Team 24

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 THE RESPONDENT

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ISSUES PRESENTED

1. Was the government's search of Respondent's laptop at a border station a valid search pursuant to the border search exception to the warrant requirement?

2. Did the use of a PNR-1 drove and handheld Doppler radar device constitute a search in violation of Respondent's Fourth Amendment rights?

STATEMENT OF FACTS

Search of Respondent's Laptop

While on patrol at the Eagle City border station, U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate stopped a car driven by Scott Wyatt. R. at 2, 25. Mr. Wyatt avoided eye contact with the agents and gave brief answers to their questions, used his fingers to fidget with the steering wheel, and appeared pale. R. at 26. Based on these observations, Agent Ludgate later claimed that Mr. Wyatt was "incredibly agitated and uncooperative." R. at 2, 26. When asked if he was transporting $10,000 or more in U.S. currency, Mr. Wyatt said he was not. R. at 2, 27. The agents informed Mr. Wyatt that they had a right to search the vehicle, and asked him to step out of his car and open his trunk. R. at 2, 26. In the trunk, agents discovered $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it, referring to Amanda Koehler, Mr. Wyatt's fiancé. *Id.* In the Order Denying Defendant's Motion to Suppress Evidence, it is stated that Mr. Wyatt told Agent Ludgate that he shared the laptop with Ms. Koehler. R. at 2. This is a misstatement of the evidence, however, since Agent Ludgate's testimony at the suppression hearing does not include this fact. R. at 24-29.

The agents searched Ms. Koehler's name in their database, and found her to be a felon with multiple convictions for crimes of violence. R. at 2, 27. They also found her to be a person of interest in the recent kidnappings of John, Ralph, and Lisa Ford, the teenage children of Timothy H. Ford. *Id*. A ransom note had previously stated that the teenagers were safe, but would only be returned for $300,000. R. at 44. Additionally, the kidnappers had agreed to give proof of life in exchange for $10,000 in $20 bills, due at noon the following day. R. at 2, 27. Aware of this investigation, Agent Ludgate opened the laptop and looked through the documents on the desktop, believing that this action was included in the search of the vehicle. R. at 2, 27-28.

Agent Ludgate did not obtain a warrant before searching the laptop, despite having time available to get one. R. at 28. Agent Ludgate did not ask for permission to search the laptop, and Mr. Wyatt did not consent to the search of the laptop. R. at 27-28.

Agent Ludgate eventually found a lease agreement with the name "Laura Pope," along with an address. R. at 3, 28. The FBI later confirmed that "Laura Pope" was an alias for Ms. Koehler. *Id*. Mr. Wyatt was arrested for failure to declare in excess of $10,000, and the agents relayed the information found on the laptop to Detective Raymond Perkins, lead detective in the investigation of the Ford kidnappings. R. at 3, 27.

Search of Macklin Manor

The lease agreement found by Agent Ludgate was the address of Macklin Manor. R. at 3, 32. Macklin Manor is a large estate atop Mount Partridge, isolated on the outskirts of town. R. at 3, 32. The top of Mount Partridge is particularly cloudy, with constant fog, clouds, and stormy weather usually covering Macklin Manor year-round. R. at 3, 42. Because of the perpetual fogginess, planes and other aircraft often steer clear of flying over Mount Partridge, opting to go around the mountain due to the extremely limited visibility, leaving the airspace over the estate not routinely used. R. at 3, 42.

Detective Perkins wanted detailed information of the estate, so at 4:30 A.M., he and other officers went to Macklin Manor to patrol the estate on foot and conduct aerial surveillance of the estate with a PNR-1 drone. R. at 3. While conducting the aerial search of the estate at dawn, the visibility was hindered with clouds and fog, such that no planes entered the airspace above Macklin Manor the entire time officers were searching the residence. R. at 3, 32, 41, 42. Eagle City Police Department is the only police department in the state to utilize drones for surveillance. R. at 3, 40. The PNR-1 drone used by the officers has a camera that captures high-

resolution photographs and video. R. at 3. While conducting the aerial surveillance, the drone took twenty-two high definition photos and recorded about three minutes of video of the estate. R. at 4, 32. Due to the technological abilities of the PNR-1, including the ability for a user to zoom in on a target up to fifteen feet away, the drone retails around $4,000.00. R. at 38, 46. Only a limited number of PNR-1 drones are available each year, and are only directly from the manufacturer. R. at 46. ECPD has only one drone of this kind. R. at 40. Having acquired the drone only six months prior, the aerial search of Macklin Manor was the first time the drone was deployed. R. at 40.

The high definition photos and videos revealed the unenclosed estate includes a large main house, an open pool and patio area, and a single-room pool house. R. at 4. The large main house is directly adjacent to the patio area, and about fifteen away from the pool. *Id*. On the other side of the pool sits the pool house, roughly fifty feet from the main house. *Id*.

Beyond the layout of the estate, the drone also captured an image of a single, young, female subject, who Detective Perkins was able to identify as Ms. Koehler. *Id*. Upon discovering Ms. Koehler was on the premises, Detective Perkins wanted further information regarding the interior of the home, so as to not endanger any potential hostages. *Id*. Detective Perkins and another officer then surreptitiously approached the front door of the main house and, without a warrant, scanned the front door with a handheld Doppler radar device. *Id*. Although handheld Doppler radar devices have become popular amongst law enforcement agencies, they remain uncommon amongst members of the public. R. at 4, 35. Eagle City Police Department orders the Doppler radar devices, built specifically for law enforcement purposes, directly from the manufacturer. R. at 35.

The Doppler device used emits a radio wave into the home that zeros in on a persons' breathing, informing the officers not only the number of individuals within fifty feet of the device, but what direction and roughly how far the individual is from the officer deploying the device. R. at 4, 33. Two Doppler radar scans of the estate were conducted which revealed an individual within the main home, standing to the left of the front door, about ten to fifteen feet away from the door, and revealed four individuals within the pool house, three about ten feet from the front door of the pool house and another moving around the pool house. R. at 4, 5, 34. After Detective Perkins and other officers completed their aerial and radar surveillance of the estate, the officers retreated and obtained a search warrant for the remainder of the estate. R. at 5.

Procedural History

A federal grand jury indicted Amanda Koehler on three counts of kidnapping under 18 U.S.C. 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. 992(g)(1). Ms. Koehler filed the instant motion to suppress the evidence found on the day of her arrest, raising two issues: first, that her Fourth Amendment rights were violated when Agent Ludgate searched her laptop at the Eagle City border station; second, that her Fourth Amendment rights were also violated during the warrantless searches conducted on Macklin Manor, via Officer Lowe's PNR-1 drone and Detective Perkin's Doppler radar device. The U.S. District Court Southern District of Pawndale denied the motion, and Ms. Koehler appealed to the U.S. Court of Appeals for the Thirteenth Circuit, which reversed and remanded the District Court's decision. The Supreme Court of the United States has granted certiorari.

SUMMARY OF THE ARGUMENT

The search of Respondent's laptop at a border station was unconstitutional under the Fourth Amendment. The border search exception permits suspicionless searches at the border so long as they are "routine." However, the contents of laptops can not be included in a routine border search because of the level of intrusiveness it necessarily involves—a laptop contains an extremely massive and varied amount of personal information available at the push of a button. Because the border search of the laptop was not routine, the government must then have at least reasonable suspicion, if not probable cause or a warrant, to search the laptop. Here, there was no reasonable suspicion because the search of the laptop's contents was not tied to and strictly justified by the circumstances. In addition, the government's need to search did not outweigh the individual's right to privacy, as there was no immediate threat of harm and no risk of evidence being destroyed. Finally, even if there was reasonable suspicion of Mr. Wyatt, the agents had no reasonable suspicion of Respondent to justify their search of her laptop.

The use of a PNR-1 drone and handheld Doppler radar device constitute a search in violation of the Fourth Amendment. Fourth Amendment jurisprudence has long held the home is sacred and protected from prying government eyes. With the advancement of technology, this Court has held when information within a home is revealed through the use of technology that goes beyond an officer's ordinary powers of perception, a search has occurred. Here, the surveillance gathered by both the PNR-1 drone and handheld Doppler radar device revealed information within Macklin Manor that was not revealed through the officer's ordinary powers of perception when they patrolled the area on foot. Because the technology used by the Eagle City Police Department enhanced the officer's senses beyond ordinary perception to reveal details and information within a home, a warrant based upon probable cause was required.

This Court should affirm the Thirteenth Circuit Court's decision because the District Court's denial of the motion to suppress was improper.

STANDARD OF REVIEW

This Court reviews questions of law de novo and reviews findings of facts for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THE APPELLATE COURT CORRECTLY CONCLUDED THAT THE GOVERNMENT'S SEARCH OF RESPONDENT'S LAPTOP AT A BORDER STATION WAS UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects the right of individuals to be secure in their person and property against unreasonable searches. U.S. Const. amend. IV. Searches are generally considered unreasonable if they are not done pursuant to a warrant issued upon probable cause. *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989). However, this Court has recognized multiple exceptions to the Fourth Amendment's warrant and probable cause requirements. *Id*. One such exception is made for border searches. The border search exception allows government agents to conduct warrantless, suspicionless, routine searches of individuals, their vehicles, and their effects when passing through a border station. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). However, if a border search is not routine in nature, then the government is required to have reasonable suspicion in order to proceed. *United States v. Ezeiruaku*, 936 F.2d 136, 140 (3d Cir. 1991).

In this case, the appellate court correctly found that the government's search of Respondent's laptop was not constitutionally protected under the border search exception for two primary reasons. First, searching the contents of a laptop is not "routine" in the context of a border search. Second, the border agents did not have reasonable suspicion to search the contents of the laptop.

a. Inspecting the Contents of a Laptop is not "Routine" in Context of a Border Search

Border searches are considered to be "reasonable" based solely on the fact that the person or property in question are crossing into our country from outside. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Thus, because they are presumptively reasonable, searches at the border do not require probable cause or a warrant. *Id*. at 617. But, in order to be presumptively reasonable, a border search must be "routine." *See United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). In determining whether a border search is routine, the focus is on whether the search poses a serious invasion of privacy. *United States v. Johnson*, 991 F.2d 1287, 1290 (7th Cir. 1993).

Thus, the critical factor in determining whether a border search is routine is the degree of intrusiveness it poses. *United States v. Tsai*, 282 F.3d 690, 694 (9th Cir. 2002). For example, a border search of a traveler's luggage and personal effects is not very intrusive, since it only requires a few minutes, does not harm the luggage, and involves no harm or indignity. *E.g., Johnson*, 991 F.2d at 1291-1292. In fact, border patrol agents are authorized to search all travelers' closed containers without any level of suspicion. *See Flores-Montano*, 541 U.S. at 152-53; *see also Montoya de Hernandez*, 473 U.S. at 538. On the other hand, searches of the person are much more likely to be held as intrusive than searches of vehicles and belongings: strip searches and other body searches are regularly held to be non-routine. *See, e.g., United*

States v. Braks, 842 F.2d 509, 514-515 (1st Cir. 1988); *see also Shorter v. United States,* 469 F.2d 61 (9th Cir. 1972); *see also United States v. Sanders*, 663 F.2d 1, 3 (2d Cir. 1981).

This Court held that the disassembly of a gas tank as part of a border search was routine, because "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles." *Flores-Montano*, 541 U.S. at 152. It should be noted, however, that the Court in this case did *not* conclude that all searches of inanimate objects are routine; "[i]t may be true that some searches of property are so destructive as to require a different result." *Id*. at 155-156. The Court left open the possibility that a search of a different type of property may still be considered non-routine.

There have been a few cases from lower courts which addressed the issue of searching laptop computers during a border search. In *United States v. Arnold*, the court found that a customs search into electronic files on a laptop are considered a routine border search. *United States v. Arnold*, 533 F. 3d 1003 (9th Cir. 2008). The 9th Circuit clarified in a later case that *Arnold* permitted only "a quick look and unintrusive search of laptops," and not a forensic examination of a computer's hard drive. *United States v. Cotterman*, 709 F. 3d 952 (9th Cir. 2013). It must be noted, however, that these cases are from the 9th Circuit and are thus not controlling over this Court. Additionally, these decisions were made prior to the key Supreme Court decision of *Riley v. California*.

Prior to *Riley*, there was a split among state and federal courts over whether the contents of cell phones may be searched incident to arrest. In *Riley*, the Court found that digital devices implicate different levels of privacy because of the vast amount of information they can hold. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014). The Court held that a cell phone (described by

the Court as a "minicomputer") may not be subjected to a warrantless search incident to arrest, placing a great emphasis on the fact that "[c]ell phones differ in both a quantitative and qualitative sense from other objects that might be kept on [one's] person." *Id*. Modern cell phones are not just a technological convenience, but a device that holds, for many Americans, "the privacies of life." *Id*. at 2493. "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id*. Although *Riley* was not a border search case, the same reasoning used by the Court is applicable in this case.

Here, there is a clear difference between laptops and other pieces of property, such as luggage. A luggage search has physical limitations and a laptop search does not. A suitcase stores items that an individual has specifically chosen to bring into the country, which is logically connected with the justification for a border search. As noted by the Thirteenth Circuit, Ms. Koehler's laptop contained hundreds, if not thousands of personal files and information that the government should not be privy to; and, through the use of cloud technology (such as Apple's iCloud or Google Drive), the amount of personal information accessible on a laptop is unlimited. R. at 17. The border search exception was created to secure the safety of the country at its borders, not to give the government full access to boundless personal data.

b. <u>The Border Agents did not have Reasonable Suspicion to Search the Laptop's Contents</u>

While no suspicion is required for a routine border search, a non-routine border search triggers the reasonable suspicion requirement. *Ezeiruaku*, 936 F.2d at 140. Reasonable suspicion is a standard that is less than probable cause (the legal standard for arrests and warrants) but more than an unparticularized suspicion or hunch; it must be based on "specific and articulable facts", "taken together with rational inferences from those facts". *Terry v. Ohio*, 392 U.S. 1, 21-

27 (1968). In the border search context specifically, this Court has found that reasonable suspicion means that the facts known to the border agent at the time of the search, combined with the officer's reasonable inferences from those facts, provides the officer with a particularized and objective basis for suspecting that the search will reveal contraband. *Montoya de Hernandez,* 473 U.S. at 541.

Here, the border agents did not have reasonable suspicion to search the contents of the laptop for three key reasons. Firstly, Mr. Wyatt's behavior, his possession of $10,000 in $20, and his relationship with Amanda Koehler does not justify searching a laptop which the border patrol agents have no reason to believe was involved in any crime or contains any information of a crime. Secondly, there was no risk of harm or risk that evidence would be destroyed if the laptop was not immediately searched. Finally, even if the border agents had reasonable suspicion of Mr. Wyatt, they can not use that as a basis to search the property of the respondent.

i. *The Search of the Laptop was not Strictly Tied to and Reasonably Justified by the Circumstances*

A search can still be found to violate the Fourth Amendment, even if there was reasonable suspicion initially. A search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *See Kremen v. United States,* 353 U.S. 346, 347-348 (1957); *see also Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-358 (1931). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas, concurring); *see, e.g., Preston v. United States,* 376 U.S. 364, 367-368 (1964).

Here, there are a variety of factors that may be considered in determining whether reasonable suspicion existed to justify a non-routine border search: the fact that Mr. Wyatt appeared agitated, the $10,000 in $20 bills that matched the request from the kidnappers, and Mr. Wyatt's relationship with Amanda Koehler. R. at 2. Given these facts, there was likely sufficient reasonable suspicion to search the trunk of Mr. Wyatt's vehicle and to seize the laptop. However, there was not sufficient reasonable suspicion to extend that search to the *contents* of the laptop.

As previously argued, *California v. Riley* indicates that laptops must be given a higher level of privacy than other pieces of property. This is due to both the sheer amount of information a laptop contains, as well as the large variety of information it contains. Thus, in order to justify a laptop search as "reasonable," a greater amount of suspicion is necessary. The three considerations here (Mr. Wyatt's demeanor, the $10,000, and Mr. Wyatt's connection to Ms. Koehler) were not enough to reach this level of suspicion.

First, Agent Ludgate claimed that Mr. Wyatt was "incredibly agitated and uncooperative." R. at 26. However, when asked to explain what she meant by this statement, Ludgate said Mr. Wyatt's answers to questions were brief, he was fidgeting with his fingers on the steering wheel, he looked pale, and he didn't make eye contact. *Id*. Describing this behavior as being "incredibly agitated and uncooperative" is a stretch. This behavior may simply indicate that an individual has a general nervousness around law enforcement. Secondly, Mr. Wyatt had $10,000 in $20 bills, which matched the "proof of life" request. *Id*. However, the border agents had no reason to believe that the kidnappers had already received the "proof of life" money. The "proof of life" money was not due until the following day, and there is no indication that the border agents were aware that the money had been paid early. *Id*. Third, Mr. Wyatt stated that his fiancé was Amanda Koehler. Although Ms. Koehler was a "person of interest" in the kidnapping

case, the officers had no reason to believe that any information about the kidnapping was available on the laptop. R. at 44. There was no evidence that a laptop had been involved in the crime at all—the ransom note had not been sent to Mr. Ford electronically. *Id*.

As previously stated, the officers likely had sufficient reasonable suspicion to seize the laptop and to search closed containers within the vehicle. However, the contents of the laptop was outside the scope of the border agent's reasonable suspicion.

ii. *The Government's Need to Search did not Outweigh the Individual's Right to Privacy*

The reasonableness of a search must be evaluated by assessing, on one hand, the degree to which it intrudes upon an individual's privacy, and the degree to which it is needed for the promotion of legitimate governmental interests on the other. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The justification for relying on reasonable suspicion rather than probable cause largely comes from the "need for immediate action" against a person. *Sibron v. New York*, 392 U.S. 40, 73 (1968) (Justice Harlan concurring opinion). For example, the possibility of a suspect being armed creates a need for immediate action; the reasonable suspicion standard was initially created by this Court to allow police the ability to search an individual for weapons in order to ensure their own safety. *See Terry v. Ohio*, 392 U.S. 1 (1968). This Court further found that when an arrest is made, it is reasonable for the arresting officer to search the arrestee's person as well as the area surrounding him from which he might gain possession of a weapon or destructible evidence. *Chimel v. California*, 395 U.S. 752, 763 (1969). Digital data cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. *Riley*, 134 S. Ct. at 2485. Officers are free to examine the physical aspects of a device to ensure that it will not be used as a weapon—for example, they may determine whether there is a razor blade hidden

between the phone and its case. *Id*. But, once an officer has secured a phone and eliminated any potential physical threats, the data on the phone can endanger no one. *Id*.

Here, the officers had no need for immediate action—unlike a gun or other weapon, the laptop was not a threat to anyone's safety in the surrounding area. The laptop itself was not capable of harming the Ford teenagers, so it's search can not be justified as reasonably necessary. Even if the government argues that the search of the laptop was necessary to *prevent* immediate harm to the teenagers, this argument would not succeed. The intent of the kidnapping was ransom, and not assault or murder, a fact which the border agents were aware of. R. at 2. The ransom note stated that the teenagers were safe, but would only be returned in exchange for $300,000. *Id*. It did not include any threats to harm the teenagers or anyone else. Thus, the agents had no reason to believe that an immediate search of the laptop's contents was necessary to prevent *immediate* harm of the Ford teenagers.

There was also no risk of evidence being destroyed. As previously mentioned, it would have been reasonable for police to seize the laptop in order to prevent the destruction of any evidence it contains. Police have the capability to put seized electronics in a radio-frequency shielded bag, which prevent signals from getting through. Had the police done this, it would have prevented the laptop from being remotely wiped clean of evidence.

Additionally, Ludgate did not claim to have searched the laptop based on reasonable suspicion that it might contain information relating to the kidnapping. Instead, she testified that she conducted the laptop search based on her belief that it was included within the border search exception. R. at 28. And finally, the border agents easily could have seized the laptop and waited for a warrant to search the contents—in fact, Agent Ludgate testified that there was time to get a warrant. *Id*.

iii. *The Border Agents did not have Reasonable Suspicion Specific to the Respondent*

Reasonable suspicion must be associated with the specific individual being searched. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). In *Ybarra*, officers had a warrant to search a bar's premises and bartender. However, while executing this warrant, officers also did a pat down of an individual who was a customer in the bar. The Court found that just because Ybarra was in the bar, it didn't mean that there was reasonable suspicion to frisk Ybarra. *Id*. Although the motor vehicle exception to the warrant requirement *does* permit the government to search closed containers within vehicles, even if the container belongs to a third-party, this exception does not apply here, since the motor vehicle exception only applies to situations in which the government already has probable cause.

Here, the search was of a laptop and not a person, but the same reasoning may be used as in *Ybarra*. Even assuming that the border agents had reasonable suspicion of Mr. Wyatt, due to his "agitated" behavior and the money he was carrying, the agents were still not justified in searching a laptop belonging to a third party, since they had no reasonable suspicion of the third party.

In the statement of facts from the Decision and Order of the District Court, Southern District of Pawndale, it is written, "… Agent Ludgate asked Mr. Wyatt if the laptop was his. Mr. Wyatt stated that he shared the laptop with his fiancé, Amanda Koehler." R. at 2. However, this is a misstatement of the evidence, since in her testimony during the suppression hearing, Agent Ludgate never mentioned that the laptop was shared. R. at 24-29. Agent Ludgate testified that the laptop was marked with the initials "AK," which Mr. Wyatt said belonged to his fiancé. R. at 26. Agent Ludgate never referred to Mr. Wyatt as the owner of the laptop in her testimony; for instance, Agent Ludgate described the device as "the laptop in Mr. Wyatt's car." R. at 27. In his

own testimony, Detective Perkins similarly did not describe the laptop as belonging to Mr. Wyatt. R. at 32.

The record states that Amanda Koehler was a "person of interest" in the Ford kidnapping case, but it gives no explanation about why police suspected her. R. at 2. It is not known how many "persons of interest" there were in this case. At the time of the search, all that the border agents knew about Ms. Koehler was that she was a felon with multiple convictions for crimes of violence. This is not sufficient reasonable suspicion to conduct a warrantless search of her laptop.

II. THE APPELLATE COURT CORRECTLY CONCLUDED THAT THE USE OF THE HANDHELD DOPPLER RADAR DEVICE AND THE PNR-1 DRONE CONSTITUTE A SEARCH UNDER THE FOURTH AMENDMENT REQUIRING A WARRANT BASED UPON PROBABLE CAUSE.

Individuals are guaranteed the right to be secure in their houses, against unreasonable searches and seizures. U.S. Cons, amend. IV. This right shall not be violated. *Id*. "'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 v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) This right has been long protected by the constitution. *Boyd v. United States*, 116 U.S. 616, 630 (1886). The line drawn at the entrance of the house is a firm. *Payton v. New York*, 445 U.S. 573, 589 (1980). "Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant." *Id*. "Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *United States v. Karo*, 468 U.S. 705, 715-716 (1984). "A Fourth

Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 32-33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

In this case, the appellate court correctly found that the use of the handheld Doppler radar device and the PNR-1 drone constitute a search in violation of the Fourth Amendment for three reasons. First, the protections of the Fourth Amendment from unreasonable search apply to the entirety of Macklin Manor because the entire estate falls within the curtilage of the home. Second, the use of the PNR-1 drone was an unreasonable search under the Fourth Amendment because the drone was highly sophisticated technology and was used in non-routine airspace. Third, the use of the Doppler radar device violates the Fourth Amendment because the radio waves emitted from the device penetrated the home to reveal intimate details within the home.

a. The Entire Estate of Macklin Manor is Protected under the Fourth Amendment

This Court has extended the protection given to homes to areas that "attach to the home." *Oliver v. United States*, 466 U.S. 170, 189 (1984). The "area intimately linked to the home, both physically and psychologically," is constitutionally protected under the Fourth Amendment. *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986). "The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chem. Co. v. United States,* 476 U.S. 227, 235 (1986). "[F]or *most* homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage - as *the area around the home to which the activity of home life extends - is a familiar one easily understood from our daily experience*." *United States v. Dunn,* 480 U.S. 294, 302 (1987) (quoting *Oliver,* 466 U.S. at 182 n.12). (emphasis added). In determining whether an area around a home falls within the curtilage

of that home, "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by" should be evaluated. *United States v. Dunn*, 480 U.S. at 294, 301 (1987).

In *Dunn*, this Court found petitioner's barn was not within the curtilage of his ranch house because the barn was not so "intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." *Dunn,* 480 U.S. at 301. Looking to the first factor, this Court found the barn's location of fifty yards from the fence surrounding the house and sixty yards from the house itself, was a substantial distance not supporting the inference that the barn should be treated as an adjunct of the house. *Id*. at 302. To the second factor, the barn did not lie within the area surrounding the house that was enclosed by a fence. *Id*. Third, officers possessed "objective data indicating that the barn was not being used for intimate activities of the home." *Id*. And fourth, this Court found the homeowner did "little to protect the barn area from observation by those standing in open fields." *Id*. at 303. However, this Court noted,

> We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed in the home's 'umbrella' of Fourth Amendment protection.

Id. at 301.

Here, unlike in *Dunn*, the areas of the estate that are not physically connected to main house are not a substantial distance from the main house. The main house is directly adjacent to a patio area and fifteen feet from the pool, and the pool is fifty feet from the main house. There is a reasonable inference that these areas should be treated as an adjunct of the house because the

distance is not substantial between the house, patio, pool, and pool house, and the small distance between the areas is from the aesthetic layout of the estate. Furthermore, although Macklin Manor was not enclosed by a fence, the estate itself was isolated on the outskirts of town. The isolation effectively created an enclosure of the estate without a fence. In addition, and unlike in *Dunn*, there was no fence separating the main house from the patio, pool, or pool house.

