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 PETITIONER

Attorneys for Petitioner

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the cursory review of open documents on a laptop during a border search is permitted by the border search exception to the Fourth Amendment.

II. Whether warrantless aerial surveillance and a Doppler radar scan of an estate used to hide kidnapped hostages constitute Fourth Amendment violations.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

On July 15, 2016, John, Ralph, and Lisa Ford were kidnapped on their way to school. R. at 44. The kidnappers sent a ransom letter to the children's father two days later demanding $300,000 for their safe return. R. at 44. The FBI and Eagle City Police Department suspected that the children were being held somewhere in Eagle City, Pawndale, which is directly on the United States-Mexico border. R. at 2. Eagle City is one of the busiest ports of entry into the United States and a major point of crossing for criminals. R. at 2.

On August 17, 2016, the kidnappers agreed to give proof of life in exchange for $10,000 in $20 bills. R. at 2. At 3 A.M. on August 18, U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate stopped Scott Wyatt at the Mexico-Pawndale border in Eagle City for a routine border search. R. at 2. Between the hours of midnight and 8 A.M., Agents Dwyer and Ludgate customarily stop every vehicle that drives through the border station. R. at. 25. When asked why he was crossing the border, Mr. Wyatt appeared extremely agitated and uncooperative when asked why he was crossing the border. R. at 25. Agents Dwyer and Ludgate continued with a series of routine questions, including whether Mr. Wyatt was transporting $10,000 or more in U.S. currency. R. at 2, 26. Although Mr. Wyatt denied carrying that amount of currency, Agent Dwyer discovered $10,000 in $20 bills and a laptop with the initials AK in Mr. Wyatt's trunk during a routine vehicle search. R. at 2, 26. Mr. Wyatt explained that he shared the computer with his fiancée, Amanda Koehler. R. at. 2.

A database search revealed that Amanda Koehler is a violent felon and a person of interest in the kidnappings of the John, Ralph, and Lisa Ford. R. at 2, 44. Aware of the kidnapping investigation, Agent Ludgate opened the laptop screen and viewed several files that were already

open. R. at 2–3. Many of the files contained alarmingly detailed business information about Timothy Ford, the father of the kidnapped children, including dates and times of Mr. Ford's schedule and his personal address. R. at 3. One of the open documents was a lease agreement for a large estate on the outskirts of Eagle City known as Macklin Manor. R. at 3. Macklin Manor had been purchased six months prior by a shell corporation owned by "Laura Pope," a known alias of Amanda Koehler. R. at 3.

Around 4:30 a.m., Eagle City Police Department Officers Kristina Lowe and Nicholas Hoffman were ordered to surveil Macklin Manor. R. at 3. Officer Hoffman patrolled the area on foot; Officer Lowe, the department's technology expert, flew a PNR-1 drone over the estate. R. at 3. The drone took seven minutes to reach the estate, captured 22 photographs and three minutes of video. R. at 4. The photos revealed the layout of the main house, pool, and pool house. R. at 4. One photo revealed Amanda Koehler walking from the main house to the pool house. R. at 4.

Familiar with Ms. Koehler's background of violent criminal behavior, the lead investigator became apprehensive for the safety of the children and decided that more surveillance was necessary. R. at 4. Officer Hoffman approached the front door of the estate and performed a Doppler radar scan of the house to determine the number and location of people in the house. R. at 4. Officer Hoffman then performed a second Doppler radar scan of the pool house, which revealed three people huddled together. R. at 5.

The officers obtained a search warrant for the entire residence and returned with a S.W.A.T. team. R. at 5. The team performed a no-knock and notice entry, as permitted by the warrant, and arrested Amanda Koehler as she was attempting to escape. R. at 5.

II. SUMMARY OF THE PROCEEDINGS

The District Court. Amanda Koehler filed a motion to suppress evidence seized at the time of her arrest, arguing that the search of the laptop at the border and the surveillance of the estate using a drone and a Doppler radar device violated the Fourth Amendment. R. at 5. The District Court for the Southern District of Pawndale ruled that the search of the laptop fell within the border search exception to the Fourth Amendment. R. at 6. However, the court declined to analyze whether the search was routine or non-routine since Agent Ludgate had the reasonable suspicion required to perform any type of border search. R. at 7–8.

Regarding the aerial surveillance of the estate, the district court found that Respondent had no reasonable expectation of privacy in curtilage photographed from navigable airspace and therefore this Court's decisions in *California v. Ciraolo* and *Florida v. Riley* approved of the aerial surveillance used on the date of Respondent's arrest. R. at 9–10. The district court also found that the use of the Doppler radar device was not a violation of the Fourth Amendment since (1) the device was in common use among law enforcement and (2) the information obtained by the radar device would have been inevitably discovered by law enforcement. R. at 11. The court further held that even if aerial surveillance and a Doppler radar scan violated the Fourth Amendment, law enforcement already had probable cause to enter the estate and that Respondent failed to show that the evidence obtained from these searches qualified as "fruit of the poisonous tree." R. at 11–12.

