case were unreasonable under the Fourth Amendment, which means that the evidence gained from them must be excluded from the record. The border search of Ms. Koehler's laptop was unreasonable because reading the information from her laptop goes beyond the narrow purpose of the border exception. The use of a PNR-1 drone to observe Ms. Koehler's curtilage was unreasonable because the drone likely operated outside of the legal altitude. And finally, the Doppler search of Macklin Manor was unreasonable because it was a physical intrusion into the constitutionally protected area that is

the home. If the Court holds that at least one of the searches is unreasonable, then it must also exclude from evidence anything that was obtained during the SWAT intervention, because the warrant that permitted the search was predicated by facts from each of the three previous searches.

CONCLUSION

For these reasons, the Court should AFFIRM the Thirteenth Circuit Court of Appeals' holding that the government's searches were unreasonable, and REMAND to the district court for further proceedings.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT