Team 27

**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 OF PETITIONER

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## STATEMENT OF THE ISSUES

1. Whether a brief, manual inspection of documents, already open on a laptop computer without a password, during a border search conducted due to the suspicious nature of the searchee and after actual evidence of a crime was revealed, was a valid search under the border search doctrine.

2. Whether the use of a PNR-1 drone in or above navigable airspace above a residence, which the resident took no steps to obscure from view, that captured non-sense-enhancing photos and video and/or the use of a handheld Doppler radar device that detected only the presence of four persons inside a residence constituted, in the context of a kidnapping of three children, unreasonable searches in violation of Respondents Fourth Amendment rights.

## STATEMENT OF THE FACTS

At approximately 3:00 AM on August 17, 2016, Border Patrol Agents Ashley Ludgate and Christopher Dywer stopped a car driven by Scott Wyatt at the border between Mexico and the U.S. Ludgate asked Wyatt standard questions, but due to Wyatt's agitated and uncooperative attitude, the Agents performed a routine search of the vehicle. R. at 2. This search determined that, contrary to Wyatt's statements, he was transporting $10,000 USD across the border in violation of 31 U.S.C. § 5136. R. at 2-3. It also revealed a laptop Wyatt shared with his fiancé, Amanda Koehler, a violent felon and a person of interest in the kidnapping of John, Ralph, and Lisa Ford. R. at 2. Because of the imminent threat to the children's safety, Agent Ludgate performed a brief, manual examination of the laptop. R. at 3. Upon opening the laptop, several documents were already displayed on the screen. R. at 3. Within one of these documents was information about a residence that did not belong to Wyatt, but to an unknown person, later identified as an alias of Koehler. R. at 3.

Along with this information, the FBI and Eagle City Police determined that a shell company owned by an alias of Koehler owned Macklin Manor and that alias had executed a lease of the property. R. at 3. Because the police were worried that violence would result if they simply approached the property, they sought to legally discover more information in an attempt to return the children safely to their family. R. at 3. Macklin Manor does regularly have cloud and fog cover (R. at 3), but does not have any enclosures of any kind or any physical improvement that would obscure view of the area. R. at 9-10. In order to get more information and to avoid violent confrontation, Officer Kristina Lowe deployed a PNR-1 drone to survey the outside of Macklin Manor. R. at 3. This drone is equipped with a video camera and a DSLR camera. R. at 39. These cameras do not give a view that is better than the eye. R. at 39. The drone viewed Koehler walking between the buildings outside. R. at 4.

With confirmation that Koehler was present, likely with the Ford children, the police were still weary that approaching the house during this tense, ongoing, and potentially violent situation would likely result in harm to them and the hostages. Detective Raymond Perkins used a handheld Doppler radar device from immediately outside the buildings that revealed one person in the main house and three people in the pool house. R. at 4-5. The device cannot detect any objects or the physical lay out of the home. R. at 4. A search of the premises later resulted in the capture of Koehler and her accomplices and the safe return of the Ford children. R. at 5. On October 1, 2016, Koehler was charged with three counts of kidnapping under 18 U.S.C. §1201. The district court denied her motion to suppress evidence seized upon her arrest. On appeal, the Thirteenth circuit reversed the ruling on the motion to suppress.

## SUMMARY OF THE ARGUMENT

The first issue presented in this case considers the constitutionality of a border search. Its focus is on whether the opening of a laptop, without a password, and reading the documents already displayed on the screen, is a valid search under the exception. This Court has long made clear, that the Fourth Amendment permits suspicionless border searches of personal property, including private materials stored in closed containers. *See United States v. Flores- Montano*, 541 U.S. 149 (2004). The Thirteenth Circuit departed from tradition, disregarded the reduced privacy interests at stake in border searches, and carved out a broad exception for electronic devices at the border. A major flaw was the failure to recognize that computers are legally and conceptually no different than other closed storage containers, like suitcases, briefcases, and purses, presented for entry at the border. Many courts in fact have concluded that computers should be treated as closed containers for Fourth Amendment purposes, and several courts have specifically applied this principle to uphold suspicionless searches of computer media at the border. Furthermore, the Thirteenth Circuit's reliance on *Riley v. California*, 134 S. Ct. 2473 (2014), is misguided. The

holding in *Riley v. California* was specifically directed at searches incident to arrest. *Id*. at 2484. Rather than weighing against border searches, this Court noted "case-specific exceptions may still justify a warrantless search of a particular phone." *Id.* at 2494. The border search exception is one such exception. Ultimately, based on the relevant Government interest, statutes, precedent, and facts of the case, the search in this case was clearly valid under the border search exception.

As for the use of the PNR-1 drone and handheld Doppler device, the Harlan concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967) establishes that for there to be a search under the Fourth Amendment, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Though the language of *Katz* is sometimes lost, this baseline formulation has been applied in situation after situation, including the use of aerial surveillance and technology used by police. In this case, Koehler lacked a subjective expectation of privacy as to the drone surveillance. Even if Koehler did evidence such an expectation, *California v. Ciraolo*, 476 U.S. 207 (1986), *Florida v. Riley*, 488 U.S. 445 (1989), and other cases establish that, under these facts, it is not one that society is prepared to recognize as reasonable. With the Doppler device, Koehler concededly had a subjective expectation of privacy. However, under the standard announced in *Kyllo v. United States*, 533 U.S. 27 (2001) Koehler's expectation of privacy as to the use of this widely-available technology is not one society is prepared to recognize as reasonable. Even if the use of one or both of these pieces of technology were searches, exigent circumstances present made the searches reasonable.