The Thirteenth Circuit Court of Appeals. The Thirteenth Circuit Court of Appeals reversed the district court's ruling, granting Respondent's motion to suppress, and remanded for further proceedings. R. at 15. The court found that the search of a digital device is nonroutine and further, that the border agent did not have reasonable suspicion to justify a nonroutine

search. R. at 17. The court of appeals additionally found that the search of any digital device without a warrant was precluded by this Court's decision in *Riley v. California*. R. at 18.

The court of appeals also held that since the drone was potentially flown outside navigable airspace, the aerial surveillance was a violation of the Fourth Amendment based on this Court's discussion of FAA flight requirements in *California v. Ciraolo*. Regarding the surveillance of the estate by the Doppler radar device, the court also concluded that this search was a violation of the Fourth Amendment since the information could not have been gathered without physically trespassing onto the property and the device is not in general common use. R. at 20. The court of appeals finally concluded that the officers had no probable cause to obtain a search warrant independent of the results of the aerial and radar surveillance and the evidence must therefore be suppressed. R. at 21.

SUMMARY OF THE ARGUMENT

I.

The search of Respondent's laptop at the border falls squarely within the border search exception to the Fourth Amendment. Border searches of personal property do not require reasonable suspicion, probable cause or a warrant unless the search is particularly destructive or intrusive. An intrusive search of a laptop occurs when a border agent performs a forensic examination of the hard drive as opposed to a cursory review of files presently saved to the computer. Since Agent Ludgate merely reviewed documents that were not only presently saved, but which were already open on the computer desktop, the review of Respondent's laptop at the border is reasonable under the Fourth Amendment. Even if the search of technological devices is an offensive intrusion into an individual's privacy, the border search exception to the Fourth Amendment only requires reasonable suspicion as a prerequisite for the search. Agent Ludgate

had reasonable suspicion and therefore the search of the laptop is still reasonable under the Fourth Amendment.

II.

The use of a drone and Doppler radar device at Macklin Manor did not constitute an unreasonable search under the Fourth Amendment. The officers' use of the drone was not a search because it only provided information that was visible in the "open fields" of Macklin Manor because such areas fall outside the areas specifically protected in the text of the Fourth Amendment and there is no reasonable expectation of privacy in what one subjects to public view in an "open field." Furthermore, the aerial surveillance of the estate was conducted by the drone in navigable airspace, which provided the officers a lawful vantage point from which they could observe the defendant standing outside the curtilage of the home. The use of the Doppler device was not a search because the information obtained by use of the device could have been obtained by the officers without ever entering the home, and the Doppler device is a commonly used device by law enforcement. The substantial risk of danger to the officers and others at the scene outweighed the minimally intrusive use of the Doppler device to determine how many people were present in the home. Even if this Court finds that the use of the drone and Doppler device violated the Fourth Amendment, the evidence obtained after the officers entered the premises with a valid arrest warrant is admissible under the independent source doctrine.

STANDARD OF REVIEW

Whether or not a Fourth Amendment violation has occurred is a mixed question of law and fact subject to de novo review. *United States v. Broadhurst*, 805 F.2d 849, 852–53 (9th Cir. 1986); *United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002); *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013). Whether there was reasonable suspicion is a legal conclusion

that is also reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Smith*, 273 F.3d 629, 632 (5th Cir. 2001).

ARGUMENT AND AUTHORITIES

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures of "persons, house, papers and effects." U.S. Const. amend. IV. A Fourth Amendment search occurs when either (1) an individual has a subjective expectation of privacy in the object of the search and this expectation is objectively "justifiable under the circumstances" or (2) when there is a physical intrusion into a "constitutionally protected area" for the purpose of obtaining information. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (adopting the *Katz* concurrence as rule of law); *United States v. Jones*, 565 U.S. 400, 407–08 (2012) (holding that both property rights and privacy rights may be used as a measure of Fourth Amendment violations).

I. THE BORDER SEARCH EXCEPTION TO THE FOURTH AMENDMENT ALLOWS FOR THE WARRANTLESS SEARCH OF TECHNOLOGICAL DEVICES AT THE BORDER.

