No. 4-422

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

AMANDA KOEHLER,

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 22

Counsel for Respondent

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Ms. Koehler's Fourth Amendment rights were violated when a government agent searched her laptop pursuant to a boarder search.

II. Whether the warrantless use of a PNR-1 Drone, to take photographs and video Ms. Koehler's property, and Handheld Doppler radar, to detect people's breathing within Ms. Koehler's home, violated the Fourth and Fourteenth Amendments.

STATEMENT OF FACTS

On October 1, 2016, Respondent, Amanda Koehler was charged with three counts of kidnapping under 18 U.S.C. § 1201(a), and one count of being a felon in possession of a handgun under 18 U.S.C. § 992(g)(1). On August 17, 2016, Scott Wyatt crossed the United States-Mexico border at the Eagle City, Pawndale, border crossing. (R. 2.) Border Patrol agents asked Mr. Wyatt to stop the car. (R.2.) Agent Ludgate asked Mr. Wyatt if he was transporting $10,000 or more in U.S. currency, which Mr. Wyatt answered in the negative. (R. 2.) Agent Ludgate believed that Mr. Wyatt seemed agitated and informed Mr. Wyatt of Agent Ludgate's right to search the vehicle. (R. 2.) Agent Ludgate subsequently found $10,000 in the trunk of the car and a laptop with the initials "AK" inscribed on it. (R. 2.) It was only after Agent Ludgate ran Ms. Koehler's name in its criminal intelligence and border watch database that she searched the laptop. (R. 2.) However, during her testimony at the suppression hearing in connection, Agent Ludgate stated that she "just figured [the laptop] was part of the search of the car, the border search that we're allowed to conduct." (R. 28). Agent Ludgate's search of the laptop involved opening the laptop, searching through the desktop, and reading the contents of the laptop's open files. (R. 3.) Later, Agent Ludgate contacted Detective Raymond Perkins, a detective investigating the kidnapping. (R. 3.)

Using the information obtained from the search of Ms. Koehler's computer, police determined she was living on a large estate called Macklin Manor. (R. 3.) Macklin Manor sits atop Mount Partridge on the outskirts of Pawndale's capital, Eagle City. (R. 2, 3.) Mount Partridge is well known for being "constantly cloudy, foggy, stormy" and having "all kinds of visibility issues all the time. (R. 42.) Because of these conditions, the airspace around Mount Partridge is plagued by extremely limited visibility and pilots avoid flying over the area all together. (R. 19.)

In order to acquire information about the Macklin Manor, police, without a warrant, flew a PNR-1 drone over the estate. (R. 3.) The PNR-1 drone is especially designed for law enforcement and is equipped with many state of the art features. (R. 39.) First, the drone comes with a highly sophisticated DSLR camera. (R. 39) The DSLR camera is far superior than an average digital camera or cellphone camera an average person might use. (R. 39.) Also, unlike civilian cameras, the DSLR camera allows police to see exactly what the lens is seeing when taking pictures and has a large image sensor that produces high definition photographs. (R. 39.) Police deployed the drone over Macklin Manor and took 22 photographs and recorded 3 minutes of video of the estate. (R. 4.) The photographs and video effectively revealed to police Macklin Manor's layout. (R. 4.) Police learned that the estate consists of a large main house with a pool and patio area, approximately 15 feet from the main house, and a pool house, which is roughly 50 fifty feet from the main house. (R. 4.) Further based on the photographs taken by the drone, police were also able to determine that Ms. Koehler was on the property. (R. 4.) The PNR-1 drone is a useful tool for law enforcement, however it does have one significant glitch. (R. 39-40.) The drone's feature that allows the user to set a maximum altitude fails about sixty percent of the time. (R. 40.) Although, police set the drone's maximum altitude at 1640 feet, Pawndale's legal height limit for drones, police lost track of the drone's location for four to five minutes mid-flight. (R. 41.)

After conducting the drone flight, Detective Perkins and Officer Hoffman clandestinely approached the front of the main house. (R. 4.) Detective Perkins then scanned the front door of the main house with a handheld Doppler radar, revealing an individual standing ten to fifteen feet away from the front door. (R. 34) The two then walked around the main house and scanned the pool house, that scan revealed three individuals standing approximately 10 feet from the pool house's entrance. (R. 34.) The scans were done without a warrant. (R. 4.)

Handheld Doppler radar is a device especially built for law enforcement and in order for a police department to obtain one it must special order it from the manufacturer. (R. 35.) The device uses radio waves to measure movement inside a building. (R. 33.) The radio waves focus in on a person's breathing, and from that information the device can determine how many people are in a building and approximately where in the building the individuals are positioned. (R. 33.) However, the device must be deployed within fifty feet of an individual to pick up its breathing. (R. 33.)

Based on the information obtained from the drone flight and Handheld Doppler radar scan, police received a warrant to search Macklin Manor. (R. 5.) Police executed the warranted, detained Ms. Koehler, and incident to that detainment police found a G29 handgun on her person. (R. 5.)

SUMMARY OF THE ARGUMENT

First, specifically protected by the Fourth Amendment are individuals' rights to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. CONST. amend. IV. The border search exception is one of the few exceptions to the warrant requirement of the Fourth Amendment. *United States v. Seljan*, 547 F.3d. 993, 999 (9th Cir. 2008). The border search doctrine focuses on keeping certain people and contraband from crossing into U.S. territory and has never been defined as a search that is meant to gather evidence to use in bringing charges against individuals. Pursuant to the logic of *Riley*, border searches should not allow the government to search devices like laptops because of the qualitative and quantitative nature of the information those devices hold. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Should the Court decide not to extend its logic from *Riley* to the boarder search context, it will have to engage in a two-step analysis to determine the validity of the boarder search. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *see also United States v. Roberts*, 275 F.3d. 1007, 1012 (5th Cir. 2001). The Court will have to determine whether the search was routine or

non-routine, then, if the search is deemed to have been non-routine, determine whether the agent conducting the search had the requisite reasonable suspicion to conduct the search. *Id*. If the agent does not have the requisite reasonable suspicion, the search will be deemed unconstitutional. *Id*.

Also, the protections of the Fourth Amendment are most heightened inside the home. *Florida v. Jardines*, 569 U.S. 1, 5 (2013). The framers of our constitution, weary of an unconstrained abusive government, required that if the sanctity of the home is going to be intruded upon the government must procure a warrant. *Boyd v. United States*, 116 U.S. 616, 631-32 (1886). The fundamental protections of the Fourth Amendment apply just as much today as it did in 1789. *Kyllo v. United States*, 553 U.S. 27, 31 (2001). However, when police use Handheld Doppler Radar and drone technology, without a warrant, to peer into the intimate details of a person's home, it threatens the rights the Fourth Amendment strives to protect. Drone technology allows police to fly over a person's property and take high definition photographs and video. Handheld Doppler radar allows police to acquire the private details about the home the walls of the home are meant to shield from the public and government. *Kyllo*, 553 U.S. at 34. This Court has consistently expressed its distain for the government's use of technology to acquire, otherwise unattainable, information about the home. *Id.*; *see also Dow Chemical v. United States*, 476 U.S. 227, 237 (1986). In a time of rapidly advancing technology, this case provides the Court with an opportunity to reaffirm the highest principle of the Fourth Amendment, that a person's home is his or her castle and what people do in the sanctity of their home is free from warrantless government surveillance.

STANDARD OF REVIEW

Review of the district court's factual findings is for clear error and review of its legal conclusions are de novo. *See United States v. Diehl*, 276 F.3d 32, 37 (1st Cir. 2002).

I. THE GOVERNMENT VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHTS WHEN IT CONDUCTED A SEARCH OF RESPONDENT'S LAPTOP BECAUSE DIGITAL SEARCHES FALL OUTSIDE OF THE SCOPE OF THE BORDER SEARCH EXCEPTION.

To some, the Fourth Amendment cloaks individuals in protections that frustrate the reach of the government's prying fingers. To others, it sets forth a set of guidelines for the government to adhere to—and then nimbly work around to achieve its legitimate aims. Fourth Amendment jurisprudence, with its touchstone set to reasonableness, has historically focused on balancing the privacy interests of the individual against the government's interest in enforcing the nation's laws. *Katz v. United States*, 389 U.S. 347, 360 (1967). Specifically protected by the Fourth Amendment are individuals' rights to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. CONST. amend. IV. Further, the requirement that the government obtain a valid warrant before invading an individual's otherwise sacrosanct Fourth Amendment rights serves to guarantee that a search and seizure by the government will not proceed without the requisite probable cause. *United States v. Ross*, 456 U.S. 798, 827 (1982).

However, there are a limited number of situations where it is permissible for the government to proceed with a search and seizure without a warrant and showing of probable cause. *Seljan*, 547 F.3d. at 999. One situation is during a border search. *Id*. A "border search is made in the enforcement of customs laws, as distinct from general law enforcement, and for the purposes of regulating the collection of duties and preventing the introduction of contraband in the United States." *United States v. Arnold*, 523 F.3d 941, 1002 (9th Cir. 2008) (citing *Montoya de Hernandez*, 473 U.S. at 537). While border search doctrine issues have focused on keeping certain people and contraband items out of the U.S., the focus and purpose of the border search doctrine has never been defined by this Court or lower courts as a search that is meant to gather evidence to use in bringing charges against individuals. Pursuant to the logic of *Riley*, border searches should

not give government agents the broad authority to search cell phones or laptops because of the qualitative and quantitative nature of the information that those devices hold. *Riley,* 134 S. Ct. at 2482. If the Court decides to not extend *Riley* to border searches, it should still find that the search at issue violated Ms. Koehler's Fourth Amendment rights because it was non-routine and Agent Ludgate lacked the requisite reasonable suspicion to conduct the search.

A. The Border Search Exception to the Warrant and Probable Cause Requirements of the Fourth Amendment was Created out of Tax, Public Health, and Public Safety Concerns, and was Not Intended to Serve as an Unchecked Governmental Power to Broadly Gather Evidence to Later be Used in Criminal Trials.

The border search exception to the warrant and probable cause requirements of the Fourth Amendment derives from taxation, public safety, and public health concerns, and was not intended to serve as unchecked power to broadly gather evidence to later be used in criminal trials. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Pursuant to the nation's first customs statute, enacted by Congress in 1789, customs officials were authorized to "enter and search 'any ship or vessel, in which they [had] reason to suspect any goods, wares, or merchandise subject to duty [were] concealed.'" *Id.*; *see also* ORGANIZATION OF GOVERNMENT IN 1789, TO MARCH 3, 1845, *The Public States at Large of the United States of America* 43 (Richard Peters ed., Charles C. Little & James Brown) (1845) (explaining section 24 of the Act of July 31, 1789). Today, a "border search is made in the enforcement of customs laws, as distinct from general law enforcement, and for the purposes of regulating the collection of duties and preventing the introduction of contraband in the United States." *Arnold*, 523 F.3d at 1002 (citing *Montoya de Hernandez*, 473 U.S. at 537). While the justifications for border searches have since expanded beyond taxation to include other governmental interests such as national security, public health, and public safety, the border search exception has never been defined as or construed to mean that "anything goes" during a border search. *United States v. Selijan*, 547 F.3d. 993, 999 (9th Cir. 2008). Privacy rights are balanced

against governmental interests, even at the border, where the "Government's interest in preventing the entry of unwanted persons and effects is at its zenith." *Montoya da Hernandez*, 473 U.S at 539.

Border searches that lacked particularized suspicion but were upheld as reasonable have typically included the following kinds of items: (1) the outer clothing of a person; (2) luggage; (2) purses; (3) wallets; (4) pockets; and (5) shoes. *United States v. Grotke*, 702 F.2d 49, 51-52 (2d Cir. 1833). Searches of these kinds of items do not substantially infringe on a traveler's privacy rights. *Id*. Notably absent from this list of commonly searched items are digital devices such as cell phones, smart watches, tablets, and laptops—a subtle but crucial distinction. While a few lower courts have decided that laptops can be searched during boarder searches, *Arnold*, 523 F.3d at 1009-1010, most courts who have ruled on border search issues have recognized that "[t]he primary purpose of a border search is to seize contraband properly sought to be brought into the country." *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir. 1966). Border searches have never been defined the courts as searches for evidence to use in bringing charges. When a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant. *Riley*, 134 S. Ct. at 2482.

In *Ramsey*, the defendants were convicted of possession of narcotics. *Ramsey*, 431 U.S. at 622. There, a U.S. customs officer inspected a sack of international mail from Thailand, spotted envelopes that were bulky, and suspected the envelopes might contain contraband rather than correspondence. *Id*. During his border search, the officer found that the envelopes weighed three to six times than normal weight of an airmail letter. *Id*. It was only after this process that the officer opened the envelopes, found bags of heroin, and removed a sample of the substance. *Id*. The court noted (1) that the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by statute for at least two centuries and (2) that

the government's power to exclude aliens can be effectuated by routine border searches. *Id*. at 616, 619. The customs officer's actions were motivated by his interest in preventing illegal substances from be transported into the country; the court held that the border search was valid. *Id*. at 632. Similarly, in *Braks*, U.S. customs officials had been warned to be on the lookout for Appellant, a known drug smuggler. *United States v. Braks*, 842 F.2d 509, 515 (2d Cir. 1988). When Appellant arrived in Boston from Beirut, customs officials performed a routine interrogation and examined her luggage. *Id*. at 510. During the search of her luggage, the officials noticed that Appellant had a thin face, hands, wrists, and arms, but was unusually bulky around her midsection. *Id*. Appellant first made inconsistent and anomalous assertions, but eventually admitted to carrying bundles of heroin in her girdle. *Id*. at 511. The court determined that Appellant's statements and actions, coupled with the officers' observations during the luggage search, led the officers to correctly conclude that a secondary search was appropriate. *Id*. Accordingly, the court held that the border searches of both Appellant's luggage and her person were permissible. *Id*. at 515.

Here, Mr. Wyatt was pulled over and underwent a border search by Border Patrol agents. (R. 2.) One of the agents, Agent Ludgate, asked Mr. Wyatt if he was transporting $10,000 or more in U.S. currency, which Mr. Wyatt answered in the negative. *Id*. Agent Ludgate believed that Mr. Wyatt seemed agitated and informed Mr. Wyatt of her right to search his vehicle. *Id*. Agent Ludgate subsequently found $10,000 in the trunk of the car. *Id*. Until this point, Agent Ludgate's search, consistent with the facts and holdings in *Ramsey* and *Braks*, was a valid border search. *Id*. However, Agent Ludgate's border search was abruptly transformed into a police investigation when she searched through the digital contents of the laptop. *Id*. Unrelated to the crime of failing to declare in excess of $10,000, Agent Ludgate's motivations for searching the digital contents of the laptop were based on the information about Amanda Koehler that appeared when Agent

Ludgate typed Ms. Koehler's name into the criminal intelligence and border watch database. *Id*. Unlike the searches in *Ramsey* and *Braks*, here, the search was not due to a tip regarding Mr. Wyatt or Ms. Koehler, and was also not due to Agent Ludgate's on-the-scene observations. *Id*. The fact that Agent Ludgate's decision to search the laptop occurred only after she researched Ms. Koehler's identity gave her search the distinct flavor of a police investigation, and not of a traditional border search. *Id*. Here, since the search of the laptop was a search pursuant to a police investigation, not a border search, it required either a warrant issued by a neutral magistrate or at the very least, probable cause that was present during an exception to the warrant requirement. *Riley*, 134 S. Ct. at 2482. Since Agent Ludgate had neither, it was an invalid search.

B. Even if it is Determined that Agent Ludgate's Search Remained a Border Search for its Duration and was Not a Police Investigation, the Laptop Should Have Been Excluded from the Reach of the Border Search Because of the Unique Capabilities of a Laptop, as Articulated by this Court in *Riley* in the context of cell phones.

The border search exception to the warrant and probable cause requirements of the Fourth Amendment should not be extended to include laptops because of a laptop's unique features, as articulated by this Court in the context of cell phones that are found during a search conducted incident to an arrest. *Riley*, 134 S. Ct. at 2489. In *Riley*, this Court determined that because of a cell phone's vast capabilities, a search of a cell phone incident to an arrest is inherently different from a search of other physical items, and therefore a warrant is required to search it. *Id*. at 2488. Extending *Riley*'s logic to laptops is the next step in the development of the border search doctrine.

In *Riley*, the contents of defendants' cell phones were searched after the defendants were arrested; evidence obtained from the cell phones was later used to charge the defendants with additional charges. *Id*. at 2480-2484. In reaching its holding, the unanimous Court evaluated the capabilities of the cell phones—which were smart phones—and determined that these phones had

a broad range of functions beyond just making calls and sending texts. *Id*. These functions derived from the cell phones' advanced computing capabilities, large storage capacities, and ability to connect to the Internet. *Id*. at 2480. In terms of storage capacity, cell phones differ from other objects that might be kept on an arrestee's person in both a quantitative and qualitative sense. *Id*. at 2489. The vast capabilities of a modern cell phone justified the Court's decision to remove it from the realm of simple containers, and classifying it instead as "a digital record of nearly every aspect of [individuals'] lives—from the mundane to the intimate." *Id*. at 2490.

Similarly, on the average laptop, a user can create a digital record of the intimate aspects of his or her life by wirelessly connecting to the web, creating documents, watching television, texting and emailing, transferring files, taking photos, organizing photos, video chatting, listening to music, and more, just as they can do on modern cell phones. APPLE INC., *MacBook Pro User Guide* 3 (2017). A comparison of the modern laptop to the cell phone discussed in *Riley*—which this Court even referred to as a "minicomputer"—reveals that the modern laptop is simply a smart phone with a widescreen display and a user-friendly keyboard. *Riley*, 134 S. Ct. at 2489. However, there is one significant difference between modern cell phones and laptops—storage capacity. In *Riley*, the immense storage capacity of cell phones played a role in this Court's decision to require that the government obtain a warrant before they conduct a search of a phone discovered incident to an arrest. *Id*. There, Chief Justice Roberts noted that "before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy" but that today, "the current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes)." *Id*. Sixteen gigabytes could hold millions of pages of text, thousands of pictures, or hundreds of videos. *Id*., *citing to* Brief for Center for Democracy & Technology et al. as Amici Curiae 7–8. *See also United States v. Flores-Lopez,*

670 F. 3d 803, 806 (C.A.7 2012). In the context of a laptop, the concerns regarding an electronic device's storage capacity are even more pressing. The average modern laptop has a standard capacity of 512 gigabytes—thirty-two times the storage capacity of the modern cell phone (and is available with up to 1 terabyte of storage capacity). APPLE INC., *MacBook Pro User Guide* 3 (2017). 1 terabyte can hold a staggering amount of digital information: around 85,899,345 pages of Word documents, 300,000 photos, 200,000 songs or 17,000 hours of music, or 500 hours-worth of film. Kelly Brown, *A Terabyte of Storage Space: How Much is Too Much?*, UNIVERSITY OF OREGON (October 7, 2014). The laptop's greater capacity to store the exact same types of sensitive information protected by *Riley* strongly suggests that applying the *Riley* warrant requirement to laptops found during boarder searches, would logically develop the border search doctrine. The Ninth Circuit has ruled on this issue in 2008 in *United States v. Arnold* and determined that laptops can be searched during a border search. *Arnold*, 523 F.3d at 1009-1010. However, *Arnold* has been extensively criticized by the U.S. Senate and U.S. legal scholars.[1] To rely on *Arnold* in deciding the present case is to accept the flawed logic that *Arnold* was based on—specifically, that laptops are no different from other types of closed containers, and therefore no heightened suspicion is required for their search. *Arnold*, 523 F.3d at 1009-1010. As articulated at length in *Riley*, the very capabilities of modern cell phones—or here, laptops—fundamentally and legally put cell phones—and here, laptops—in a category that is separate from other kinds of containers. *Riley*, 134 S. Ct. at 2489. When compared to typical physical containers, the urge to claim that a call phone—or

[1] *See Laptop searches and Other Violations of Privacy Faced by Americans Returning From Overseas Travel: Hearing Before the Subcomm. On the Constitution of the Sen. Comm. on the Judiciary*, 110 CONG. 1 (2008) (statement of Peter Swire, C. William O'Neill Professor of Law, MORITZ COLL. OF LAW, THE OHIO STATE UNIV.); *see also* Ellen Nakashima, *Clarity Sought on Electronics Searches: U.S. Agents Seize Travelers' Devices*, WASH. POST, Feb. 7, 20008, at A1 (analyzing how the "seizure of electronics at U.S. borders has prompted protects" from civil liberties groups, academic scholars, travelers, and corporations).

here, a laptop—is just another container, is understandably stifled.[2] Here, when Agent Ludgate searched Ms. Koehler's laptop, she began by looking through the desktop of the laptop and read through several documents. (R. 2). That the record does not explicitly list information intimate and personal to Ms. Koehler that was revealed to Agent Ludgate during her search is of no consequence; *Riley* focused on the intimate kind of information that could potentially be on a phone. Here, the focus should be on the type of information that can be stored on laptops—which are "literal trove[s] of personal information." *Id*. at 18.

C. Even if this Court Declines to Establish a Bright-Line Rule Excluding Digital Devices Such as Laptops from the Reach of a Border Search, This Case Fails the Standard Two-Step Inquiry Regarding the Admissibility of Evidence Found During Border Searches.

Within the last few decades, courts have modified the border search doctrine. Now, when determining the constitutionality of a border search, courts evaluate whether the search was routine or non-routine. *Montoya de Hernandez*, 473 U.S. at 538; *see also Roberts*, 275 F.3d. at 1012. If a search is non-routine, then the agent conducting the search is required to have reasonable suspicion before conducting the search. *Id*. If the agent does not have reasonable suspicion to conduct a non-routine search, the search is invalid and the evidence found can be suppressed. *Id*.

[2] In the last few decades, this Court has ruled on many once-*sui generis* issues regarding the intersection of technology and Constitutional rights and has recognized that it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. *Kyllo*, 533 U.S. at 29. In writing this nation's foundational documents, the Founders could not have foreseen the unique ways in which certain technologies can presently invade an individual's privacy interests; accordingly, this Court has rejected mechanical interpretations of the Fourth Amendment in technology cases. *Katz*, 389 U.S. at 371; (discussing a wire-tap); *see also Kyllo*, 533 U.S. at 29 (discussing a thermal-imager) *see also* PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE – SECTION 331 OF TITLE 28 (April 28, 2016) (amending the Federal Rules of Criminal Procedure Rule 41 to address the unique storage features of cloud computing).