Looking to the next factor, unlike in *Dunn*, there was nothing indicating the patio, pool, or pool house was not being used for intimate activities of the home. Distinguishable from a barn, a pool and pool house, or more generally a backyard, likely are used for intimate activities of the home because backyards are designed to allow for intimate activities of the home to occur outside in a private area. Finally, to the last factor in *Dunn*, while the record does not indicate Ms. Koehler took steps to prevent observation into her backyard, the record establishes that the natural environment in which the estate stands prevents observation. Macklin Manor is isolated on the outskirts of town, atop Mount Partridge, which is known to have poor visibility due to continuously cloudy and stormy weather. Further, because the visibility is limited, planes and other aircrafts avoid the airspace above Macklin Manor. Because of these naturally present barriers, it was unnecessary for Ms. Koehler to take steps to prevent observation in her backyard.

Moreover, even looking beyond the four factors and looking to whether the area in question is so intimately tied to the home itself that it should be placed in the home's umbrella, the same result is produced. An individual's backyard, no matter how large, is an area around the home to which the activity of home life extends in an outdoor setting, and is a familiar area easily understood from our daily experience. *Dunn*, 480 U.S. at 302 (quoting *Oliver,* 466 U.S. at 182 n.12). Furthermore, as an estate, the entirety of Macklin Manor falls under the home's umbrella of Fourth Amendment protection because the entire property composes the residence.

As such, the main house, the patio, the pool, and the pool house are all protected under the Fourth Amendment.

b. Aerial Photograph and Video Surveillance of a Home or the Curtilage of the Home Requires a Warrant

"The touchstone of the Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz*, 389 U.S. at 360)). In determining whether an expectation is reasonable, "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly private activity, but instead whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id*. at 212 (internal citations omitted)(quoting *Oliver*, 466 U.S. at 181-183). "The Fourth Amendment does not, … prevent all investigations conducted on private property… ." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citing *Hester v. United States*, 265 U.S. 57 (1924)). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

This Court held in both *California v. Ciraolo,* 476 U.S. 207 (1986), and *Florida v. Riley,* 488 U.S. 445 (1989) that naked eye observations of the curtilage of a home from public airspace did not violate the homeowner's expectation of privacy. However, both cases are *explicitly limited to naked eye observations.* Here, the aerial surveillance went beyond that in *Ciraolo* and *Riley* because it was not an officer conducting the aerial surveillance, but a drone with a high definition camera. The ability of the drone to photograph a woman clearly enough for Detective Perkins to identify the woman, despite poor weather and limited visibility, indicates the camera on the drone went beyond that of the naked eye.

Furthermore, *Ciraolo* and *Riley* are further distinguishable from the case at hand, due to the location and weather surrounding Macklin Manor. This Court states in *Ciraolo*,

> In an age where *private and commercial flight in the public airways is routine*, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.

Ciraolo, 476 at 215 (emphasis added). This Court similarly stated in *Riley,* "Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, 'private and commercial flight [by helicopter] in the public airways is routine' in this country, and there is no indication that such flights are unheard of in Pasco County, Florida." *Riley*, 488 U.S. at 451 (citing *Ciraolo* 476 U.S. at 215).

However, in the case at hand, although the airspace over Macklin Manor was public, planes and other aircraft often steered clear of flying over Mount Partridge due to the perpetual fogginess and no planes flew over Macklin Manor during the entire time officers were there. Such circumstances indicate that the explicitly limited holdings in *Ciraolo* and *Riley* should not apply because the underlying facts demonstrating reasonable expectation of privacy are vastly different.

Moreover, in *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 238, although this Court held the aerial photographs taken did not violate the Fourth Amendment, they observed human vision was only "enhanced somewhat," and the pictures were "limited to an outline of the facility's buildings and equipment." *Dow,* 476 U.S. at 238. Furthermore, this Court distinguished the facts of *Dow* from surveillance of private property by noting 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. *Id*. Further in *Dow*, this Court

found "it important that this enhancement was *not* in an area immediately adjacent to a private home, where privacy expectations are most heightened." *Id*. at 237 n.4 (emphasis in original).

Here, the photos were not limited to an outline of the property as Detective Perkins was able to identify Ms. Koehler from the images. Additionally, here, the officers went beyond naked eye observations and used highly sophisticated surveillance equipment not generally available to the public, to photograph the curtilage of Macklin Manor. As such, the use of the PNR-1 drone to conduct aerial photograph and video surveillance constituted a search in violation of the Fourth Amendment.

c. The Surveillance Conducted by the Handheld Doppler Radar Device was in Violation of the Fourth Amendment because it Revealed Private Details within the Home

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). The line drawn at the entrance to the house "must not be only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40. When "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id*. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Id*. at 31; See *Illinois v. Rodriguez*, 496 U.S. 117, 181 (1990), *Payton*, 445 U.S. at 586.