The government generally must first acquire a warrant based on probable cause before conducting a search or seizure in order to meet the Fourth Amendment's reasonableness requirement. U.S. Const. amend. IV. However, this Court has recognized that there are circumstances in which it would actually be unreasonable for law enforcement officials to acquire a warrant before performing a search or seizure. *Katz*, 389 U.S. at 357; *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . . ."). A border search is an exception to the Fourth Amendment's requirement of a warrant based on probable cause. *United States v. Ramsey*, 431 U.S. 606, 616–19 (1977)

(finding that Congress never intended to subject border searches to the probable cause requirements of the Fourth Amendment).

An individual at the border nevertheless retains the Fourth Amendment right to be free from unreasonable searches and seizures. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). An individual's expectation of privacy and property interests are significantly less at the border than in the interior considering the strength of the nation's interest in maintaining territorial and social integrity, so the Fourth Amendment "reasonableness" requirement heavily favors the government. *Carroll v. United States*, 267 U.S. 132, 154 (1925); *Montoya de Hernandez*, 473 U.S. at 539–40; *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) (holding that without a showing that the property searched was destroyed or damaged, an individual's Fourth Amendment property interests are not implicated in a border search).

A. The Search of Respondent's Laptop Was a Routine Border Search.

A border search is routine or nonroutine, but there is no balancing test to classify a border search as necessarily one or the other. *Flores-Montano*, 541 U.S. at 152 (clarifying that the word "routine" is merely a descriptive term and that no test is available to categorize border searches as "routine" or "nonroutine"). Examples of non-routine searches provided by this Court include highly intrusive personal searches such as "strip, body-cavity, or involuntary x-ray searches" that implicate the privacy and dignity of an individual. *Id.*; *Montoya de Hernandez*, 473 U.S. at 152 n.4; *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (holding that the level of intrusion into an individual's privacy is the determinative factor in deciding whether a search is routine). Although a routine border search does not require any justification, a non-routine border search must be justified by reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 541.

1. The search of Respondent's laptop was a cursory review, not a forensic examination.

In *United States v. Ickes*, border agents searched the defendant's laptop and video camera while performing a cursory, routine search of defendant's vehicle. 393 F.3d 501, 502–03 (4th Cir. 2005). While the laptop was being searched, the defendant confessed that the computer contained child pornography. *Id.* at 503. The border agents seized the laptop and later conducted a forensic examination of the laptop and the disks. Brief for Appellant at *5, *United States v. Ickes*, No. 03-4907, 2004 WL 5200393 (4th Cir. Feb. 17, 2004). The Fourth Circuit Court of Appeals held that the search of defendant's laptop was a routine border search even though the border agents continued to search the vehicle after the defendant had already been placed under arrest. 393 F.3d at 507–08. The search of Respondent's laptop was less intrusive than the search of the laptop in *Ickes*: Respondent's laptop was never taken to a secondary location for further investigation and was never subjected to a forensic examination. R. at 3.

In *United States v. Arnold*, border agents detained the defendant and asked him to turn on his laptop. 533 F.3d 1003, 1005 (9th Cir. 2008). One of the border agents opened several folders on the desktop of the computer and clicked through the individual photographs in each folder. *Id.* The border agents found nude photographs and called Immigration and Customs Enforcement (ICE) agents. The ICE agents searched the computer for several hours and found child pornography. *Id.*

At trial, the defendant filed a motion to suppress on the basis that the border agents needed to have reasonable suspicion before searching a laptop. *Id.* at 1006. The court of appeals found that the search of a laptop was a routine border search. *Id.* at 1008. Although the holding in *Arnold* is refined by the rule in *United States v. Cotterman* that a forensic examination of a laptop is not a routine border search, the result in *Arnold* would arguably be the same since the

laptop's hard drive was not imaged or forensically examined with software. *Id.* at 1005–06; *Cotterman*, 709 F.3d at 962. Unlike the defendant in *Arnold*, Respondent's laptop was never even subjected to a second search, nor were files or folders opened during the initial search. R. at 3.

In *United States v. Cotterman*, border agents detained the defendant and his wife for a secondary border inspection after receiving information regarding defendant's potential involvement in child sex tourism. 709 F.3d at 957. The border agents retrieved two laptops and three cameras from within the defendant's vehicle. *Id.* One of the agents inspected the laptops and found family and personal photos, along with password-protected files. *Id.* at 957–58. The laptops were subsequently delivered to Immigrations and Customs officials in Tucson who copied the hard drives of the laptops and used forensic software to examine the copied hard drives over a two-day period. *Id.* at 958.

The Ninth Circuit Court of Appeals analyzed the intrusiveness of each laptop search and stated that the initial search at the border would qualify as a routine border search if it had not been followed by a second, more intrusive search. *Id.* at 960–61. However, the secondary inspection that involved performing a forensic examination of imaged hard drives was non-routine. *Id.* at 962. The court of appeals was particularly troubled by the fact that the secondary inspection involved examination of deleted files. *Id.* at 965 ("It is as if a person's suitcase could reveal not only what the bag contained on the current trip, but everything it had ever carried.").