1. Agent Ludgate's Search of Ms. Koehler's Laptop was a Non-Routine Border Search.

A routine border search does not seriously invade an individual's right to privacy. *United States v. Johnson*, 991 F.2d. 1287, 1291 (7th Cir. 1993). Such searches do not require reasonable suspicion, probable cause, or a warrant. *Montoya de Hernandez*, 473 U.S. at 538 (1985). Also, the degree of intrusion must be "reasonably related in scope to the circumstances which justified it initially." *Montoya de Hernandez*, 473 U.S. at 542. Courts have held that a border search of a traveler's luggage and personal effects is routine. *Johnson*, 991 F.2d. at 1291. In *Johnson*, U.S. customs agents searched the luggage of a woman who had just returned from a trip to the Philippines. *Id.* at 1291. The agents conducted physical tests on the top and bottom parts of the suitcase. *Id*. at 1295. The court determined that these procedures were minimally intrusive and required only a few minutes of the woman's time, did not harm the suitcase, and involved no harm or indignity to the woman. *Id*. After the suitcase had failed the physical tests, it was X-rayed. *Id*. This procedure took a few minutes, was minimally intrusive, caused no harm to the suitcase, and caused no embarrassment or indignity to the woman. *Id*. The court deemed the search routine. *Id*.

On the other hand, a non-routine search is more intrusive than a routine search. *Johnson*, 991 F.2d. at 1291. "Highly intrusive searches are not reasonable merely because they take place at the border." *Arnold*, 523 F.3d at 1002. A non-exhaustive list of border searches that courts have defined as non-routine include strip searches, body-cavity searches, and involuntary x-ray searches. See *United States v. Guadalupe-Garza*, 421 F.2d. 876, 878 (9th Cir. 1970); *United States v. Asbury*, 586 F.2d. 973, 975-76 (2nd Cir. 1978); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967). In distinguishing non-routine border searches from routine border searches, courts have listed common sense and policy considerations as guiding principles; "fundamental human interests forbid intrusions of privacy that are conducted on the mere chance that desired evidence

might be obtained." *Schmerber v. California*, 384 U.S. 770, 769-70 (1966). This Court has once suggested that the dignity and privacy interests involved in searches of an individual's body do not extend to physical belongings or vehicles. *Flores-Montano*, 541 U.S. at 152. However, *Flores-Montano* was decided a decade before this Court's articulation of the unique characteristics of cell phones in *Riley*. *Id*., *see also Riley*, 134 S. Ct. at 2474. In fact, in *Riley*, this Court explained the personal nature of the privacies that are stored on cell phones by describing the cell phone as another appendage of modern American's body. *Id*. at 2489. Since large quantities of the same types of information that are stored on cell phones are stored on laptops, a search of a laptop during a border search should be hereinafter categorically classified as a non-routine search. Here, Agent Ludgate's search was a non-routine search because she searched well beyond the car and its physical compartments. (R. 2-3.) Unlike the search in *Johnson*, Agent Ludgate's search was not limited to physical containers or to an individual's clothing. (R. 2-3.) When Agent Ludgate searched through the contents of the laptop, she had access to what was potentially extremely sensitive and intimate information about Ms. Koehler. (R. 3.) Due to the highly intrusive nature of this search, it was non-routine.

2. Agent Ludgate Lacked the Requisite Reasonable Suspicion to Conduct the Non-Routine Search of Ms. Koehler's Laptop.

Agent Ludgate lacked the requisite reasonable suspicion to conduct the non-routine search of Ms. Koehler's laptop. When a border search becomes non-routine, courts have reevaluated the individual and state interests involved and have generally required the government to possess at least reasonable suspicion to conduct the search. *Johnson*, 991 F.2d. at 1291. Some scholars have argued that "this is because the Fourth Amendment balancing test survives at the border, and 'the reasonableness of a particular stop must be gauged by comparing the degree of the intrusion with the grounds for the suspicion that intrusion is called for.'" Lindsay E. Harrell, *Down to the Last*

.JPEG: The Constitutionality of Suspicionless Border Searches of Computers and One Court's Pioneering Approach in United States v. Arnold, 37 Sw. U. L. Rev. 205, 211 (2008).[3] Certain types of intrusive searches are categorically unreasonable "if the government conducts them without subjective suspicion supported by objective and clearly articulated facts." *Id. See also United States v. Rodriguez,* 592 F.2d 553, 556 (9th Cir. 1970)) (arguing that non-routine searches require some level of particularized suspicion based on more than a "hunch." *Terry v. Ohio,* 392 U.S. 1, 27 (1968)). Unreasonable intrusions that are performed "on the mere chance that desired evidence might be obtained are forbidden." *Id.* Here, Agent Ludgate did not have the requite reasonable suspicion to conduce the non-routine border search. As articulated in *Aman* and *Rodriguez,* heightened suspicion is required to conduct body searches because of the intrusive nature of a body search; similarly, a search of a laptop, because of the highly intimate information it contains, should require reasonable suspicion. During the suppression hearing, Agent Ludgate testified that she "just figured [the laptop] was part of the search of the car, the border search that we're allowed to conduct." (R. 28). Agent Ludgate searched the laptop under broad border search authority, not due to reasonable suspicion, or even a hunch. She lacked the requisite reasonable suspicion to conduct the search of the laptop, rendering that aspect of the search invalid. In conclusion, Agent Ludgate's search of Ms. Koehler's laptop violated Ms. Koehler's Fourth Amendment rights.

II. THE GOVERNMENT'S USE OF A PNR-1 DRONE AND HANDHELD DOPPLER RADAR VIOLATED MS. KOEHLER'S FOURTH AND FOURTEENTH AMENDMENT RIGHT TO PRIVACY AND POSES A DANGEROUSE THREAT TO TRADITIONAL NOTIONS OF PRIVACY AND LIBERTY.

"'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.'" *Kyllo, at* 31 (quoting

[3] *See also United States v. Aman,* 624 F.2d 911, 912-13 (9th Cir. 1980) ("As a search becomes more intrusive, it must be justified by a…higher level of suspicion of wrongdoing.").

