Team P3

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 PETITIONER

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STATEMENT OF THE ISSUES

1. May the government rely on reasonable suspicion to search the contents of an individual's laptop at the border, pursuant to the border search exception to the warrant requirement of the Fourth Amendment?
2. Is a surveillance that is conducted from publicly navigable airspace and that utilizes readily available technology to obtain non-intrusive information considered a search under the Fourth Amendment?

STATEMENT OF FACTS

Eagle City, the capital of the State of Pawndale, is one of the largest and busiest ports of entry along the border between the United States and Mexico. R. at 2. While the Eagle City border station has always been a major crossing point for criminals, the station has seen an increase in criminal activity in the past two or three years. R. at 2, 24. As a result, the United States Border Patrol has assigned more Border Patrol Agents to the Eagle City border station than in any other border station in the country. R. at 2, 24.

On August 17, 2016, U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate were assigned to patrol the Eagle City border station during the "early morning shift" from around midnight to 8:00 A.M. R. at 2, 24. Since there are generally less vehicles that pass through the station during these hours, Border Patrol Agents stop every car, ask every driver a few routine questions, and look for any objective signs of criminal activity. R. at 24. At around 3:00 A.M., on the same day, Agents Dwyer and Ludgate stopped a vehicle driven by Scott Wyatt. R. at 2. When the agents asked Wyatt why he was crossing the border into the U.S., Wyatt appeared to be extremely agitated and uncooperative. R. at 2, 26. Wyatt would not make eye contact with either of the agents; he was using his fingers to fidget with the steering wheel; he appeared to be very pale; and he only gave brief answers to the agents' questions. R. at 26.

The agents proceeded to give Wyatt routine questions and admonishments. R. at 2, 26. Agent Ludgate asked Wyatt if he was traveling with $10,000 or more on his person. R. at 2, 26. Wyatt said that he was not. R. at 2. Agent Ludgate then informed Wyatt that this was a routine stop and they had a right to search his vehicle. R. at 2, 26. Based on Wyatt's agitated and uncooperative behavior, the agents suspected that Wyatt may have been hiding something. R. at 2, 26. Thus, Agent Dwyer asked Wyatt to step out of his vehicle and open the trunk. R. at 2, 26.

When Wyatt opened his trunk, Agent Ludgate discovered two things: (1) $10,000 in $20 bills, and (2) a laptop with the initials "AK" inscribed on it. R. at 2, 26. Agent Ludgate asked Wyatt if the laptop was his. R. at 2, 26. Wyatt said that he and his fiancée, respondent Amanda Koehler, both shared the laptop. R. at 2, 26. The agents searched Amanda Koehler's name in their criminal intelligence and border watch database. R. at 2, 27. The database search indicated that Amanda Koehler was a felon with multiple convictions for crimes of violence and that she was named as a person of interest in the recent, high profile kidnappings of the three teenage children of billionaire biotech mogul Timothy H. Ford. R. at 2, 27. The children – John, Ralph, and Lisa – were kidnapped in San Diego, on their way to school, and were held for a ransom of $100,000 each. R. at 2, 27.

Because the FBI and the Eagle City Police Department (ECPD) believed that the Ford children were transported across state lines and detained somewhere in Eagle City, every Border Patrol Agent at the Eagle City border station was briefed on the case beforehand. R. at 27. Agent Ludgate knew from these briefings that the kidnappers had recently asked for $10,000 in $20 bills in exchange for proof of life through a phone call. R. at 2, 27. The kidnappers demanded this money to be given by noon on the following day, August 18. R. at 2.

Agent Ludgate suspected that Wyatt may have been involved with the kidnappings because the $10,000 in $20 bills exactly matched the kidnappers' demands, which were due on the following day, and he was engaged to Koehler, a person of interest in the case. R. at 27. Acting on this information, Agent Ludgate opened the laptop, which was not password protected, and began looking through the desktop. R. at 2, 27, 28. Wyatt did not explicitly give consent to Agent Ludgate to open the laptop; he stayed silent. R. at 28. Agent Ludgate viewed several documents that were already opened, many containing Timothy H. Ford's personal information, including his address, a list of his upcoming meetings and appearances, and names of his staff members. R. at 3, 28.

Within the documents, Agent Ludgate found a lease agreement listed to "Laura Pope," with an address not matching Mr. Ford's. R. at 3, 28. Wyatt was then placed under arrest for failing to declare in excess of $10,000, a violation of 31 U.S.C. § 5136. R. at 3, 27.

The address on the lease agreement was traced to Macklin Manor, a large, mountaintop estate on the outskirts of Eagle City. R. at 3. Macklin Manor was purchased about six months prior by R.A.S., a shell company owned by "Laura Pope," one of the respondent's known aliases. R. at 3. However, the manor had been abandoned for six months and no one had seen any residents at the property. R. at 3, 32. Concerned for the safety of his officers, given Koehler's history of violent crimes, Detective Perkins chose to not conduct a search right away. R. at 32. He wanted to initially ensure that it was safe to enter the premises. R. at 32. He assigned Officer Hoffman to patrol the area on foot while having Officer Lowe conduct an aerial search using a PNR-1 drone. R. at 3.

The PNR-1 drone has become a popular drone amongst drone enthusiasts due to its affordability and availability. R. at 5. The drone already has been used by police departments in thirty-five states. R. at 40, 46. Officer Lowe, the technology expert for the ECPD, conducted test runs every month following the acquisition of the drone to ensure it was in working conditions. R. at 41. The last test run, conducted only three days prior to the drone's deployment at Macklin Manor, indicated that the drone was working within its pre-programmed altitude limit. R. at 41.

On August 18, 2017, Officer Lowe parked her car two blocks away from Macklin Manor and then deployed the PNR-1 drone. R. at 4. The flight's duration was about thirty minutes, taking about seven minutes to get to Macklin Manor, fifteen minutes of hovering above Macklin Manor, and another seven minutes to return to Officer Lowe's car. R. at 4. During the flight, there was a four-minute window where Officer Lowe was unable to determine the drone's altitude. R. at 41.

The PNR-1 comes equipped with a camera capable of capturing high-resolution photographs and videos. R. at 3. The photos and video surveillance provided the officers with the layout of Macklin Manor. R. at 4. The large main house was directly adjacent to the patio area, and about 15 feet separated the house from the pool. R. at 4. The pool house was on the other side of the pool, roughly 50 feet away from the main house. R. at 4. There were no fences or gates surrounding the estate. *Id.* The drone captured the image of a young woman walking from the main house to the pool house, whom Detective Perkins identified to be Amanda Koehler. R. at 4.

After confirming that Ms. Koehler was on the premises, Detective Perkins became fearful for the lives and safety of any potential hostages. R. at 4. Knowing that the respondent was a violent offender, Detective Perkins wanted to know whether the police were outnumbered. R. at 33. He determined this information by utilizing a handheld Doppler radar device. R. at 33. Extremely popular amongst several law enforcement departments and within the ECPD, the device measures movement within a building by sending out radio waves. R. at 33. The radio waves extend about 50 feet and work by usually keying in on a person's breathing. R. at 33. The device is incapable of providing a specific layout of a house and can only show how many individuals are breathing and a rough estimate of how far away an individual is from the device. R. at 33. The Doppler radar detected at least one person in the main house, a few feet away from the front door. R. at 5. A second Doppler radar search of the pool house revealed three people who were close together and breathing but not moving, and another individual who was pacing back and forth in a guard-like manner. R. at 5. The police retreated and returned with a no-knock and notice warrant. R. at 5. Upon entering the house, the officers detained two individuals in the living room. R. at 5. A third individual, who was identified as the respondent, ran outside through the back door. R. at 5. Officers Lowe and Hoffman chased her and were able to detain her. R. at 5. The officers

discovered that Koehler was carrying a Glock G29 handgun. R. at 5. The police entered the pool house and detained the individual standing guard. R. at 5. In the pool house, the police found the Ford children, restrained to chairs, but unharmed, ending a month-long investigation. R. at 44.

On October 1, 2016, a federal grand jury indicted the respondent 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. § 922(g)(1). R. at 5. On November 25, 2016, the respondent filed a motion to suppress the evidence found on the day of her arrest in the United States District Court of the Southern District of Pawndale. R. at 5. The respondent argued that the search of her laptop at the Eagle City border station as well as the warrantless searches conducted at Macklin Manor using the PNR-1 drone and Doppler radar device both violated her rights under the Fourth Amendment. R. at 5. The district court denied the respondent's suppression motion, finding that neither the search of the laptop nor the use of the PNR-1 drone and the Doppler radar device constituted a Fourth Amendment violation. R. at 6. As to the laptop search, the court held that the border search exception to the warrant requirement of the Fourth Amendment extends to the contents of electronic devices. R. at 6. Additionally, the court held that because Agent Ludgate had reasonable suspicion, the search was reasonable under the Fourth Amendment, regardless of the intrusiveness or non-routine nature of the search. R. at 7. As to the Macklin Manor searches, the court held that the search conducted by the PNR-1 was valid because it was a nonintrusive search conducted in navigable airspace fully accessible to the public. R. at 8, 11. Also, the court found that the Doppler radar usage did not constitute a search under the Fourth Amendment. R. at 11.

On February 1, 2017, the respondent filed an appeal to the United States Court of Appeals for the Thirteenth Circuit arguing that the lower court erred in denying her motion to suppress. R. at 14. The Circuit Court reversed the district court's judgment, holding that both the search of the

laptop and the search of Macklin Manor via the PNR-1 drone and the handheld Doppler radar device violated her rights under the Fourth Amendment. R. at 15. With respect to the laptop search, the court held that digital border searches fall outside the scope of the border search exception. R. at 18. The court held that the search would only be valid if there was reasonable suspicion because the search was intrusive and non-routine. R. at 16, 17, 18. The court concluded that while Agent Ludgate may have had reasonable suspicion to search the car, "there was no reasonable suspicion to search the laptop" because "there is no reason to believe that there would be any further evidence of crime or wrongdoing in Ms. Koehler's laptop." R. at 17. With respect to the Macklin Manor searches, the court found that the respondent's reasonable expectation of privacy was violated by the drone surveillance. R. at 19. The court also held that the Doppler radar device was not in general public use. R. at 19, 20.

SUMMARY OF THE ARGUMENT

The government's search of the respondent's laptop at the Eagle City border station was reasonable under the Fourth Amendment. The "border search exception" to the warrant requirement of the Fourth Amendment extends to the search of the contents of a laptop at the border. In order for the government to "interdict those who would further crime, introduce matter harmful to the United States, or even threaten the security of its citizens[,]" they must be allowed to search the contents of a laptop at the border. *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002). When a Border Patrol Agent has a reasonable suspicion that a person stopped at the border is involved with a specific criminal act, as is clearly the case here, the search is reasonable regardless of whether it is routine or not.