"A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 32-33 (citing

Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This Court observed in *Kyllo*, "[I]n the case of the search of the interior of homes … there is a ready criterion, with roots deeps in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. *Id*. at 34 (emphasis in original). This Court explained, "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search –at least where (as here) the technology in question is not in general public use." *Id*. (quoting *Silverman*, 365 U.S. at 512). Finally, this Court declared, "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37 (emphasis in original); See generally *United States v. Karo*, 468 U.S. 705, 716 (1984) (holding that the Fourth Amendment does not allow the government to use electronic devices to determine "whether a particular article--or person for that matter- is in an individual's home at a particular time"), *Arizona v. Hicks*, 480 U.S. 321 (1987) holding moving stereo equipment located within the home to reveal the serial numbers on the bottom of the stereo equipment constituted a search).

In *Kyllo*, the officers used a thermal-imaging device to reveal the presence of excessive heat escaping from the interior of his home. Nevertheless, the Court held that the officers' acts in revealing the presence of excessive heat inside the home constituted a Fourth Amendment search because details of the home that would previously have been unknown without physical intrusion, became known through the use of a device that is not in general public use.

Here, like in *Kyllo*, details of the home that would previously have been unknown without physical intrusion became known through the use of a device that is not in general public use. A handheld Doppler radar device emits radio waves into the home, zeroing in on a person's

breathing, revealing their presence inside the home and roughly where they are located. Unlike an officer walking past a window of a home, a Doppler radar reveals the distance and direction of any breathing individual within fifty feet. Using this radar device, the officers were able to discover an individual was not only within the main home, but was standing to the left of the front door, about ten to fifteen feet away from the door. Officers were further able to discover from a second scan, four individuals within the pool house, three of whom were about ten feet from the front door of the pool house and another moving around the pool house. The number and location of individuals within the main house and pool house were not revealed when the officers were patrolling the residence on foot, but only discovered after the Doppler radar device was deployed. Because the Doppler radar device allowed Detective Perkins the ability to obtain information regarding the interior of Macklin Manor that he was otherwise unable to obtain using his ordinary powers of perception without physical intrusion into the home, the use of the device fails the first element provided in *Kyllo*.

Again, like in *Kyllo*, the device used to obtain details of Macklin Manor is not in general public use. The record clearly demonstrates this. Handheld Doppler radar devices may be prevalent and popular with law enforcement officer, they remain uncommon amongst members of the public. Eagle City Police Department orders the Doppler radar devices directly from the manufacturer indicating they are not available through a general public retailer. Further, these Doppler radar devices are built specifically for law enforcement purposes indicating they are not designed for general usage. As such, a handheld Doppler radar device fails the final element in *Kyllo.* Accordingly, Detective Perkin's use of a handheld Doppler radar device to reveal the location of individuals in the main house and in the pool house, is a Fourth Amendment search and is presumptively unreasonable without a warrant based on probable cause.

i. Even if the the Pool House does not constitute a Protected Area under the Fourth Amendment, the use of the Radar Device on the Pool House nonetheless constitutes a Violation of the Fourth Amendment

This Court's "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." *United States v. Jones*, 565 U.S. 400, 405 (2012). However, this Court "must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Id*. at 406 (citing *Kyllo*, 533 U.S. at 34). In holding the Fourth Amendment protects persons and their private conversations, this Court did not intend to "withdraw any of the protection which the Amendment extends to the home …." *Id*. at 407 (citing *Alderman v. United States*, 394 U.S. 165, 180 (1969)). A search under the Fourth Amendment has not occurred through trespass alone, but rather when trespass is conjoined with an attempt to find something or to obtain information. *Id*. at 408-411.

In *Jones*, this Court held the use of a GPS tracking device that had been attached to a vehicle was a search within the Fourth Amendment because the government obtained information by physically intruding on a constitutionally protected area. Here, through the use of the radar device, the officers were able to reveal three individuals about ten feet from the front door of the pool house. This indicates the officers were standing within forty feet of the pool house. Because the range on the handheld Doppler radar device is fifty feet, and the main house is fifty feet from the pool house, the officers were standing near the main house, well within the curtilage of the home when they utilized the radar device. Pursuant to *Jones*, when the officers trespassed onto the curtilage of the home, for the sole purpose of scanning the pool house with the radar device to obtain information, a search occurred.

CONCLUSION

For the aforementioned reasons, the United States Court of Appeals for the Thirteenth Circuit's holding should be *affirmed.*

Respectfully submitted,

Team 24

Counsel for Respondent

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