## STANDARD OF REVIEW

Since "the Supreme Court has not spoken unequivocally on this subject," courts have gasped at the standard of review for the constitutionality of searches and seizures. *United States v. Montilla*, 928 F.2d 583, 588 (2nd Cir. 1991). Several Circuits have applied de novo review to

"[w]hether certain conduct by law enforcement officers infringes upon rights guaranteed by the Fourth Amendment." *United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002); *United States v. Gomez*, 276 F.3d 694, 697 (5th Cir.2001). "Underlying factual findings, however, are reviewed for clear error." *Breza*, 308 F.3d At 433. This is appropriate as "decisions on questions of law are reviewable *de novo,* decisions on 'questions of fact' are reviewable for clear error[.]" *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (quotation marks omitted).

## ARGUMENT

### I. This Court should reverse the Thirteenth Circuit because the validity of the search is supported every standard used to judge border searches in the United States.

The Thirteenth Circuit ruled that the border search of Appellant was a violation of his Fourth Amendment Rights. In doing so, it failed to consider the Government's vital and historical interest in protecting the border, statutory authorization for broad border searches, and misconstrued the nature of the computer search conducted by Agent Ludgate.

#### a. Computers should be treated as containers because the Government's interest in protecting the border outweighs a travelers significantly diminished expectation of privacy at the border, which is justified due to the broad historical and statutory authority bestowed upon customs officials.

##### 1. The United States' vital interest in determining who and what enters the country is at its highest at the border.

This Court has long made clear that the government has plenary authority to search personal belongings and items at the border without a warrant, probable cause, or even reasonable suspicion. *See, e.g., United States v Montoya de Hernandez*, 473 US 531, 538 (1985); *United States v. Flores-Montano,* 541 U.S. 149, 152-53 ("Time and again. . . [the Supreme Court has reiterated] searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.") (quoting *United States v. Ramsey,* 431 U.S. 606, 616 (1977). The concept of enhanced searches at the border has stood the test of time; it was authorized by the First Congress in the Act of July 31, 1789, ch. 5, §§ 23, 24. *See* 19 U.S.C. §§

507, 1581, 1582; *Landau v. United States Att'v for S.D.N.Y.*, 82 F.2d 285, 286 (2d Cir. 1936) ("As early as 1799, the baggage of one entering the country was subject to inspection.").

Furthermore, the government maintains a preeminent interest in protecting its borders. *See Flores-Montano*, 541 U.S. at 153 ("It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."); *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 472-73 (1979) ("The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity.").

The border is the literal gateway to our nation. Logically, any interest the government has in preventing the entry of unwanted persons and effects is "at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. Because of the heightened interest in protecting our borders, Agent Ludgate acted reasonably, as she was trained and in standard practice (R. at 26-27), by stopping Wyatt and conducting a search of items that could contain evidence of criminal activity.

2. Title 19, United States Code, sections 1581(a), 482(a), and Title 31, United States Code section 5317(b) provide customs officials with wide authority to inspect and search any container, including computers and computer media, which might pass through the border.

This historical, overriding interest of government has been reflected in the "broad, comprehensive" powers bestowed on Congress to regulate foreign commerce. *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125 (1973). 19 U.S.C. § 1581(a) provides that:

> *Any officer* of the customs may at any time go on board of *any vessel or vehicle* at any place in the United States or within the customs waters or, as he may be authorized. . . and *examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every other part thereof and any person, trunk, package, or cargo on board*, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance. 19 U.S.C. § 1581(a) (emphasis added).

Additionally, 19 U.S.C. § 482 gives customs officers the authority to search vehicles and persons where they suspect items have been introduced into the United States contrary to law:

> *Any of the officers* or persons authorized to board or search vessels may stop, search, and examine. . . *any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law*. . . and to search *any trunk or envelope*, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law. 19 U.S.C. § 482(a) (emphasis added).

Moreover, the search is explicitly authorized under 31 U.S.C. § 5317(b), which provides: "For purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and *without a search warrant*, *any vehicle*, vessel, aircraft, or other conveyance, *any envelope or other container,* and *any person* entering or departing from the United States." *Id.* (emphasis added).

In interpreting a statutory provision, courts must, "look first to its language, giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation and internal quotation marks omitted). The term "any" is inherently broad. It is defined as, "indicat[ing] one selected without restriction," and is synonymous with "every." Any, MERRIAM-WEBSTER DICTIONARY (2016 ed.). Furthermore, courts have specifically held that sections 1581 and 482 should be given the broadest possible interpretations. *United States v. Ickes*, 393 F.3d 501, 504 (4th Cir. 2005) ("courts have historically construed the language of § 1581(a) in an expansive manner. . . [it permits officials] to search [defendant's] computer"). This is evident in the holdings of cases permitting warrantless searches of various "containers." *See, e.g., United States v. Santiago*, 837 F.2d 1545 (11th Cir. 1988) (purse and carry-on luggage); *United States v. Caminos*, 770 F.2d 361 (3rd Cir. 1985) (wood carvings); *United States v. Cimino*, 631 F.2d 57 (5th Cir. 1980) (plastic mesh bags); *Alexander v. United States*, 362 F.2d 370 (9th Cir. 1966) (toolbox in trunk of car).

It is undisputed that Wyatt violated United States law, specifically 31 U.S.C. § 5316, when he failed to declare an excess of $10,000. R. at 3. This was discovered before the search of the

computer. R. at 3. Therefore, Agent Ludgate did not merely "suspect" there were materials introduced into the United States contrary to law, she *knew* it. So, under § 1581(a), § 482(a), and § 5317(b), Agent Ludgate acted well within her authority by opening the laptop and reading the already displayed documents.

3. These justifications and the diminished expectation of privacy at the border, which is applicable to computers, weigh in favor of the Government's interest.

The "protection afforded by the [Fourth] Amendment varies in different settings." *United States v. Ross*, 456 U.S. 798, 823 (1982). Consistent with the aforementioned justifications, and as the lower court noted (R. at 16), all privacy rights are still balanced against the interests of the government, even at the border. *Montoya de Hernandez*, 473 U.S. at 539. The government's interest is significant at the border, while the individual's privacy interest is substantially lessened because "a port of entry is not a traveler's home." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion).

The Thirteenth Circuit was therefore incorrect when it asserted that, "label[ing] this as a 'routine' search would not serve to protect the privacy of any individual crossing the border with a phone or laptop." R. at 17. The privacy interest of any individual is of a wholly different character at the border, "because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). Ultimately, a person's, "right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search." *Thirty-Seven Photographs,* 402 U.S. at 376.

Recognizing the diminished expectation of privacy, customs officers have been permitted

to search, *without any individualized suspicion*, the contents of a traveler's briefcase and luggage, *United States v. Tsai*, 282 F.3d 690, 696 (9th Cir. 2002), his "purse, wallet, or pockets," *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967), and the papers stored in closed containers. *See United States v. Fortna*, 796 F.2d 724, 738 (5th Cir. 1986) (documents in carry-on bag, including map and handwritten note); *United States v. Schoor*, 597 F.2d 1303, 1305-06 (9th Cir. 1979) (airway bills carried by passengers); *United States v. Grayson*, 597 F.2d 1225, 1227 (9th Cir. 1979) (papers in shirt pocket). Additionally, various forms of media have been searched. *See Thirty-Seven Photographs*, 402 U.S. at 365; *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. at 124 ("movie films, color slides, photographs, and other printed and graphic material"); *United States v. Borello*, 766 F.2d 46, 58-59 (2d Cir. 1985) ("the opening of the cartons and the screening of the 8-millimeter films were plainly permissible steps in a reasonable border search").

Thus, there is no relevant distinction between a computer and other closed containers used to store highly personal items. While both are repositories that can hold private and innocent materials, they may also contain contraband and evidence of criminal conduct. This Court has made clear that the "nature of a container" has no bearing on the degree of protection guaranteed by the Fourth Amendment. *Robbins v. California*, 453 U.S. 420, 425-26 (1981) ("Once placed within a [closed] container, a diary and a dishpan are equally protected by the Fourth Amendment"), overruled on other grounds, *United States v. Ross*, 456 U.S. 798 (1982). This has been recognized in numerous holdings across the nation. In *Ickes*, the Fourth Circuit upheld the border search of a computer and compact discs found in the defendant's van during a customs search at the United States border. 393 F.3d at 501. In *United States v. Roberts,* the court upheld the border search of the defendant's computer as a "paradigmatic routine border search," identical to the, "opening of luggage, itself a closed container." 86 F. Supp. 2d 678, 689 (S.D. Tex. 2000).

Recently, in *United States v. Kolsuz*, a district court found manual inspection of an iPhone, "conducted by accessing the content of defendant's iPhone in the same manner as a typical user, namely by using the touch screen to navigate the phone's operating system to reveal defendant's recent text messages and calls . . . did not require individualized suspicion." 185 F. Supp. 3d 843, 854–55 (E.D. Va. 2016); *see also United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008) (holding reasonable suspicion is not needed for customs officials to search a laptop); *United States v. Feiten*, No. 15-20631, 2016 WL 894452, at *6 (E.D. Mich. Mar. 9, 2016) ("[a]llowing customs officials without a warrant to forensically search an electronic device presented at an international border or its equivalent is utterly consistent with its historical mooring of protecting the country by preventing unwanted goods from crossing the border into the country.").

The above searches were more invasive than the search Agent Ludgate conducted. Conceptually, her search would be no different if the documents had been taped onto the computer screen rather than displayed on the screen. There is no logic in basing the reasonableness of a border search on the technological capabilities of a computer, especially where none of those capabilities were in play. It would be a different matter entirely if the computer was password protected, or Agent Ludgate had searched every file, or it had been taken to an off-site lab for deep probing. But no such invasions occurred here.

Moreover, the Thirteenth Circuit's claim that computers deserve more protection than other luggage because it would be, "perhaps even more intrusive that [sic] the warrantless entrance into a home," is unfounded. R. at 18. It completely and erroneously discounts the fact that travelers possess, "highly personal items [such] as photographs, letters, and diaries," that would certainly be uncomfortable to have others search. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). If a border crosser has a sheet of paper with his darkest secret written down on it, well-established black-letter

law permits it to be examined at the border without even a scintilla of individualized suspicion. Yet, the Thirteenth Circuit would illogically suggest that because that same information was photographed and left open on a computer, it is then drastically more private, outweighing the significant Government interests in protecting our borders and unable to be viewed. The government's vital interest in blocking contraband is no less important a because computers have become common and contain large amounts of data. Such a misguided view would present a paradox for border security. The lower court's premise that computers are unique because of their potentially limitless storage capacity means the more an information an item may contain, including criminal information, the less authority customs officials would have to search the item. This surely an absurd result.

**b. The border search was reasonable based on the facts and the exception is unaffected by *Riley v. California.***

It is true that many Supreme Court cases, such as *Flores-Montano*, have left "open the question 'whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." 541 U.S. at 154 n.2 (quoting *Ramsey*, 431 U.S. at 618). Some searches clearly qualify, for example, a "921 page peek" into a cell phone at the border was found to be objectionable. *United States v. Djibo*, 151 F. Supp. 3d 297, 309 (E.D.N.Y. 2015). Another case, *United States v. Kim,* 103 F. Supp. 3d 32, 55 (D.D.C. 2015), used a "balancing test" for reasonableness requiring courts to assess, "the degree to which [the search] intrudes upon an individual's privacy, and . . . the degree to which it is needed for the promotion of legitimate governmental interests." (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)). Both *Kim* and other similar cases rely on *Riley* in finding laptops different than other containers. The border search here is not only distinguishable from cases like *Kim*, but the underlying rationale– that *Riley* affects the border search –is also incorrect.

1. *Riley* does not affect border searches.

The case most often cited to support enhanced protection for cell phones and computers at the border, *Riley v. California*, had no effect on border searches, and if it did, it only requires "reasonable suspicion." In *Riley*, this Court found that the government interests at stake did not outweigh a reduced expectation of privacy regarding cell phones because of the immense quantity and scope of information modern phones contain. *Riley*, 134 S.Ct. at 2485. *Riley* clearly held that digital data does not fall under the warrant exception for searches incident to arrest and in ordinary situations law enforcement must get a warrant before searching the contents of an arrestee's electronic devices. *Id*. at 2484. What it did not do, is recognize a categorical privilege for electronic data, *see id*. at 2494 ("case-specific exceptions may still justify a warrantless search of a particular phone"), nor did it attempt to diminish the Government's interests in protecting the border or the scope of the border search exception.

The border search exception is a case-specific exception referred to *Riley*. By declining to address case specific exceptions, it stands to reason the holding is limited to searches incident to arrest. That is the key in this analysis. Even viewing the facts favorably to the Respondent by conceding that search of Wyatt's device was more invasive than routine border searches because of the nature of computers, and admitting electronic devices deserve heightened protection, the result is the same. Even when applying the most restrictive standard that the law has applied at the international border when considering whether Fourth Amendment rights have been violated, not a single case holds that anything more than reasonable suspicion is required to perform a search of the most invasive kind at the international border. Moreover, this Court reversed the Ninth Circuit in *Montoya de Hernandez* when the intermediate court tried to create a "clear indication" standard at the border. 473 U.S. at 539. Thus, even if this Court implements the highest standard for

electronic devices, reasonable suspicion, the search was still valid under the border search exception.

2. Factually, this border search is objectively reasonable.

In analyzing a border search, the Supreme Court has relied on a case-by-case analysis because when considering a border search, reasonableness, "is incapable of comprehensive definition or of mechanical application." *United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013) (quoting *United States v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982)); *see Ramsey,* 431 U.S. at 616 ("Whether a particular search is routine is a case–specific question of fact.").

The *Kim* case provides a good example of an unreasonable search. The search was a pre-planned encounter at the border rather than a random encounter (*Kim,* 103 F. Supp. 3d. at 57); and the actual search of the laptop was approximately 150 miles away from the airport (*id*. at 35). There was no evidence that the search of the laptop was based on observation of Kim's activities within the United States. *Id*. at 58. Further, the search was extremely extensive, using specific search terms. *Id.* Clearly, the search was not a typical border search. *Id*. The court ultimately found, "imaging and search of the entire contents of Kim's laptop, aided by specialized forensic software, for a period of unlimited duration and an examination of unlimited scope, for the purpose of gathering evidence in a pre-existing investigation, was supported by so little suspicion of ongoing or imminent criminal activity," was unreasonable. *Id.* at 59. Nothing argued in this brief would oppose such a holding.

The present case is distinguishable however, because in *Kim*, "[t]here was little or no reason to suspect that criminal activity was afoot at the time Kim was about to cross the border." *Id*. at 49. As noted, there was reason to suspect criminal activity (Wyatt's agitated and uncooperative state), and based on the $10,000 cash found in the car, Agent Ludgate had *actual*

*knowledge* criminal activity was afoot at the time the computer was searched. R. at 2-3. These facts distinguish this case from *Kim* and cases like it. The present case is much more analogous to cases where the search has been found reasonable. *See, e.g.*, *United States v. Ramos*, 190 F. Supp. 3d 992, 1001 (S.D. Cal. 2016) (finding the manual search of a cell phone to be reasonable). So, even under a "balancing test" post-*Riley*, the Government's interest still outweighs the privacy interests of Respondent. In short, there is no evidence of anything other than a normal border search here.

The facts also render the "routine vs. non-routine" distinction made by the Thirteenth Circuit irrelevant. Even if this Court categorizes the search as "non-routine" it is still valid because reasonable suspicion was present. "A reasonable suspicion inquiry simply considers, after taking into account all the facts of a particular case, 'whether the border official ha[d] a reasonable basis on which to conduct the search.'" *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006) (alterations in original) (quoting *United States v. Asbury*, 586 F.2d 973, 975–76 (2d Cir.1978)). Reasonable suspicion is a low standard and border officials are afforded deference due to their training and experience. *See Montoya de Hernandez*, 473 U.S. at 542; *cf. United States v. Sokolow*, 490 U.S. 1, 9 (1989) (several factors which by themselves are "consistent with innocent travel" may, taken together, "amount to reasonable suspicion"). Because Agent Ludgate had actual knowledge that Respondent violated United States law, the search was made under far more than "reasonable suspicion" required by "non-routine" searches. Moreover, nothing in the record indicates that Agent Ludgate conducted the search in a manner that was "particularly offensive" in comparison with other lawful border searches. No court in the long history of the border search doctrine has held that more than "reasonable suspicion" was required for a border search of any extent. *See Flores–Montano*, 541 U.S. at 153. Based on the Government's interest, statutes, and the facts of the case, the suppression of evidence obtained at the border should be overturned.

## II. This Court should reverse the Thirteenth Circuit as neither the use of the PNR-1 drone nor the handheld Doppler device were "searches" under the Fourth Amendment or were reasonable searches due the exigent circumstances present.

### a. The use of the PNR-1 drone was not a "search."

#### 1. Koehler did not evidence a subjective expectation of privacy in the context of the drone.

The Harlan standard set out in *Katz* requires in the first instance "that a person have exhibited an actual (subjective) expectation of privacy." *Katz v. United States.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Accordingly, the home is "a place where [one] expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to [one]self has been exhibited." *Id*. In terms of a residence, this expectation can be evidenced through erection of fences (*California v. Ciraolo*, 476 U.S. 207, 211 (1986)), or other facts that obscure view from the ground (*Florida v. Riley*, 488 U.S. 445 (1989)). The baseline of showing a subjective expectation of privacy is whether the person "took normal cautions to maintain [their] privacy." *Ciraolo*, 476 U.S. at 211 (*quoting Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

This subjective expectation is even narrower in the context of aerial surveillance. In *Ciraolo*, this Court found the placement of a ten-foot fence evidenced a subjective expectation of privacy "[s]o far as the normal sidewalk traffic was concerned." 476 U.S. at 211. However, the Court was skeptical that the marijuana farmer "manifested a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits." *Id*. at 211-12. Since a person "perched on the top of a truck or a two-level bus" could see in, a blanket finding of an expectation of privacy was dubious.

This proposition was affirmed in *Florida v. Riley*. There, "the precautions [defendant] took protected against ground-level observation." 488 U.S. at 450 (plurality opinion). However, "Riley could not reasonably have expected that his greenhouse was protected from public or official

observation from a helicopter had it been flying within the navigable airspace." *Id*. at 450-51. Thus, a subjective expectation of privacy must be evidenced through actions that are context specific.

In the present case, Koehler has not evidenced any subjective expectation that her activities at Macklin Manor would be protected from the viewing she challenges. There were no enclosures of any kind around the property or either of the structures. R. at, 4. Using a false name may be sneaky, but absent physical action on the property, cannot give rise to a subjective expectation of privacy. *Cf. United States v. Broadhurst*, 805 F.2d 849, 854 (9th Cir. 1986) (Defendants used fake names *and* took pains to obscure area from view). Thus, Koehler took no ordinary precaution to ensure that her activities would remain private. If Macklin manor sits adjacent to a public road, any passerby could view anything that the police did. Even if Macklin Manor had a long driveway, there was still no evidence of a subjective expectation of privacy as all people, including police have "implicit license . . . to approach the home by the front path" from which they could see whatever was taking place in the area. *Florida v. Jardines*, 569 U.S. 1, 8 (2013). Since Koehler did not take normal cautions to maintain privacy, it is unlikely she evidenced a subjective expectation of privacy for *any* observations of the activities at Macklin Manor.

Though the Thirteenth Circuit treated it as such, the fact that there may be fog or cloud cover is not determinative. The presence of cloud cover was not an affirmative step to shield Macklin Manor from view but rather an uncontrollable factor. Nonetheless, the cloud cover, at most, may evidence Koehler's subjective expectation as to one type of search. As in *Ciraolo* and *Riley*, Koehler may have had an expectation of privacy against some views, as those flying in or above the clouds could not observe her activities. Since she did not shield herself against any other type of viewing, Koehler did not evidence a subjective expectation of privacy as to her activities that could be seen in those ways. Since she did not have even a subjective expectation of privacy

as to her activities outside of the buildings at Macklin Manor, Koehler fails the first prong of the *Katz* test and no violation of her Fourth Amendment rights occurred.

2. The use of the PNR-1 drone was a valid use of aerial surveillance that does not invade a reasonable expectation of privacy and is not a search under the Fourth Amendment.

If the Court finds Koehler evidenced a subjective expectation of privacy for the use of a drone and the disputed area was curtilage even though Koehler took no steps shield it from view, precedent establishes it is not an expectation society will recognize as reasonable. This Court has stated, "[t]hat the area is within the curtilage does not itself bar all police observation." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Id*.

In terms of the nature of the police observation of Macklin Manor as a flight, *Ciraolo* and *Riley* control. In *Ciraolo*, the Court found that defendant's "expectation that his [home's curtilage] was protected from" observation from "public navigable airspace . . . in a physically nonintrusive manner" was "unreasonable and is not an expectation that society is prepared to honor." 476 U.S. at 213-14. A plurality in *Riley* found the same where a helicopter flying at 400 feet, a lawful altitude, and not disturbing the area, allowed an officer to observe the curtilage. In each case, "[a]ny member of the public could legally have been flying over [the area] at th[at] altitude and could have observed [the activity]." *Riley*, 488 U.S. at 451 (1989) (plurality opinion). In either case, the fact that "the observation from aircraft was directed at [surveying the suspected area] is irrelevant." *Ciraolo*, 476 U.S. at 213. Thus, where the observation takes place in navigable airspace, it is presumptively not a search.

Though "of obvious importance," the inquiry does not end solely with whether "the [aircraft] is within the navigable airspace specified by law." *Id*. at 451. The challenger must show

that the manner and place of flight is "sufficiently rare . . . to lend substance to [a] claim that he reasonably anticipated that [the area] would not be subject to observation from that altitude." *Id*. at 451-52. Justice O'Connor opined as much when she concurred in the judgment in *Riley*; finding, "the defendant must bear the burden of proving that his expectation of privacy was a reasonable one" and present evidence that such observation is "sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy." *Id*. at 455 (O'Connor, J., concurring in the judgment). In sum, evidence must be presented by the defendant to show that the method of surveillance from the air would be so rare as to make the search unreasonable.

This flight was not physically intrusive as it did not disturb the area. *Riley*, 488 U.S. at 451 (1989) (plurality opinion). Though it cannot be known with certainty, on balance it seems that the PNR-1 used in this case flew within navigable airspace when observing Macklin Manor. Though "about 60% of the time the PNR-1 drone will exceed the altitude limit," this information does not establish that this drone at this time was not within navigable airspace. R. at 41. First, this statistic is nationwide. In Pawndale, the incidence of "network connectivity errors" could be lower or even non-existent due to unknown factors. R. at 41. The fact that this drone never exceeded that limit in any test run supports that conclusion as well as the conclusion that this particular drone did not exceed the limit. R. at 41. There is also no evidence, or even contention in the proceedings, below that the PNR-1 flew in any other way that violates regulation. Thus, the evidence at least does not establish that the drone was flying unlawfully.

Even if the drone flew above the 1650-foot ceiling for drone operation in Pawndale, the surveillance should still not be considered a search. In *Riley*, the Court was clearly more concerned that the helicopter's flight path was too close to the targeted area. The plurality noted "there was no undue noise, and no wind, dust, or threat of injury" *Riley*, 488 U.S. at 452. Justice O'Connor

felt the same way when she concluded "altitudes lower than" 400 feet may trigger the Fourth Amendment. *Id*. at 455 (O'Connor, J., concurring in judgment).

This is precisely why the plurality in *Riley*, and in even stronger terms O'Connor, did not simply end the inquiry at whether the flight was in lawful airspace. The regulations exist to protect "safety" not "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id*. at 453 (O'Connor, J., concurring in the judgment). Using flight regulations as a proxy for "how far can the public get from the curtilage?" would be counterintuitive. This the Thirteenth Circuit wholly missed. The evil being protected against when the government flies over curtilage is the government getting too close and seeing more than any person legally flying would. A flight that exceeds the maximum altitude does not result in this evil and thus should not take away the presumption that such a flight is presumptively not a search. In this case then, even if the PNR-1 flew above the maximum altitude, a "search" still would not have occurred as the view would have been *worse* than a person legally flying.

The next step then is to determine whether any evidence has been presented that the challenged flight is sufficiently rare to render it a violation of a reasonable expectation of privacy. The amount of evidence required is not small. *See United States v. Breza*, 308 F.3d 430, 434 n. 3 (4th Cir. 2002) (testimony that flight by helicopter at claimed altitude was "definitely rare" insufficient to show sufficient rarity.). In this case, there is evidence that planes do not typically fly overhead at Macklin Manor. R. at 42. However, this at most means that Koehler may have proven that flight over Macklin Manor by airplanes was sufficiently rare to make observation by *planes* searches under the Fourth Amendment. This says nothing about the use of drones. Drones like the PNR-1 are quickly becoming ubiquitous. By March of 2017 the number of registered drones was over 770,000. Kaya Yurieff, *U.S. drone registrations skyrocket to 770,000*, CNN (Mar.

28, 2017, 11:18 AM) http://money.cnn.com/2017/03/28/technology/us-drone-registrations/index.html. This is far greater than the number registered manned planes in the US. Joan Lowry, *There are more drone operators that there are pilots in the US*, Associated Press, Business Insider (Feb. 8, 2016, 10:11 PM) http://www.businessinsider.com/ap-faa-more-registered-drone-operators-than-licensed-pilots-2016-2. Regardless of what the standard for "sufficiently rare" is, Koehler has not met it. There is no evidence suggesting that drone flights over Mount Partridge were rare. In fact, as the number of drones climbs toward one million, it is likely that some enthusiasts have taken the opportunity to view Mount Partridge. Since there was no evidence presented on the issue, Koehler has not met her burden to show that drone flight over her residence was sufficiently rare to trigger the Fourth Amendment.

3. The technological nature of the PNR-1 does not transform its use into a search that invaded a reasonable expectation of privacy.

Of course, the differences between airplanes and drones like the PNR-1 are not just in the number registered. The fact that the PNR-1 takes photos and does not allow for in-person observation is important. This technological advancement is, stepping back, incredible. However, the use of the PNR-1 here still does not transform otherwise permissible surveillance into a physically intrusive search under the Fourth Amendment.

In some ways, the use of the camera on the PNR-1 is comparable to that used in *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986) which was "conventional, albeit precise." Though the Court there found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," it also made clear that the plant observed was not "an area where Dow has made any effort to protect against aerial surveillance." *Id*. at 238. Though *Dow* gave dicta on the issue of the home, *Kyllo, Ciraolo,* and *Riley* make clear that the use the PNR-1 still does not constitute a search. In *Kyllo*, the Court recognized, "[i]t 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 v. United States*, 533 U.S. 27, 33-34 (2001). Though *Kyllo* does not speak directly to this issue (as it dealt with sense enhancement *into* the home with devices not in general use), it and other cases key in as to what makes any expectation Koehler may have had against the use of the PNR-1 unreasonable: whether the observation was of intimate details and "otherwise-imperceptib[le]." *Id*. at 50 n. 5.

Starting in *Ciraolo*, the Court qualified its holding: "[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *California v. Ciraolo*, 476 U.S. 207, 215 n. 3 (1986) (citation omitted). Just a few years later, Justice White seemed to keep this intimacy distinction alive finding "no intimate deals connected with the use of the home or curtilage were observed" in *Florida v. Riley*. 488 U.S. 445, 452 (1989) (plurality opinion). In *Kyllo*, Justice Scalia returned to this intimacy issue, characterizing the footnote in *Ciraolo* as "secondhand dictum" and finding, "[i]n 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). Justice Scalia stated that the Court in that *Ciraolo* footnote was focusing "upon otherwise-imperceptibility." *Id*. at 50 n. 5.

The reason Justice Scalia gave for disavowing the intimate activities distinction in the home was practical: "no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up 'intimate' details—and thus would be unable to know in advance whether it is constitutional." *Id*. at 39. Whatever this means for *inside* the home, it is clear the government may still conduct aerial surveillance of curtilage without knowing exactly what they will see. With this understood, the only consideration left is whether the surveillance observed details that were

otherwise imperceptible. Though convoluted, this makes sense if the practical effects are considered. The government under this standard cannot use an piece of technology to improve their senses to perceive the area or to eavesdrop in a home. But, where the activities are happening outside and are observable from airspace, the values of protecting from observation do not obtain.

Applying these principles to the PNR-1 flight, it becomes clear that any expectation of privacy Koehler had was unreasonable. It did not capture any images of the inside of the home. It was not physically intrusive. The fact that it was programmed on a flight path does not make the images it captured otherwise imperceptible. Though the DSLR camera is a very advanced piece of equipment, it does not capture otherwise imperceptible details. If the PNR-1 as equipped with a thermal vision camera shooting through cloud cover, this would be a different case. A person in flight above Macklin Manor where the drone was would have seen exactly what the drone did. This is especially the case because the way the DLSR takes a photo is quite like visual observation by the eye. R. at 39. This is not a situation as in *Ciraolo* where a photograph did not "reveal a 'true representation' of the color of the plants." *Ciraolo*, 476 U.S. at 212 n. 1 (1986). Since this precise camera captured images that were otherwise observable in what can be considered curtilage, any expectation of privacy Koehler may have had against this type of surveillance was unreasonable. Thus, the use of the PNR-1 was not a search and the Thirteenth Circuit should be reversed.

**b. The use of the handheld Doppler radar was not a search because they are in general public use and it did not reveal details of the home that would previously have been unknowable.**

Understanding of this issue begins with *Kyllo's* bright and firm line that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search[.]'" *Kyllo v. United States*, 533 U.S. 27, 40 (2001). The divergent facts between *Kyllo* and the case at hand establish that the use of this device was not a search under the Fourth Amendment.

The first distinguishing factor is the question of general public use. Despite the Court's holding in *Kyllo*, the standard for general public use has remained unclear. Sheryl (Marx) Maccarone, *Moving Past the "General Public Use" Standard: Addressing Fourth Amendment Policy Concerns Amidst the Development of New Surveillance Technology*, 45 SW. L. REV. 199, 208 (2015). However, the use of radar technology like that used here should be considered to be in general public use. First, radar has numerous public uses. Radar is used for home automation, security sensors, collision avoidance in passenger automobiles and industrial equipment, measurement of fluids, and 90% of automatic door openers. INNOSENT, *Applications*, http://www.innosent.de/en/applications/ (last visited Oct. 5, 2017). Specifically, radar guns like that used in this case are available for public use. Maccarone, *supra*, at 204. They are not very expensive, costing "[r]oughly $400." R. at 35. Given the wide availability and low expense of this specific instrument, it should be considered to be in general public use.

The second distinguishing fact is that the use of the Doppler device, unlike the heat scanner in *Kyllo*, did not review "details of the home that would previously have been unknowable without physical intrusion." In *Kyllo*, the scanner showed "how warm—or even how relatively warm—Kyllo was heating his residence." *Kyllo*, 533 U.S. at 38. This is a detail of the physical condition of the house. In this case, the Doppler radar did not reveal any information about the physical structure of Macklin Manor. Rather, only information as to the possible presence of people inside Macklin Manor. This information is not only different in kind from the details about the physical attributes of the house itself in *Kyllo*, it is also something that could have been observed without physical intrusion. There is no evidence that either the pool house nor the main house did not have windows. Thus, the presence of people may have been in plain view of any person standing outside or across the street, looking through the window. Such surveillance is lawful (*Id*. at 33), meaning

that the search did not reveal information that could not have been otherwise gathered. Since the Doppler device is both in general public use and did not reveal otherwise unperceivable information, its use was not a search within the meaning of the Fourth Amendment and the Thirteenth Circuit should be reversed.

**c. Even if the use of the PNR-1 and/or the handheld Doppler radar device were searches, the exigent circumstances present made them reasonable.**

"Circumstances qualify as 'exigent' when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape." *Kentucky v. King*, 563 U.S. 452, 473 (2011) (Ginsburg, J., dissenting) (citing *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006)). "[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense" (*Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984)) "as well as the hazards of the method of attempting to reach it." *McDonald v. United States*, 335 U.S. 451, 459 (1948). If the crime is one that "endanger[s] life or limb or the peace and good order of the community," it is more likely that the exigency was present. *Id*.

Exigent circumstances exist even if lawful police action causes the exigency. *Kentucky v. King*, 563 U.S. 452, 462 (2011). The Court has "repeatedly rejected a subjective approach, asking only whether the circumstances, viewed *objectively,* justify the action." *King*, 563 U.S. at 464 (internal quotation marks omitted). The standard is also deferential and "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor,* 490 U.S. 386, 396–397 (1989). Thus, if there is a reasonable basis for believing that exigent circumstances exist, the search is reasonable.

Turning to the case at hand, if the Court finds that only the use of the handheld Doppler radar device was a search, the dangers of harm to the children and the threat of Koehler's escape

were imminent enough to justify its use. Through evidence gathered from the border search and drone, the police had enough knowledge to understand that this was a dangerous situation. Koehler was a dangerous and violent felon whom the police had already named a person of interest. R. at 2. She had very specific information about the father of the children kidnapped. R. at 3. They knew that she had executed a lease agreement for Macklin Manor and was actually present there. *Id*.

Kidnapping is a dangerous undertaking. At any apprehension of capture, kidnappers could kill or injure their victims. Not only is this a possibility, but to be successful in reaping their rewards, kidnappers must exude a willingness to harm their victims. This was a tense and ongoing situation involving innocent children, vastly different from the already-ended drunk driving in *Welsh*, 466 U.S. at 753 or the secured murder scene in *Mincey v. Arizona*, 437 U.S. 385 (1978). The children had been gone for more than a month. R. at 2, 44. There were no guarantees that the children were not already injured and in need of medical attention. *See Stuart,* 547 U.S. at 406. Yet, police could not just barge in without information as a hostage situation could arise. There was also a serious possibility that Wyatt would get word to Koehler, meaning certain harm to the children or Koehler's escape. The police were reasonable, armed with the knowledge they had, in gaining information to return the Ford children unharmed.

Kidnapping undermines order in the community. The community was clearly very concerned about the fact that these children could be plucked and their parents extorted for money. R. at 44. Success kidnappings are what really threaten the community. Opportunist criminals could see the success of Koehler and take their chance at a pay day. In sum, the police were justified, given the exigent circumstances, to use the Doppler radar device.

The same reasons obtain if the use of the PNR-1 is considered a search. The only difference that existed before the drone flight and after is the visual confirmation that Koehler was at Macklin

Manor. This does not change the danger of the crime at issue and the necessity of speed and care the police had to take to avoid possible further harm to the children and community safety eroding. With the information they had gleaned from the border search, there was clear reason to believe Koehler had kidnapped the children and was holed up at Macklin Manor where her escape or harm to the children, due to both the tense situations of kidnappings generally and the fact that Wyatt could have likely tipped her off, was imminent. Accordingly, the police reasonably determined they had to acquire information so they could safely rescue the children.

It is worth noting finally, that even if the border search violated the Fourth Amendment, the information gathered therefrom would have inevitably been discovered and was information the police could rely on in determining this was an emergency situation. In *Nix v. Williams*, 467 U.S. 431, 444 (1984) the Court determined that police may rely on ill-gotten information if it can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." This is because the government should not be put "in a worse position" because of an error. *Id*. In this case, Border Patrol lawfully could have impounded Wyatt's vehicle and effects. Then, they could have done a search that would have produced the same information they received. Thus, the police were still permitted to rely on the information in determining that there were exigent circumstances that justified the use of the PNR-1 drone and the Doppler radar device.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the decision of the Thirteenth Circuit.