The government's search of Macklin Manor via the PNR-1 drone and the Doppler radar device was also reasonable under the Fourth Amendment. As to the drone surveillance, the

respondent had no reasonable expectation of privacy because the area that the drone surveilled was not curtilage. The aerial surveillance was conducted from a public vantage point and there is no reasonable expectation of privacy for searches conducted from places accessible to the public. Furthermore, the use of the Doppler radar on the respondent's property was not a search under the Fourth Amendment because it did not obtain any information that could not otherwise have been obtained through other surveillance methods such as observation from a public street or peering into a window. The radar only revealed the number of individuals inside the structure. No actual details of the structures were able to be seen, no details about the individuals were learned, and nothing intimate was revealed. The prevalence of Doppler radars in both police departments as well as other public fields indicates that the respondent did not have a reasonable expectation of privacy that her property would be viewed with a Doppler radar.

STANDARD OF REVIEW

Whether the respondent's Fourth Amendment rights have been violated is a question of law; thus, it is reviewed *de novo*. *See, e.g. Ornelas v. U.S.*, 517 U.S. 690, 697 (1996); *United States v. Arvizu*, 534 U.S. 266, 275 (2002); *United States v. Ickes*, 393 F.3d 501, 503 (4th Cir. 2005).

ARGUMENT

I. THE GOVERNMENT'S SEARCH OF RESPONDENT'S LAPTOP AT THE EAGLE CITY BORDER STATION WAS A VALID SEARCH PURSUANT TO THE BORDER SEARCH EXCEPTION TO THE WARRANT REQUIREMENT AND, THUS, WAS A REASONABLE SEARCH UNDER THE FOURTH AMENDMENT.

The Court should reverse the lower court's judgment that the government's search of the respondent's laptop at the Eagle City border station violated her Fourth Amendment rights. Reasonable suspicion is, without question, a sufficient basis for a government agent to search the

laptop of an individual who is stopped at the border. The search was reasonable because Agent Ludgate clearly had reasonable suspicion.

A. The "Border Search Exception" To The Warrant Requirement Of The Fourth Amendment Does Not Carve Out A Special Exception For Laptops.

In the present case, the government urges the court to reject the respondent's invitation to carve out a special exception to the long-established "border search doctrine" with regards to the search of laptops at the border. To require Border Patrol Agents to obtain a warrant before searching the laptop of an individual at the border would significantly depart from this Court's prior decisions involving the border search doctrine and would significantly interfere with the government's ability to police its borders and further its paramount interest in securing the nation.

The Fourth Amendment of the United States Constitution protects the "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Because "[t]he touchstone of the Fourth Amendment is reasonableness," the Fourth Amendment "merely proscribes [state-initiated searches] which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Warrantless searches are presumed unreasonable, unless the government can show that a "specifically established and well-delineated" exception applies. *See Katz v. United States*, 389 U.S. 347, 357 (1967). The "border search exception" to the warrant requirement of the Fourth Amendment is an "established and well-delineated" exception. *See United States v. Ramsey*, 431 U.S. 606, 616 (1977). The Court has consistently recognized that "searches made at the border, pursuant to the long-standing 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." *Id.* at 616; *see also United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). Congress gives Border Patrol Agents broad authority to search entrants and their

belongings at the border for illegal contraband without obtaining a warrant and without establishing probable cause. 19 U.S.C. § 1581(a); *see Flores-Montano*, 541 U.S. at 153. While Congress does not explicitly authorize Border Patrol Agents to search the belongings of individuals to determine whether they are involved with specific kidnappings, courts have recognized that the government's interest at the border is more expansive than merely preventing contraband and locating merchandise subject to duty. *See, e.g. id.* ("The Government's interest in preventing the entry of unwanted persons . . . is at its zenith at the [] border."); *Ickes*, 393 F.3d at 506 (upholding a border search of a laptop for the purpose of finding child pornography and suggesting that customs officers have authority to conduct laptop border searches in order to uncover terrorist communications and protect national security); *Okafor*, 285 F.3d at 845 ("Such searches may interdict those who would further crime, introduce matter harmful to the United States, or even threaten the security of its citizens."). Furthermore, "the validity of a border search does not depend on whether it is prompted by a criminal investigative motive" because "it would make little sense to allow random searches of any incoming [traveler], without reasonable suspicion, . . . but require reasonable suspicion for searches of passengers that are suspected of criminal activity." *See United States v. Irving*, 452 F.3d 110, 124 (2d. Cir. 2006). Thus, it is well recognized that, pursuant to the Fourth Amendment, the government may generally search an individual stopped at the border, as well as his or her property, without a warrant. *See Ramsey*, 431 U.S. at 619.

It is reasonable under the Fourth Amendment for the government to conduct a warrantless search of a laptop at the border; in other words, the border search exception extends to the search of laptops. In determining "whether to exempt a given type of search from the warrant requirement," this court balances the degree of intrusiveness against "the degree to which [the search] is needed for the promotion of legitimate governmental interests." *See Riley*, 134 S. Ct. at

2484; *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The Court has never imposed a constitutional requirement upon the government to obtain a warrant before conducting a search at the border, no matter how intrusive the search was. For example, in *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985), the Court held that the government must have reasonable suspicion in order to search the alimentary canal of a person stopped at the border, but they do not need a warrant. The Court reasoned that the government must have reasonable suspicion to conduct an alimentary canal search at the border because "'[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such [bodily] intrusion on the mere chance that desired evidence might be obtained.'" *Id.* at 540 n. 3 (quoting *Schmerber v. California*, 384 U.S. 757, 769 (1966)). Therefore, even when a search involves a high degree of bodily intrusion, implicating interests in both person-dignity and privacy, the Court has declined to require the government to obtain a warrant before conducting a search.

Moreover, the search of an individual's alimentary canal is surely more intrusive than the search of already opened files on an individual's computer. An alimentary canal search is when the government detains and monitors a traveler until he or she produces bowel movement and then the fecal matter is searched for contraband. *Id.* at 551. (Brennan, J., dissenting). In contrast, the search of a laptop does not require the traveler to be detained, monitored, or even touched for that matter. When the government searches an individual's laptop, there is no intrusion upon the individual's interest in their personal dignity; there is only a potential intrusion upon their privacy interest. Although an individual's laptop may contain an abundance of personal information, the degree of intrusiveness in a laptop search will vary depending on the context. For example, in the present case, the search of the respondent's laptop was not intrusive; Agent Ludgate had merely scanned through documents that were already opened on the respondent's laptop. R. at 3, 28. Thus,

to hold that the government needs a warrant before conducting a laptop search at the border, specifically in this circumstance, would be inconsistent with the Court's precedent in *Montoya de Hernandez* and would depart from the Court's expansive view of the border search doctrine.

B. The Border Search Of A Laptop Is Valid Under The Fourth Amendment, Even If Non-Routine, If It Is Supported By Reasonable Suspicion.

Given that the government does not need a warrant in order to search an individual's laptop at the border, the Court must determine whether it is reasonable under the Fourth Amendment for a government agent to conduct such a search on the basis of reasonable suspicion. In order for the government to effectively police its borders and further its paramount interest in securing the nation, the Court must allow government agents to rely on reasonable suspicion to search the laptop of an individual stopped at the border. This concern is especially pertinent here, given that the Eagle City border station is such a major crossing point for criminals entering the U.S. R. at 2.

To determine the reasonableness of a particular search under the Fourth Amendment, the Court balances the interests of the government against the privacy rights of the individual. *See Montoya de Hernandez*, 473 U.S. at 538. However, at the border, "the Fourth Amendment balance . . . is [] struck much more favorably to the Government . . ." *Id.* This is because, at the border, "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith . . . ." *Flores-Montano*, 541 U.S. at 152. Additionally, "the expectation of privacy [is] less at the border than in the interior" because "[c]ustoms officials characteristically inspect luggage . . . ; it is an old practice and intimately associated with excluding illegal articles from the country." *Flores-Montano*, 541 U.S. at 152; *Ramsey*, 431 U.S. at 618. Because the balancing of interests under the Fourth Amendment differs in the context of border searches as opposed to searches in the interior, the Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014), which the lower

court cites as controlling precedent, is inapplicable in the context of border searches. R. at 16; *Riley,* 134 S. Ct. at 2485 (holding that, in the interior, the government "must generally secure a warrant before conducting" a search of the contents of a cell phone, incident to a lawful arrest).

Generally, it is reasonable under the Fourth Amendment for the government to search closed containers and their contents at the border without particularized suspicion. *See United States v. Arnold*, 533 F.3d 1003, 1007 (9th Cir. 2008) ("Courts have long held that searches of closed containers and their contents can be conducted at the border without particularized suspicion under the Fourth Amendment."). In *Montoya de Hernandez*, the Court stated that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant[.]" *Id.* at 538. The Court left open the possibility that "non-routine" searches could require some level of suspicion by stating that "[b]ecause the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches." *Id.* at 541, n. 4. Drawing on this language, some courts have held that certain intrusive "non-routine" searches at the border require reasonable suspicion. *See, e.g. United States v. Roberts*, 274 F.3d 1007, 1012 (5th Cir. 2001); *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993); *United States v. Braks*, 842 F.2d 509, 514 (1st Cir. 1988). However, courts have generally only required reasonable suspicion where the non-routine search involved a highly intrusive search of a *person* or when the search occurred after the individual had already passed through customs. *See Montoya de Hernandez*, 473 U.S. at 541; *see also United States v. Yang*, 286 F.3d 940, 945 (7th Cir. 2002); *United States v. Levy*, 803 F.3d 120, 123 n.3 (2d. Cir 2015).

Ultimately, it is unclear whether the distinction between routine and non-routine border searches could be applied beyond the context of border searches that involve bodily intrusion.

Nevertheless, Circuit Courts have consistently upheld the searches of digital material at the border where reasonable suspicion existed. *See, e.g. Irving*, 452 F.3d at 124 (upholding the border search of diskettes and film); *Ickes*, 393 F.3d at 507 (upholding the border search of defendant's computer); *United States v. Cotterman*, 709 F.3d 952, 962 (9th Cir. 2013) (upholding the forensic examination of the defendant's hard drive at the border). The Third and Ninth Circuits have both held that searches of digital material at the border generally do not require particularized suspicion. *See, e.g. United States v. Linarez-Delgado*, 259 Fed.Appx. 506, 508 (3d. Cir. 2007) (upholding the border search of defendant's camcorder); *Arnold*, 533 F.3d at 1008 (upholding the border search of defendant's laptop); *Cotterman*, 709 F.3d at 962. In *Cotterman*, the Ninth Circuit suggested that reasonable suspicion was necessary for the forensic examination of the defendant's hard drive, only because of "the comprehensive and intrusive nature of a forensic examination." *Id.* Therefore, the Circuit Courts are in accord with the proposition that, at the very minimum, reasonable suspicion justifies the search of a laptop, no matter how non-routine or intrusive the search is. *See Irving*, 452 F.3d at 124.