Silverman v. United States, 365 U.S. 505, 511 (1961)). This right to be let alone in one's home, free from unsanctioned government intrusion, is not merely ascribed in our Constitution but is entrenched in hundreds of years of Anglo-American common law and traditional notions of liberty. *See Boyd v. United States*, 116 U.S. 616, 631-32 (1886); *see also Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *see further* 4 W. Blackstone, Commentaries on the Laws of England 223 (1765) (explaining "the law of England has so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with impunity"). The constitutional baseline is one's home and in the home, freedom from warrantless government intrusion is at its zenith. *Florida v. Jardines*, 569 U.S. 1, 5 (2013). However, new technology threatens this fundamental "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. CONST. amend. IV. Accordingly, when authorities employ Handheld Doppler radar and drones to see through walls and peer into the intimate details of one's private home this Court must stand as the defender of the fundamental freedoms the Fourth Amendment aims to protect. *Kyllo*, 533 U.S. at 40.

Although traditional Fourth Amendment jurisprudence has been linked to common law trespass, this Court has extended Fourth Amendment protections through the *Katz*, or reasonable-expectation, test. *See Jardines*, 569 U.S. at 11. The *Katz* test is a two-part analysis. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The first inquiry is whether "a person has exhibited an actual (subjective) expectation of privacy." *Id.* The second, is whether that subjective expectation of privacy is "one that society is prepared to recognize as reasonable." *Id.* However, the *Katz* test merely adds to, and does not subtract from, "the traditional property-based understanding of the Fourth Amendment." *Jardines*, 569 U.S. at 11. The police's searches of Ms.

Koehler's home violated the Fourth Amendment because the searches implicate both the common law trespass doctrine as well as *Katzian* expectations of privacy.

A. The Area Searched by Police Is the Curtilage of Ms. Koehler's Home and Therefore Protected by The Fourth Amendment from Unreasonable Searches.

"The overriding respect for the sanctity of the home has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1979). This overriding respect extends not just to the physical house itself but also to curtilage, "the land immediately surrounding and associated with the home." *Oliver v. United States*, 466 U.S. 170, 180 (1984); *but see Hester v. United States*, 265 U.S. 57, 59 (1924) (holding "opens fields" are not protected by the Fourth Amendment). Determining what constitutes curtilage is a fact-sensitive exercise. *See United States v. Dunn*, 480 U.S. 294, 301 (1987). To assist in this analysis this Court has set forth four factors for courts to consider. *Id.* Those four factors are: (1) the proximity of the area to the dwelling, (2) "whether the area is included within an enclosure surrounding the home," (3) the way the area is used, and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Id.* Although these factors serve as a guide, no one factor is dispositive, and the ultimate question remains "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* Because the area searched (the pool, patio area and pool house) is the curtilage of the main house, the property is afforded the full protections of the Fourth Amendment. *Id.*

Courts have grappled with determining how far the protections of the home should extend to surrounding areas. *Id.* Here, the record indicates that the main house, the patio and pool area, and the pool house are within 50 feet of each other, with the pool house and the main house 50 feet apart, and the pool and patio area 15 feet from the main house. (R. 32-33.) While there is no bright-line rule for determining where curtilage ends and open field begins, courts would agree

that property, and structures on that property, within fifty feet of the home is certainly within curtilage. *See e.g., United States v. Reilly*, 76 F.3d 1271, 1277 (2d Cir. 1996) (holding a cottage located 375 feet from the main house was within the curtilage of the home); *United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292, 1297 (7th Cir. 1976) (proposing a bright-line rule that any building within 75 feet of the main house is within curtilage); *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 600 (6th Cir. 1998) (finding a dilapidated garage, located 50 to 60 yards from the house, was within curtilage); *but see Oliver*, 466 U.S. at 173, 180 (holding a marijuana crop over a mile from the grower's home was not within curtilage).

Further, although the record states that Macklin Manor is not surrounded by a fence (R. 4), a person need not surround their property with a fence or other enclosure in order for the property to be considered curtilage. *See Reilly*, 76 F.3d at1278 (quoting *Williams v. Garrett*, 722 F. Supp. 254, 260–61 (W.D. Va. 1989) (explaining that "reading the word 'enclosure' in *Dunn* to require an artificial barrier seems unduly narrow"). Rather, what is most relevant is the nature of the property itself and the steps taken by the homeowner to protect his or her privacy. *See Reilly*, 76 F.3d at 1278. Here, Macklin Manor is an isolated large estate that sits atop Mount Partridge; by its very nature the property appeals to those seeking seclusion. (R. 3.) While, a fence may be necessary to protect one's privacy in the heart of an urban area, secluded areas, like Macklin Manor, are held to a different standard. *See United States v. Arboleda*, 663 F.2d 989, 992 (2d Cir. 1980).

However, the touchstone of any curtilage determination is whether the area in question is associated with those "intimate activities linked with the sanctity of a man's home." *Dunn*, 480 U.S. at 301 (quoting *Boyd*, 116 U.S. at 630). Here, the area searched was the backyard of the main house, it includes a pool, patio area, and pool house. (R. 4.) As courts have pointed out, "[t]he backyard and area immediately surrounding the home are really extensions of the dwelling itself."

Hardesty v. Hamburg Twp., 461 F.3d 646, 653 (6th Cir. 2006) (quoting *Daughenbaugh*, 150 F.3d at 601). This awareness that the backyard is in fact an extension of the dwelling itself is based on the practical consideration that "many of the private experiences of home life often occur outside the house." *Id.* Here, the area searched was a typical backyard, precisely the type of property that courts recognize deserve the full protection of the Fourth Amendment. *Id.*

B. The Government's Use of a PNR-1 Drone to Search Ms. Koehler's Property Infringed on Ms. Koehler's Reasonable Expectation of Privacy.

This Court has previous addressed warrantless aerial surveillance of a person's home twice before. *Florida v. Reilly,* 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986). In *Ciraolo* and *Reilly* this Court held warrantless aerial surveillance of the home did not violate the Fourth Amendment when police flew a from transport aircraft (a fixed-winged airplane in *Ciraolo*, and a helicopter in *Reilly*) from navigable airspace, in a physically nonintrusive manner. *Reilly*, 488 U.S. at 448; *Ciraolo*, 476 U.S. at 209. In both these cases, police, acting upon the belief that marijuana was growing in the backyards of each case's respective suspect, took to the skies and flew and over the suspects' homes where the officers made naked-eye identifications of marijuana plants growing in the suspects' yards. *Id.* Critical to both case's holdings was that the aircraft used were operating at a lawful altitude. *See Reilly*, 488 U.S. at 449. The Court analogized the aircraft in these cases to cars driving on a public thoroughfare and held that because police do not need to shield their eyes from illegal activity that is apparent at street level, law enforcement can lawfully view what any person in an airplane could see from the air. *See id.* However, because the drone used by police is fundamentally different from the naked-eye aerial observations of the police in *Ciraolo* and *Reilly* those cases are instructive but not controlling.

1. Drone Searches Are Fundamentally Different from Aerial Searches with Traditional Transport Aircraft.

Unlike the searches in *Ciraolo* and *Reilly* where officers observed property only with their own eyes, the drone here was equipped with a state of the art DSLR camera. (R. 39); *Reilly*, 488 U.S. at 449; *Ciraolo*, 476 U.S. at 213. The DSLR camera is much more advanced than the typical camera a person would have on their cellphone. (R. 39.) Also, unlike regular cameras, the DSLR camera allows an individual to see exactly what the lens is seeing when taking pictures and has a large image sensor that produces high definition photographs. *Id*. These facts shatter the analogy of airline passengers looking out their cabin window and instead evokes visions of Orwellian dystopia. *Kyllo*, 533 U.S. at 34. In the past this Court has recognized, and the Government has conceded, "that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." *Dow Chemical v. United States*, 476 U.S. 227, 237 (1986) (holding lawful, enhanced aerial photography of an industrial complex, but noting the importance that the area searched was not "adjacent to a private home, where privacy expectations are most heightened"). Drone technology, assisted by high-definition cameras, fits well into the category of "highly sophisticated surveillance equipment" imagined in *Dow Chemical*. *Id.*

2. The Drone was Not Operating at a Lawful Altitude, Therefore the Search is Unconstitutional.

First, the government here cannot establish whether the drone was flying at a lawful altitude, a prerequisite for constitutionality under *Ciraolo* and *Reilly*. (R. 41.); *Id.* In Pawndale, drones are restricted from flying over 1640 feet. (R. 39.) However, during the search, the government lost track of its drone and cannot prove that the drone was operating at a lawful altitude. *Id*. at 41. Although, the PNR-1 drone allows users to set a maximum altitude, this model

is notorious for flying above the altitude limit. *Id*. Unless the government can prove that its search was conducted at a lawful altitude, which it cannot, the search fails to meet this Court's basic requirement for constitutionality for aerial searches. *Id*.

3. Ms. Koehler had a Reasonable Expectation of Privacy Over Her Property.

However, even if the search was conducted from a lawful altitude, it is still unconstitutional. *See Reilly,* 488 U.S. at 454-55 (O'Connor, J., concurring). In *Reilly,* Justice O'Connor's concurrence, which provided the fifth and deciding vote in the case, questioned the plurality's reliance on FAA regulations and whether the aircraft was operating in navigable airspace to determine what is reasonable under the Fourth Amendment. *Id.* at 452. In her view, "there is no reason to assume that compliance with FAA regulations alone determines whether the government intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 453. Therefore, under Justice O'Connor's standard, which is derived from the *Katz* test, the appropriate question in this case is "whether the [drone] was in the public airways at an altitude at which members of the public travel with sufficient regularity." *Id.* at 454. However, if it is found that "the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and [Ms. Koehler] cannot be said to have knowingly exposed [her backyard] to public view." *Id.* at 455.

Ms. Koehler sufficiently meets Justice O'Connor's test. *Id.* at 454. If a person wanted to be free from airline passengers peering out their windows into his or her backyard, Mount Partridge is the ideal place to live. (R. 3, 19.) The mountain's airspace "is constantly cloudy, foggy, stormy" and has "all kinds of visibility issues all the time." *Id*. at 42. On the day police deployed the drone, officers "did not see or hear a single plane the entire time [they] were there." *Id*. The record clearly supports the fact that planes avoid flying over Mount Partridge because it would be dangerous to

do so. *Id*. at 19. It was reasonable for Ms. Koehler to believe that her yard would be free from aerial observation because aircraft rarely, if ever, travel over Mount Partridge *Id*. at 3, 19. Aside from enclosing her backyard with a dome, it is difficult to think of a more affirmative step to prevent overflight sight of one's property than buying a house on Mount Partridge. *See United States v. Broadhurst*, 805 F.2d 849, 856 (9th Cir. 1986) (explaining "[t]he Constitution does not require one to build an opaque bubble over himself to claim a reasonable expectation of privacy.")

C. Police's Use of Handheld Doppler Radar is an Egregious Affront to the Fourth Amendment's Overwhelming Respect for the Sanctity of a Person's Home.