The court of appeals ultimately held that a border agent must have reasonable suspicion before performing a forensic search of a laptop at the border. *Id.* at 962. The court declined to define "forensic," trusting that border agents would be able to use common sense to distinguish between a "manual review of files on an electronic device and application of computer software

to analyze a hard drive." *Id.* at 967. In contrast to the forensic search in *Cotterman*, the hard drive of Respondent's laptop was not copied, analyzed, or subjected to any further examination at the border beyond reviewing already-opened files. R. at 3. Agent Ludgate was performing a routine border search of a vehicle when she discovered the laptop. R. at 2. The laptop was already on and several documents were already open. R. at 3. Agent Ludgate did not open any other documents or folders on the computer, nor did she attempt to search for files or folders that had already been deleted. R. at 3. The search of Respondent's laptop was *less* intrusive than the initial search performed in *Cotterman* and is perfectly analogous to opening a suitcase to reveal "what the bag contain[s] on the current trip." 709 F.3d at 965. The search of Respondent's laptop was therefore a routine border search.

2. A routine border search of a laptop does not require reasonable suspicion or a warrant.

A routine border search does not require reasonable suspicion or a warrant based on probable cause to be reasonable under the Fourth Amendment. *Montoya de Hernandez*, 473 U.S. at 540; *Ramsey*, 431 U.S. at 617. However, the Thirteenth Circuit Court of Appeals erroneously found that regardless of whether the search of Respondent's laptop was routine or non-routine, a warrant was still required based on this Court's dicta in *Riley v. California* discussing the privacy implications of searching a cell phone. R. at 17–18.

In *Riley v. California*, this Court considered the Fourth Amendment implications of a warrantless search of a cell phone and held that police must secure a warrant prior to searching a cell phone incident to arrest. 134 S. Ct. 2473, 2480–81 (2014). As stated previously, this Court recognizes exceptions to the Fourth Amendment warrant requirement if the search or seizure prior to obtaining a warrant is reasonable. *Katz*, 389 U.S. at 357. The search incident to arrest exception to the warrant requirement is permitted so that a law enforcement officer may search

the area immediately surrounding the detainee to remove weapons that would endanger safety and confiscate evidence that may otherwise be hidden or destroyed. *Chimel v. California*, 395 U.S. 752, 762–63 (1969), *abrogated by Davis v. United States*, 564 U.S. 229 (2011).

In light of this justification, this Court discussed how cell phones differed from other objects that a detainee could carry on his or her person in terms of the amount of data that a cell phone carries. *Riley*, 134 S. Ct. at 2489. This Court reasoned that since digital data could not be used as a weapon to endanger the safety of officers and that there were methods to prevent the destruction of digital evidence, the search of a cell phone incident to arrest did not meet either *Chimel* justification for the exception to the warrant requirement. *Id.* at 2485–86.

The justification for the border search exception to the warrant requirement is the nation's interest in protecting its territorial sovereignty by regulating the entry of persons and their effects. *Flores-Montano*, 541 U.S. at 152–53. This Court's reasoning in *Riley* is therefore inapposite to border searches of digital devices. *See United States v. Saboonchi*, 48 F. Supp. 3d 815, 817 (D. Md. 2014) (holding that *Riley* did not create a "categorical privilege for electronic data" and does not apply to border searches); *United States v. Kolsuz*, 185 F. Supp. 3d 843, 852 (E.D. Va. 2016) (holding that border search of an iPhone is not governed by *Riley*); *United States v. Mendez*, 240 F. Supp. 3d 1005, 1008 (D. Ariz. 2016) (holding that *Riley* does not alter the requirements for the search of a cell phone at the border).

It is undisputed that the search of Respondent's laptop occurred at a border station. R. at 2. The Thirteenth Circuit Court of Appeals therefore erroneously applied *Riley* to the search requirements of Respondent's laptop.

B. Agent Ludgate Had Reasonable Suspicion to Search Respondent's Laptop.

The Thirteenth Circuit Court of Appeals conceded that non-routine searches have only been applied to describe intrusive searches of an individual, but nevertheless functionally equated the privacy interests in a laptop with the privacy interests in a strip search or body cavity search. R. at 17. The court of appeals based this determination on the amount of information that Agent Ludgate hypothetically could access instead of on the information that Agent Ludgate actually accessed. R. at 17; *cf. Cotterman*, 709 F.3d at 960–61 (finding a difference in the level of intrusion incurred by a cursory search of a laptop as compared to a forensic search of the hard drive). Although this Court has historically refused to place an intrusive search of property on the same plane as an intrusive search of a person, the search of Respondent's laptop was still nevertheless justified by reasonable suspicion. *Flores-Montano*, 541 U.S. at 152.

A non-routine border search must be justified by reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 541. Reasonable suspicion is a "particularized and objective basis" for suspecting a detainee of criminal activity under the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 418 (1981). In examining whether reasonable suspicion existed during a border search, courts may consider the conduct of the detainee, the "discovery of incriminating evidence during routine searches, computerized information showing propensity to commit relevant crimes, or a suspicious itinerary." *Irving*, 452 F.3d at 124.

In this case, Agents Dwyer and Ludgate were performing a routine border search when the driver became agitated and uncooperative as he was asked to exit the vehicle. R. at 2. Upon opening the trunk of the car, Agent Dwyer discovered $10,000 even though the driver had denied carrying $10,000 or more in currency just moments before at the beginning of the search. R. at. 2. There was computerized information connecting the driver and the owner of the laptop to a

kidnapping. R. at 2. The laptop was not opened until *after* the border agents collected this information. R. at 3. Agent Ludgate therefore had reasonable suspicion to search the laptop.

II. NEITHER THE AERIAL SURVEILLANCE NOR THE DOPPLER RADAR SCAN OF THE ESTATE VIOLATED THE FOURTH AMENDMENT.

A. Aerial Surveillance of the Estate Was Not a Fourth Amendment Violation Under *Katz* or *Jones*.

Individuals are not guaranteed a general right to privacy under the Fourth Amendment and can have no legitimate interest in what is exposed to the public. *Katz*, 389 U.S. at 350–51. The protection of the Fourth Amendment does not extend to open fields. *Hester v. United States*, 265 U.S. 57, 59 (1924). The "open fields" doctrine was reaffirmed in *Oliver v. United States* based on the justification that (1) areas outside the curtilage of the home are not one of the constitutionally protected areas specifically delineated in the text of the Fourth Amendment and (2) in light of the privacy holding in *Katz*, an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." 466 U.S. 170, 176–77 (1984); *Katz*, 389 U.S. at 360. The Fourth Amendment only applies to areas that extend "the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 180.

1. Respondent has no Fourth Amendment rights in the curtilage of the estate.

In *United States v. Dunn*, DEA agents tracked a vehicle they believed was transporting chemicals and equipment to make controlled substances to the defendant's ranch. 480 U.S. 294, 294–95 (1987). After aerial photographs of the ranch showed the truck back up to a barn behind the house, officers made several warrantless entries onto the defendant's ranch to confirm that the barn contained a drug laboratory. *Id.* The officers then obtained a warrant to search the ranch based on information obtained during the warrantless entries. *Id.* at 299. The Court held that no

violation of the Fourth Amendment occurred when the officers entered the ranch without a warrant and looked inside the barn because the barn was outside the curtilage of the home. *Id.* at 304. The Court noted "there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields." *Id.* Thus, a defendant has no reasonable expectation of privacy in what is placed in an open field. *Id.*

The Court considers four factors to determine whether an area is properly considered curtilage: "(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 . . . to protect the area from observation by passersby." *Id.* at 294–95 (1987).

In this case, the pool house is approximately fifty feet from the main house. R. at 4. In *United States v. Breza*, the Fourth Circuit Court of Appeals clarified that the proximity of the area to the home must be considered in conjunction with the other *Dunn* factors and ultimately held that a garden only fifty feet from the main house was curtilage. 308 F.3d 430, 435–36 (4th Cir. 2002) (holding that there is no "fixed distance at which curtilage ends" (citing *United States v. Depew*, 8 F.3d 1424, 1427 (9th Cir. 1993))). There are no enclosures surrounding the pool, pool house, or open space behind the pool house. R. at 4; *see Breza*, 308 F.3d at 436 (holding that the focus of this factor is whether the enclosure "clearly demarcates" where the home ends and the curtilage begins).

Respondent was not using the pool house as part of the home, but rather as a location to hold kidnapping hostages. R. at 5; *see also Dunn*, 480 U.S. at 295 (noting that it was "especially significant that the officers possessed objective data indicating that the barn was not being used as part of respondent's home"). Finally, Respondent made no effort to shield the area from

observation. R. at 4–5. The pool house and surrounding area is properly considered curtilage, especially in light of the purpose for which Respondent was using the pool house.