C. Agent Ludgate Had Reasonable Suspicion To Search The Contents Of The Respondent's Laptop At The Border.

In the present case, Agent Ludgate clearly had established reasonable suspicion before searching the already opened documents on the respondent's laptop for information which enabled the ECPD to locate and rescue three kidnapped children. The presence of reasonable suspicion, in itself, was sufficient to justify the search of the respondent's laptop. Reasonable suspicion is measured by the totality of circumstances and it only requires that the law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez,* 449 U.S. 411, 417-418 (1981); *Navarette v. California*, 134 S.

Ct. 1683, 1687 (2014). The level of suspicion this standard requires is "'obviously less' than is necessary for probable cause." *Navarette,* 134 S. Ct. at 1687 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Courts "simply consider[], after taking into account all the facts . . . , 'whether the border official ha[d] a reasonable basis on which to conduct the search.'" *Irving*, 452 F.3d at 124 (quoting *United States v. Asbury*, 586 F.2d 973, 976 (2d. Cir. 1978)).

The government agrees with the district court that the factors identified in *Irving* for assessing reasonable suspicion are particularly helpful in guiding the inquiry here. R. at 16. *See Irving*, 452 F.3d at 124. According to the *Irving* court, "a number of factors that courts may consider in making the reasonable suspicion determination[] includ[e] unusual conduct of the defendant, discovery of incriminating matter during routine searches, [or] computerized information showing propensity to commit relevant crimes . . . ." *Id.* at 124.

The first factor is "unusual conduct of the defendant." *Id.* Here, Scott Wyatt was clearly exhibiting "unusual conduct." *Id.* Upon stopping Wyatt at the border, the agents observed that he was extremely agitated and uncooperative. R. at 2, 26. As they asked him routine questions, he would only respond with brief answers. R. at 26. He was also not making eye contact with either of the agents and was using his fingers to fidget with the steering wheel. R. at 26. Unusual behavior like this is likely to draw suspicion that the traveler is trying to hide something.

The second factor is the "discovery of incriminating matter during routine searches." *Id.* Here, the agents discovered incriminating matter during their routine search of Wyatt's car trunk. When the agents asked Wyatt whether he had $10,000 or more on his person, he lied and said that he did not. R. at. 2, 26. When the agents conducted a routine search of his car trunk, they discovered $10,000 in $20 bills. R. at 2, 26. Since Wyatt failed to declare that he had $10,000 in his car, he was in violation of 31 U.S.C. § 5136. R. at 3. Although this violation alone would not be

necessarily incriminating, as it pertains to Wyatt's potential involvement with the kidnappings, the fact that the agents knew that the kidnappers had recently demanded $10,000 in $20 bills in exchange for proof of life and that the amount was due on following day made the discovery of the money particularly suspicious. R. at 2, 26. Also, the agents were briefed on the Ford kidnappings prior to the search and were on notice that the kidnappers would be potentially passing through the Eagle City border station. R. at 26. Because the officers knew this information, the discovery of the money drew suspicion that Wyatt may have been involved with the kidnappings, despite the evidence not being necessarily incriminating, standing alone. This is analogous to the situation in *Irving*, where the Customs agents discovered "children's books and drawings" when they conducted a routine search of the defendant's luggage. *Id.* at 115. This, standing alone, was not necessarily incriminating evidence, but, taken in light of the fact that the defendant admitted that he was a convicted pedophile, the evidence drew suspicion that the defendant potentially had child pornography on his laptop. *Id.* Although there may have been an innocent explanation for the fact that Wyatt lied about $10,000 being in his car trunk, "reasonable suspicion 'need not rule out the possibility of innocent conduct.'" *Navarette*, 134 S. Ct. at 1692 (quoting *Arvizu*, 534 U.S. at 277). Therefore, the discovery of the $10,000 in $20 bills gave the agents more reason to suspect that Wyatt may have been involved with the Ford kidnappings.

The third factor is "computerized information showing propensity to commit relevant crimes." *Id.* at 124. Here, the agents discovered, from searching Scott Wyatt's fiancée's name in the criminal intelligence and border watch database, that Amanda Koehler had multiple felony convictions for a variety of violent crimes and that she was listed as a person of interest in the Ford kidnappings. R. at 2, 27. The agents also knew that Wyatt and Koehler shared the laptop that was searched. R. at 2. This gave the agents further reason to suspect that Wyatt may have been involved

with the Ford kidnappings and that the laptop may contain relevant information for the authorities in locating the kidnapped children. And, ultimately, the laptop did contain such information.

These factors, taken together, clearly establish that Agent Ludgate had a reasonable suspicion that Scott Wyatt was potentially involved with the Ford kidnappings. Since Agent Ludgate knew about the details of the Ford kidnappings, and Wyatt's conduct seemed to indicate that he was involved with the kidnappings, and there was a temporal and logical connection between the $10,000 found in his trunk and the demands of the kidnappers, Agent Ludgate had a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette,* 134 S. Ct. at 1687. Agent Ludgate was not required to rule out every possibility that Wyatt was engaged with the crime, nor was she required to have enough information to meet a probable cause standard. *See id.* Considering all of the facts, Agent Ludgate had a "reasonable basis on which to conduct the search." *Irving*, 452 F.3d at 124. For these reasons, the search of the respondent's laptop was reasonable under the Fourth Amendment.

II. THE ECPD'S USE OF THE PRN-1 DRONE DID NOT CONSTITUTE A SEARCH BECAUSE THE AREA OBSERVED WAS NOT CONSIDERED CURTILAGE AND AS A RESULT, THE PROTECTIONS OF THE FOURTH AMENDMENT DO NOT APPLY.

In *Katz*, 389 U.S. 347, the Court established a two-fold test to determine whether a search is considered unreasonable under the Fourth Amendment. *Id.* First, a person must exhibit "an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). Since the holding of *Katz,* courts have expounded upon the reach of protections to the expectation of privacy. As the court explained in *Kyllo v. United States*, 533 U.S. 27, 33 (2001), "a Fourth Amendment search does not occur, even when the *explicitly protected location of a house is concerned*, unless the

individual manifested a subjective expectation of privacy in the object of the challenged search and society is willing to recognize that expectation as reasonable." (emphasis added). One such example is demonstrated in the "open fields doctrine," which "permits police officers to enter and search a field without a warrant." *Oliver v. United States*, 466 U.S. 170, 173 (1984). "An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in areas immediately surrounding the home." *Id.* at 176. These areas – known as curtilage – are areas that extend "the intimate activity associated with the 'sanctity of a man's home and the privacies of life' and therefore has been considered part of the home itself for Fourth Amendment." *Oliver*, 466 U.S. at 180 (1984) (quoting *Boyd. v. United States*, 116 U.S. 616, 630 (1886)). In *United States v. Dunn*, 480 U.S. 294, 301 (1987), the Court identified four factors to consider in order to determine whether an area is curtilage and thus protected under the Fourth Amendment: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) how the area is used; and (4) the steps taken by the resident to protect the area from observation by people passing by.

Since the drone in this case only viewed an outside area, it must be determined whether this area observed is considered curtilage to see if the respondent had a reasonable expectation of privacy. Taking into account the factors from *Dunn*, the area observed was not curtilage. First, the pool house was 50 feet away from the main house. Courts have held that a distance of 50 feet from the main structure is not curtilage. *See United States v. Brady*, 993 F.2d 177, 178 (9th Cir. 1993) (holding that 45 feet is outside of the curtilage); *see also United States v. Calabrese*, 825 F.2d 1342, 1350 (9th Cir. 1987) (holding that 50 feet is outside of the curtilage). Second, there were no natural or artificial enclosures that enclosed the pool house or the main house. When it comes to determining whether curtilage exists, "fencing considerations are important factors . . . ." *Bleavins*

v. Bartels, 422 F.3d 445, 452 (7th Cir. 2005) (quoting *Dunn*, 480 U.S. at 301). The lack of fencing around the pool house or the property denotes a lack of reasonable expectation of privacy. *See United States v. Haynes*, 551 F.3d 138, 147 (2d Cir. 2008) (rejecting the argument that the enclosure factor should be weighed differently, stating that the purpose of the enclosure factor was to determine the areas a homeowner intends to keep private). Third, the area was not being used as a residence. Here, the pool house was separate from the main house. R. at 4. Additionally, none of the residents in the nearby area reported seeing anyone living at the home. R. at 3. Ultimately, the curtilage doctrine exists to protect areas where intimate activity associated with "the sanctity of a man's home and the privacies of life" might occur. *Dunn*, 480 U.S. at 300. If no one resides at the main house, it cannot be said to be a home. As such, intimate activities related to the home cannot occur in a surrounding area where there is no home. In *United States v. Potts*, 297 F.2d 68, 69 (6th Cir. 1961), the Sixth Circuit found that curtilage did not exist as the appellant "was not using the house as a residence or dwelling" and, thus, the revenue agents' warrantless entrance "was not [an] unconstitutional invasion." Given that no one resides in the main home, the pool house was unlikely being used in a way to invoke the curtilage doctrine. Finally, there were no discernable steps taken to protect the pool house area. Although the respondent chose an isolated location, that alone is insufficient to establish that she was trying to protect the area. *See United States v. Breza*, 308 F.3d 430, 436 (4th Cir. 2002) (holding that choice of home due to remote location alone was insufficient to establish protective steps because no additional efforts were taken to conceal garden). Where courts have found that sufficient protective steps had been taken, defendants used fences, trees, signs, and other methods to make their intentions known. *See United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997) (wooded field behind defendant's home protected against undesirable public viewing); *United States v. Depew*, 8.F.3d 1424, 1428 (9th Cir.

1993) ("no trespassing" signs posted on property) (overruled on separate grounds); *United States v. Johnson*, 256 F.3d 895, 903 (9th Cir. 2001) (constructed fence and only gave the key to the gate to meter man and propane man); *United States v. Beene*, 818 F.3d 157, 162 (5th Cir. 2016) (insufficient protective steps because lack of "no trespassing" signs). Since respondent did not take any protective steps, she did not intend for this area to be private. Considering all these factors together, the area observed by the drone was not curtilage. Therefore, the respondent had no reasonable expectation of privacy from the airspace above Macklin Manor.

A. Even If The Area Observed Is Considered Curtilage, There Is No Reasonable Expectation Of Privacy For Searches That Are Conducted From Public Vantage Points.

Under *Katz,* the defendant must have both a subjective expectation of privacy and an expectation of privacy that society is prepared to recognize as "reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Even if an area is curtilage, it is not precluded from all police observations. *See California v. Ciraolo*, 476 U.S. 207, 213 (1986). Law enforcement officers are not required "to shield their eyes when passing by a home on public thoroughfares." *Id*.

In this case, police conducted surveillance from the sky, a public thoroughfare from which the police "lawfully may survey lands." *Oliver*, 466 U.S. at 179. The drone flew in a physically non-intrusive manner and there is no evidence that it exceeded the legal regulations set out by Pawndale. R. at 10, 41. However, even if we assume that the drone did exceed its pre-programmed flight pattern, courts are primarily concerned with drones flying *too low* as opposed to too high. *See, e.g. United States v. Young*, 2010 WL 693117 (S.D.W.Va. 2010) (heights *as low* as 100 feet have been upheld; the concern is low flying aerial surveillance, not high flying); *State v. Davis*, 360 P.3d 1161, 1170 (N.M. 2015) (warrant is needed for intrusive *low-flying* aerial activity, but

helicopter was flying at 50 feet); *State of Vermont v. Bryant*, 183 Vt. 355, 374 (Vt. 2008) (warrantless aerial surveillance that circled at 100 feet was not a reasonable search.). While the observation in *Ciraolo* was conducted by the naked eye and the search here was conducted with cameras, the usage of cameras is insignificant. In *Dow Chemical Co. v. United States*, 476 U.S. 227, 227 (1986), the Court held that the "mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems." The Court saw no issue with the camera being used because the camera was "commonly used in mapmaking." *Id.* at 237. Similarly, the drone and camera used in this case are readily available to the public. R. at 38, 46. Simply because the respondent's home was in an isolated location did not mean that she had a reasonable expectation of privacy. The mere fact that an individual has taken measures to restrict some views does not preclude an officer's observations from a public vantage point. *See Ciraolo*, 476 U.S. at 213. In *Florida v. Riley*, 488 U.S. 445, 448 (1989), the defendant went to enormous lengths to protect his greenhouse by enclosing two sides, covering the greenhouse with corrugated roofing panels, erecting a wire fence surrounding his home and the greenhouse, and posting a "DO NOT ENTER" sign. Although the Court recognized the area as curtilage, it held that the aerial search was reasonable under the Fourth Amendment. *Id.* at 449. While the defendant had demonstrated a subjective expectation of privacy, such an expectation "was not reasonable and not one 'that society is prepared to honor.'" *Id.* (citing *Ciraolo*, 476 U.S. at 214). Although respondent contends that there is a reasonable expectation to privacy from the sky simply because planes do not tend to fly over her property, this expectation is not one that society would recognize as reasonable. The *Riley* court acknowledged that "in an age where private and commercial flight in the public airways is routine," it is unreasonable for a defendant to expect that his marijuana plants were constitutionally protected from being observed from the sky. *Id.* at 215. In 2017, air flight has

increased substantially with 5,000 aircraft in the sky at any given time. *Air Traffic By The Numbers*, FED. AVIATION ADMIN., https://www.faa.gov/air_traffic/by_the_numbers. Therefore, respondent's expectation that no aircraft would fly over Macklin Manor is unreasonable.

Moreover, there have been significant technological advancements since the *Ciraolo* and *Riley* decisions. The Court has addressed these advancements in *Kyllo*, which has become the seminal case dealing with technology and the Fourth Amendment. The *Kyllo* court further expounded on the *Katz* reasonable expectation of privacy and developed a test to determine whether the usage of a device constituted a search under the Fourth Amendment. *Kyllo,* 533 U.S. at 34. Two factors were used to determine whether a search under the Fourth Amendment occurred: (1) whether the information the device gained would not otherwise be obtainable without entering the house and (2) whether the device is in general public use. *Id.* First, the drone did not acquire any information that would not otherwise be obtainable without entering the house. The photos and video surveillance that provided the layout of Macklin Manor could also have been obtained through an easily obtainable land survey. The surveillance also captured an image of the respondent, allowing the police to determine she was at the manor. R. at 4. A surveillance from a public road would have rendered the same information. Second, the PNR-1 drone is considered a favorite among drone enthusiasts due to its availability and affordability. R. at 3. The popularity of the device further suggests that it is in general public use. Therefore, under *Kyllo*, the PNR-1 drone would not be considered a search.

B. The Use Of The PNR-1 Drone Did Not Constitute A Search Under The Trespass Doctrine.

In *Olmstead,* the Court developed a theory of trespass that constituted a search in violation of the Fourth Amendment. Ultimately, the Court overruled *Olmstead* in *Katz*, replacing the

"trespass theory" with the "reasonable expectation of privacy" theory. *See Katz*, 389 U.S. at 347. However, the Court's decision in *United States v. Jones*, 565 U.S. 400, 406-407 (2012), revived the trespass theory as an alternative theory of privacy. The majority explained that the reintroduction of the trespass theory was not the exclusive test, but rather was a guarantee against unreasonable searches, which "must provide at a minimum the degree of protection it afforded when it was adopted." *Id.* at 411. This "minimum degree of protection" is the principle "that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *Id.* at 406. The majority also stated that situations involving "merely the transmission of electronic signals without trespass would *remain* subject to Katz analysis." *Id.* at 411.

Even if the alternative "trespass theory" is considered, the facts of this case do not constitute a trespass. The "trespass theory" was based on common law notions that involved the physical entry into a person's home or office. *See Olmstead*, 277 U.S. at 464. In the present case, there was no physical intrusion onto the respondent's property. The surveillance was conducted from publicly navigable airspace where the public was permitted to fly drones. *See Ciraolo*, 476 U.S. at 207; *Riley*, 488 U.S. at 445. Since there was no trespass here, the trespass theory does not apply to this case. If there is no physical intrusion, then the *Katz* test must be utilized. Moreover, under *Katz*, the respondent did not have a reasonable expectation. Therefore, the respondent cannot find avail under the alternative trespass theory.

III. THE ECPD'S USE OF THE DOPPLER RADAR DID NOT CONSTITUTE A SEARCH UNDER THE FOURTH AMENDMENT.

As of this point, the Tenth Circuit has been the only court to address the use of handheld Doppler radar devices in the context of Fourth Amendment searches. *See United States v. Denson*,

775 F. 3d. 1214, 1218 (10th Cir. 2014). However, the court declined to make a definitive decision, citing a lack of information about the Doppler radar as its reason. *Id.* However, currently, there is enough information about the Doppler radar to permit this Court to analyze this search under the *Kyllo* factors. Under the first factor in *Kyllo*, it needs to be determined whether the information the device gained would not otherwise be obtainable without entering the home. *Id.* at 34. Based on Detective Perkins' testimony, the only information the Doppler radar was able to discern was the amount of breathing individuals within 50 feet from where the device was utilized. R. at 33. Based on the record, it appears that the Doppler radar cannot reveal any details about the actual individuals or about the layout of the house. R. at 33. That information could easily have been obtained by surveillance or peering through a window or the front door, methods which courts have upheld. *See United States v. Taylor*, 90 F.3d 903, 909 (4th Cir. 1996) (holding that officers' observation through claimants' picture window did not constitute a search); *see also United States v. Hersh*, 464 F.2d 228, 230 (9th Cir. 1972) (holding that the conduct of officers who merely looked through a window was proper). Under the second factor in *Kyllo*, the device needs to be in general public use. *Kyllo*, 533 U.S. at 34. Courts have not agreed on a single interpretation as to what the concept of "general public use" encompasses. Beginning at the rudimentary meaning of the phrase "general public use," most dictionaries define "general" to mean "involving, applicable to, or affecting the whole" while "public" is defined as "of, relating to, or affecting all the people or the whole area of a nation or state." Douglas Adkins, *The Supreme Court Announces A Fourth Amendment "General Public Use" Standard for Emerging Technologies but Fails to Define It: Kyllo v. United States*, 27 U. DAYTON L. REV. 245, 254 (2002). Taking this approach, the phrase "general public use" would indicate that the device could be used by all people. *Id*. Indeed, this seems to be the definition used by the lower court. R. at 20. However, adhering to this definition

interferes directly with technology whose usage has not been considered a search under prior Fourth Amendment precedent. Some of these technologies include: mapping cameras, *see Dow Chemical Co.,* 476 U.S. 227*;* helicopters, *see Riley*, 488 U.S. 445; pen registers to track phone numbers, *see Smith v. Maryland*, 442 U.S. 735 (1979); binoculars, *see People v. Ferguson,* 365 N.E.2d 77 (1977); and night vision goggles, *see U.S. v. Eberle*, 993 F.Supp. 794 (D. Mont. 1998). Several of the mentioned technologies are not within the general public's usage and are utilized solely or mainly by police departments and government agencies. Pen registers, for example, are prohibited to be install or used with first obtaining a court order. *See* 18 U.S. Code § 3121. Despite helicopters being in the public eye, most members of the general public cannot fly a helicopter nor have the means to obtain one. Rather, these decisions are more in line with a definition that allows general public usage to include wide usage by police departments as part of the definition. If the Thirteenth Circuit's generic, dictionary definition is adopted, only but the most common technologies would be allowed under *Kyllo*. *See* Adkins, *supra*, at 254. Modifying the definition to include wide usage by police departments would maintain consistence between prior Fourth Amendment precedent and the general public use in *Kyllo.* The record indicates that numerous police departments have been using Doppler radar devices. R. at 33. By using a definition of general public use that includes widespread usage by police department, the Doppler radar clearly would be considered to be in general public use.

Even if this court chooses to adopt the lower court's interpretation of general public use, the technology here would satisfy this factor. The device in this case is simply a type of a Doppler radar device. Doppler radar is readily used in other disciplines such as metrology and medicine. *See* Grove Potter, *Goodbye, login. Hello, heart scan*, U. BUFF., (Sept. 25, 2017), http://www.buffalo.edu/news/releases/2017/09/034.html; *see also Using and Understanding*

Doppler Radar, NAT'L WEATHER SERV., https://www.weather.gov/mkx/using-radar. Radar guns, while primarily used by police, are accessible to a private individual. *A Radar Gun for Everyone*, WASH. TIMES, (May 29, 2003), http://www.washingtontimes.com/news/2003/may/29/20030529-093451-7951r/. While the usage of Doppler radar is different amongst private citizens, the utilization of any technology by the police varies greatly from the average civilian's use. In *United States v. Walker*, 771 F. Supp. 2d 803, 809 (W.D. Mich. 2011), the court upheld the use of a specifically engineered tracking device because the technology itself – GPS tracking – was widely available. The fact that the device was tailored for a specific use did not stop the court from realizing that the technology was already out there, stating that simply because the "police chose to use a specifically engineered GPS tracking device rather than merely duct-taping an iPhone to Defendant's bumper is of little moment." *Id*. Similarly, here, simply because the police chose to use a specifically engineered Doppler radar does not mean that the technology was not in general public use. *Id.* Therefore, considering both factors under *Kyllo*, the Doppler radar did not constitute a search under the Fourth Amendment.

CONCLUSION

Because neither the search of the respondent's laptop, nor the search of Macklin Manor via the use of the PNR-1 drone and the Doppler radar device violated the respondent's Fourth Amendment rights, the Petitioner respectfully requests that this Court reverse the Thirteenth Circuit's decision and remand with instructions to deny the respondent's motion to suppress.