From time immemorial, "the house of every one is to him as his castle and fortress." *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604). Accordingly, "[t]he Fourth Amendment "draws 'a firm line at the entrance to the house.'" *Kyllo*, 533 U.S. at 40. Based on this guiding principle, this Court in *Kyllo* held unlawful the government's use of a thermal imager to obtain intimate details about a home. *Id.* at 34. There, agents from the Department of the Interior believed that marijuana was being grown in a suspect's home. *Id.* at 29. Aware that indoor marijuana production requires the use of high-intensity heat lamps, agents used a thermal imager to scan the suspect's home to detect whether there was an unusual amount of heat emanating from the home. *Id.* Agents conducted their scans of the house from the streets in front of and behind the home. *Id.* at 30. The scans revealed heat emanating from the roof of the garage. *Id.* This Court held that a Fourth Amendment search, requiring a warrant, occurs when authorities use "sense-enhancing technology" to obtain information about the interior of the home that could not have been acquired absent a "physical intrusion into a constitutionally protected area." *Id.* at 34. This Court qualified its holding by stating such actions constitute a search "at least where . . . the technology in question is not in general public use." Thus, a *Kyllo* inquiry is a two-prong analysis: (1) whether the information obtained could have been obtained without a physical intrusion into the home, and (2) whether the device

used is in general public use. *Id.* Because the police here used Doppler radar, technology that is not in general public use, without a warrant, to see through Ms. Koehler's walls and obtain intimate details about her home, their actions constitute an impermissible search under the Fourth Amendment. *Id.*

1. Police's Scans Revealed Intimate Details About Ms. Koehler's Home.

Here, the police clearly obtained information they would have not otherwise obtained absent a physical intrusion into the home. (R. 5.) The scans revealed one individual in the front room of the main house and three individuals standing close together in the pool house. (R. 5.) Just like the search in *Kyllo*, where agents determined that heat was emanating from the garage, police here obtained radar scans of people's breathing. *Id*. at 33; 533 U.S. at 30. In both *Kyllo* and the present case it would have been impossible for police to lawfully obtain the information without using novel, through-the-wall imaging technology. *Id.* The District Court's reasoning that no search occurred because the information obtained showed "merely that people were present inside the house," defies *Kyllo's* logic. (R. 11.); *see Id.* at 37. As this Court has repeatedly pointed out, "[in] the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id.* Even though the search in *Kyllo* merely revealed the heat emanating from the roof of the garage, that small but meaningful intrusion was still an affront to the overriding respect the Fourth Amendment places in the sanctity of one's home. *Id.* at 38. Here, however minor in the District Court or government's view, the search was invalid. (R. 11.); *Id.*

2. Doppler Radar Technology is Not in General Public Use.

Further, *Kyllo's* second prong is satisfied because Doppler radar technology is not in "general public use." (R. 33-35.) Although *Kyllo* held that thermal imagers, and suggested that powerful directional microphones and satellites, are not in "general public use," it did not set a

standard for determining when sense-enhancing devices are in "general public use." *See Id.* at 34-35. But, based on how on this Court and lower courts have addressed this inquiry, Doppler radar is clearly a device not in "general public use." *Shafer v. City of Boulder*, 896 F. Supp. 2d 915, 932 (D. Nev. 2012) (holding that "long-range, infrared, heavy-duty, waterproof, daytime/nighttime cameras" were not in general public use); *but Zavec v. Collins*, No. 3:16-cv-00347, 2017 WL 3189284, at *5 (M.D. Pa. July 27, 2017) (finding cell phone cameras in general public use). For example, in *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016), the Seventh Circuit held police violated the Fourth Amendment when they used of a drug-sniffing dog in an apartment hallway without a warrant. The court reasoned that "[a] trained drug-sniffing dog is a sophisticated sensing devise not available to the general public," and the dog detected what would have otherwise been unknowable without entering the apartment. *Id.* It is apparent that Doppler radar is not in general public use. *Id.* First, Doppler radar is designed specifically for law enforcement and is not available for public sale. *Id.* at 33, 35. Doppler radar uses radio waves to allow the user to see through the walls of a person's home. *Id.* It can detect how many and where people are in a building. *Id* at 4, 33. The fact that a device may be popular with law enforcement does not mean that it is in general public use. *Id*.; *Whitaker*, 820 F.3d at 853. While a cell phone camera or a pair of binoculars may be in general public use because a member of the general public uses these devices, devices used exclusively by law enforcement are not. *Id.* As *Whitaker* illustrates, a trained drug-sniffing dog is not considered a device in public use because only police have access to them. *Id.* Considering how prevalent dogs are in society, if a drug-sniffing dog is a sense-enhancing device not in general public use, then certainly the Doppler radar is too. *Id.*

3. Because Police Conducted Their Scans of Ms. Koehler's Home While Within the Home's Curtilage, *Jardines* And Not *Kyllo* Controls the Outcome of This Case.

In *Jardines*, this Court held the government's use of a drug-sniffing dog to inspect a suspect's home was an unconstitutional search because the police conducted their search from within the home's curtilage. 569 U.S. at 4-6. There, authorities approached a suspect's home with a drug-sniffing dog. *Id.* 3-4. After the dog sniffed the area in front of the home, it signaled that drugs were present in and around the house. *Id.* at 4. The *Jardines* Court did not address whether the drug-sniffing dog was in general public use because it was irrelevant to the analysis. *Id.* at 11. This Court held that "when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant." *Id.* Clearly, the police's action here went beyond that of the agents in *Kyllo*. (R. 4.); *see* 533 U.S. at 30. In *Kyllo,* the agents were across the street from the suspect's home when they conducted their scans. *Id.* However, here police scanned Ms. Koehler's home while they were standing on her property. (R. 33-34.) The record also indicates that police were at most 35 to 40 feet away from Ms. Koehler's main house and pool house when they conducted their scans. (R. 34.) Therefore, because the police conducted their search from within the curtilage of Ms. Koehler's home, that warrantless physical intrusion alone is sufficient to establish a trespass of the home and render the police's action a violation of the Fourth Amendment. *See Jardines*, 569 U.S. at 11.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that the judgment of the United States Court of Appeals for the Thirteenth Circuit be affirmed.

Respectfully submitted,
Team 22
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