In *Jones*, the Court explains that trespass doctrine is not applicable to "open fields" under *Oliver*. 565 U.S. at 411. The Court found that the curtilage of a home is not a constitutionally protected area. *Id.* Therefore, there is no search under the Fourth Amendment occurs when the government views something in an open field from a lawful vantage point. *Id.*

2. The aerial surveillance was conducted from navigable airspace.

The "open fields" doctrine has been extended to cases where aerial surveillance reveals incriminating evidence in an open field. *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (holding that police are not prohibited from observing curtilage); *Florida v. Riley*, 488 U.S. 445, 449 (1989) ("[T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion."). In *Ciraolo*, the Court held that the warrantless aerial surveillance of the defendant's backyard was not a search under the Fourth Amendment when officers observed marijuana plants in his backyard from a private plane in the navigable airspace above his home. 476 U.S. at 214. The Court explained that a "member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.* at 213–14. This Court found that an individual could have no objectively reasonable expectation of privacy in what is exposed to third parties traveling a public thoroughfare. *Id.* at 214. Therefore, no violation of the Fourth Amendment occurs when officers conduct aerial surveillance of an open field from navigable airspace. *Id.*

In this case, the Thirteenth Circuit Court of Appeals misplaced emphasis on the fact that the PNR-1 drone has been experiencing network connectivity problems that could allow it to fly higher than navigable airspace. R. at 19. However, there is simply no evidence in the record to

suggest that *this* PNR-1 drone ever flew outside navigable airspace. R. at 10. The court of appeals also noted that it was uncommon for airplanes to fly over the estate due to weather conditions. R. at 3, 19. However, the purpose of analyzing whether the area is navigated frequently is tied to the individual's expectation of privacy. *See Florida v. Riley*, 488 U.S. at 451–52; *cf. Broadhurst*, 805 F.2d at 854 (holding that the proximity of an airport did not affect defendant's subjective expectation of privacy).

The reasonableness of aerial surveillance is determined by whether or not the aerial surveillance interfered with use of the curtilage or "caused undue noise, wind, dust, or threat of injury." *State v. Davis*, 360 P.3d 1161, 1175 (N.M. 2015) (analyzing the federal Fourth Amendment implications of helicopter surveillance). In this case, the drone did not damage the curtilage, make undue noise, and was not a threat of injury to anyone. R. at 4.

This Court should hold that aerial surveillance of a curtilage from navigable airspace is not a Fourth Amendment violation.

B. Detective Perkins' Doppler Radar Scan of the Estate Was Used to Perform a Protective Sweep.

The Thirteenth Circuit Court of Appeals relied on this Court's decision in *Kyllo v. United States* to claim that the use of the Doppler device was a search under the Fourth Amendment. R. at 20. Under *Kyllo*, a Fourth Amendment search occurs when the government uses sense-enhancing technology to obtain incriminating information that could not otherwise be obtained without physically entering the home. 533 U.S. 27, 34 (2001). Conversely, a search would not occur when (1) the government could have obtained the information without using the technological device or (2) the technology is in common usage. *Id.* at 27.

This reliance by the court of appeals is misplaced for three reasons. First, the officers' use of the Doppler device in this case actually meets the standard established in *Kyllo* because the

officers could have determined how many people were in the house by conducting surveillance of the residence without the use of the device. Second, Doppler radar devices are commonly used by law enforcement. R. at 33. Third, *Kyllo* is not dispositive for determining whether the use of a Doppler device to conduct a preliminary protective sweep constitutes a search under the Fourth Amendment. The police are permitted to conduct a protective sweep of a home without a warrant during the course of an arrest if they have reasonable suspicion that there is some danger. *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

In *Kyllo*, officers suspected the defendant was growing marijuana plants in his house, but they lacked the probable cause necessary to get a search warrant. 533 U.S. at 29. They used a thermal imager to measure the amount of heat coming from the defendant's house to determine if the defendant was using the high-heat lamps that are frequently required to grow marijuana indoors. *Id.* at 29–30. After scanning the defendant's home and his neighbor's homes with the thermal imager, the officers determined that an unusually high amount of heat was emanating from the house. *Id.* at 30. This information was used to obtain a search warrant and upon execution of the warrant, the officers discovered marijuana inside the defendants' home. *Id.*

Unlike in *Kyllo*, the officer in this case was not using the Doppler device to obtain incriminating evidence to provide probable cause to support a search warrant. R. at 33. The only purpose of using the device was to ensure the officers' safety when they entered the estate after obtaining a warrant. R. at 33. Unlike the information provided by the thermal imaging device in *Kyllo*, the officers could have determined how many people were inside the estate without the Doppler device by conducting visual surveillance of the outside of the estate to see how many people come and go. R. at 11. The only information provided by the use of the Doppler device was how many people were in the home and what their general location was. R. at 33–34.

Also unlike the thermal imager in *Kyllo*, the technological device in this case has become extremely popular amongst law enforcement. R. at 11, 33. Although *Kyllo* does not lay out the appropriate criteria for determining when something is in common use, the fact that law enforcement commonly uses these devices indicates that society in general has a reduced expectation of privacy in the information obtained through these devices. This is the result of the balance struck by the Court in *Katz* and *Kyllo*, which is that individuals' expectations of privacy in certain information is reduced to the extent that new technologies intruding on those expectations become more common.

Although the Court in *Kyllo* expressed concern for the physical penetration of the house by technological devices, no court has held that the transmission of radio waves into a house or any other constitutionally protected area constitutes a physical trespass. 533 U.S. at 39–40; *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 698 (Cal. 1996) ("As we also explained in our discussion of the cause of action for trespass, however, electric and magnetic fields are wholly intangible phenomena that, like television and radio waves, "occupy" no "space" at all and cannot even be perceived by the senses. When, as here, the conduct of a public entity results in an intangible intrusion onto the plaintiff's property that does not physically damage the property, there has been no trespass."). To hold otherwise today would mean that emission of radio signals by radio stations all over the country is a trespass. This would, in essence, provide every individual in the country a right to sue any radio station that has not received their consent to emit such radio signals. Analogously, the prevention of any device that could physically penetrate a wall with waves or particles is an unreasonable limitation on a Fourth Amendment search.

A more important distinction between this case and *Kyllo* involves the justification for the officers' use of the Doppler device here. The officers in this case were not using the Doppler device to obtain information necessary to establish probable cause to obtain a warrant. R. at 35. The only purpose of the officers' use of the device was to ensure the officers' safety when they entered the estate after obtaining a warrant. R. at 33. This use is more analogous to cases where officers conduct a protective sweep of a home to ensure there is not someone lurking inside who may pose a danger to the officers or other individuals inside the home. The *Kyllo* standard is not dispositive when officers use sense-enhancing technology to conduct a protective sweep because such a use implicates different interests than are implicated by the use of technology to obtain incriminating information.

In *Maryland v. Buie*, the defendant was convicted of armed robbery based in part on evidence that was found during a "protective sweep" of his home. 494 U.S. at 328. The officers in that case entered the defendant's home to execute an arrest warrant. *Id.* After the defendant was apprehended, an officer entered the basement to make sure no one else was down there and discovered a red running suit that was worn by one of the robbers. *Id.* The officer seized the suit, which was later used as evidence against the defendant. *Id.* The Court held that the police may conduct a warrantless protective sweep of a home as a precautionary measure during the course of an arrest so long as the officers have reasonable suspicion that there is a dangerous individual in the area. *Id.* at 334.

Noting that the risk of danger associated with an arrest in the home is as great as, if not greater than, an on-the-street or roadside investigatory encounter, the Court noted that the intrusion on privacy involved when officers conduct a protective sweep is slight when balanced against ensuring the safety of the officers. *Id.* at 333–34. *Compare Terry v. Ohio*, 392 U.S. 1, 24–

25 (1968) (holding that officers are permitted to perform a protective cursory search of an individual on the street if they have reasonable suspicion that the individual is armed and dangerous), *with Michigan v. Long*, 463 U.S. 1032, 1033 (1983) (holding that protective search of a vehicle's passenger compartment is reasonable during a lawful investigatory stop where an officer has a reasonable belief that an occupant of the vehicle is dangerous).

Like the protective searches in *Buie*, *Terry*, and *Long*, the officers' use of the Doppler device in this case was permissible in light of the substantial risk of danger posed by the defendant and her fellow kidnappers. The potential dangers in this case are far greater than those present in *Buie*. Here, the officers knew Amanda Koehler was a violent criminal and was suspected of kidnapping the three Ford children. R. at 32. They knew she was inside the estate because of the information provided by the drone. R. at 33. They had reason to believe she was not acting alone because border patrol had just apprehended her fiancé trying to cross the border with $10,000 in $20 bills, which is the exact amount and denomination requested by the kidnappers the day before in exchange for proof of life. R. at 2. Finally, they had reason to believe that the children were being held in Eagle City based on information obtained by the FBI and Eagle City Police Department, the information obtained from the defendant's laptop at the border, and the reasonable inference that the children might be held in the same location where she was attempting to hide from law enforcement. R. at 2–3. All of this information provided the officers with more than a reasonable belief that arresting the defendant could pose a substantial danger to the safety of law enforcement, the children, and anyone else at the scene.

Also like in *Buie*, *Terry*, and *Long*, the extent of the intrusion was minimal in this case. The Doppler device was only capable of determining how many people were located on the estate and their general location at the time it was used. R. at 33. The device was only capable of

providing precisely the sort of information the Court held officers were permitted to look for when conducting a protective sweep in *Buie* (i.e., it only revealed information regarding areas of the estate where people could potentially be hiding). Unlike in *Buie*, the officers did not physically enter the home to conduct the protective sweep in this case. They instead were able to determine how many people were present by virtue of information they obtained from a lawful vantage point outside the home. R. at 33–34. The officers' interest in using the Doppler device to do a preliminary protective sweep of the estate to ensure the safety of officers and others at the scene of the arrest far outweighed the intrusiveness of the officers' conduct in this case.

This Court should hold that using a Doppler radar device to scan an estate that is being used to further a kidnapping and presents a danger to the investigating officers is not a Fourth Amendment violation.

C. The Evidence Obtained from the Aerial Surveillance or Doppler Radar Scan Was Sufficiently Attenuated from the Border Search and Is Also Subject to the Independent Source Doctrine.

In *Murray v. United States*, this Court held that evidence initially discovered because of an unlawful search is admissible if later discovered independently from activities untainted by the initial illegality. 487 U.S. 533, 542 (1988). The defendant in *Murray* was convicted based on evidence seized under a search warrant obtained after law enforcement initially entered his home illegally and saw the evidence in plain view. *Id.* at 535–36. The officers illegally entered the defendant's warehouse without a warrant and saw bales of marijuana in plain view before retreating to obtain a warrant to search the premises. *Id.* at 535. The officers did not mention the illegal entry in their subsequent application for a warrant. *Id.* at 535–36. The warrant was then issued based on information not obtained by virtue of the illegal entry, and the officers re-entered the warehouse pursuant to the warrant and seized the evidence they had previously viewed. *Id.* at

536. The Court held that the evidence was admissible in the defendant's trial because the previous illegal search did not taint the evidence that was obtained by virtue of the warrant. *Id.* at 533. The fact that the warrant was based on information that was not obtained by the illegal entry provided the government with an independent source for obtaining the information that was untainted by the illegal search. *Id.* at 542. Therefore, a court that is trying to determine whether a warrant was independent of an illegal entry must determine whether the officers would have sought the warrant even if the illegal search had not occurred. *Id.*

In *United States v. Denson*, officers used a Doppler device to do a protective sweep of a home where they believed the defendant was staying. 775 F.3d 1214, 1216 (10th Cir. 2014). The purpose of the use of the device in that case was to confirm other evidence that suggested the defendant was staying there and to ensure no one else was in the home. *Id.* Based on the information obtained by the Doppler device and other evidence suggesting the defendant was inside the home, the officers entered the home to execute an arrest warrant. *Id.* They arrested the defendant and discovered he was in unlawful possession of guns in the home. *Id.* The Court held that the use of the Doppler device did not taint the evidence obtained by the subsequent entry and protective sweep, because the officers had probable cause to believe the defendant was in the home and reason to believe there may be "someone lurking inside who could pose a danger to them or to others present." *Id.* at 1219. Specifically, the officers knew defendant was a fugitive, that he had a history of violent crime, that he was a gang member and had violent associates, and that a second person lived in the home who was wanted on an outstanding warrant. *Id.*

Like in *Murray*, the officers in this case ultimately obtained a valid warrant to enter Macklin Manor. R. at 5. Thus, even if this Court were to find that the use of the Drone or Doppler device prior to the issuance of the warrant violated the defendant's Fourth Amendment

rights, the evidence obtained after the warrant was issue is admissible under the independent source doctrine from *Murray*. 487 U.S. at 542. The reason the evidence is still admissible is because the officers in this case had sufficient probable cause to believe the defendant was located in Macklin Manor based on information not obtained through the use of the drone or Doppler device like in *Denson*. R. at 35. Specifically, the officers knew that the estate was purchased six months prior by a shell corporation owned by the defendant. R. at 3, 32. They also had information indicating that the defendant was leasing the estate from the corporation. *Id.* Also like in *Denson*, the officers had sufficient reason to believe that the defendant was dangerous and that there could be other dangerous people in the home with her, as explained above. All of this information in conjunction with the information tying the defendant to the kidnappings of the children to Eagle City constituted sufficient independent probable cause to issue an arrest warrant allowing officers to enter Macklin Manor and seize any evidence discovered pursuant to that warrant. Thus, the evidence obtained from the officers' entry to the home with an independently valid arrest warrant would be untainted by the prior drone and Doppler device searches even if this Court found that those searches violated the defendant's Fourth Amendment rights.

This Court should hold that the evidence against Amanda Koehler gained by the aerial surveillance and Doppler radar scan is admissible, regardless of the validity of those searches.

CONCLUSION

This Court should REVERSE the judgment of the Thirteenth Circuit Court of Appeals and REMAND for further proceedings consistent with this opinion.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER