Team 30

Docket No. 4-422

In the Supreme Court of the United States

United States of America,

Petitioner

v.

Amanda Koehler,

Respondent

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE ISSUES

1. U.S. Border Patrol agents are permitted to perform suspicionless searches at the border under the border search exception to the Fourth Amendment. Some searches are so invasive that that they cannot be conducted without suspicion. A laptop search invades the privacy of large quantities of highly sensitive information. Does the border search exception apply to laptops carried across the border?

2. Surveillance becomes a search if it violates the subject's reasonable expectation of privacy. The Eagle City police used a drone equipped with a high-definition camera to survey Amanda Koehler's secluded, fog-shrouded estate and photograph her from more than one-thousand feet in the air. The police then came onto Koehler's property and used a sophisticated Doppler radar device to look through walls and determine how many people were in her home and where they were located. Did the drone surveillance and Doppler scan constitute searches in violation of Koehler's Fourth Amendment rights?

STATEMENT OF RELEVANT FACTS

This case involves government overreach concerning the rights of individuals to be safe from unreasonable searches and seizures.

The Border Search. On August 17, 2016, two U.S. Border Patrol agents stopped Scott Wyatt as he was crossing the border into the United States. R. at 2. The agents thought Wyatt was agitated and uncooperative. R. at 2. Agent Ludgate testified that Wyatt didn't make eye contact, fidgeted, provided brief answers, and was pale. R. at 26. The agents performed a routine search of the vehicle, during which they found $10,000 in $20 bills and a laptop. R. at 2. Wyatt said he and his fiancée, Amanda Koehler, shared the laptop. R. at 2. The agents ran Koehler's name and discovered that she was a felon and a person of interest in a recent kidnapping of three children. R. at 2. The kidnapper had offered to provide proof that the children were alive in exchange for $10,000 in $20 bills to be exchanged August 18. R. at 2.

The agents opened and searched the laptop. R. at 2. They found several open documents containing information on the father of the missing children. R. at 3. They also found a lease agreement, in the name of Laura Pope, for a large estate on the top of Mount Partridge called Macklin Manor. R. at 3. The FBI confirmed Laura Pope is an alias of Koehler's. R. at 3.

The Estate. Mount Partridge, where Macklin Manor sits, is habitually shrouded in clouds and fog year-round. R. at 3. It is so cloudy that planes and other aircraft typically fly around, rather than over, the mountain due to extremely limited visibility. R. at 3. Officer Lowe of the Eagle City Police Department described the mountain as "constantly cloudy, foggy, stormy, just all kinds of visibility issues all the time," and noted that planes typically avoid it. R. at 42.

The Drone. Detective Perkins, the lead investigator in the kidnappings, assigned two other officers to conduct surveillance on Macklin Manor, although it had sat abandoned for two

years and no one had seen any residents there. R. at 3. Officer Lowe deployed a PNR-1 drone to fly over the residence at dawn. R. at 3. The drone was equipped with a specialized, high-definition DSLR camera for taking photographs and recording video. R. at 3, 39. Although the drone was preprogrammed to stay within the legal maximum altitude of 1640 feet, recent testing indicated that PNR-1 drones illegally flew above this altitude (up to 2000 feet) 60% of the time. R. at 4, 41. It was foggy and cloudy as usual on Mount Partridge at the time of the flight, and the officers did not hear any other aircraft in the vicinity while they were there. R. at 41–42. The drone flew for about thirty minutes, requiring extra time due to the cloudy conditions and poor visibility. R. at 4, 41. The drone took twenty-two photos of Koehler's property and recorded three minutes of video. R. at 3. The photos and video showed the general layout of Macklin Manor, consisting of an unfenced property with a main house and swimming pool separated by fifteen feet. R. at 4. On the other side of the pool, fifty feet from the house, was a single-room pool house. R. at 4. The high-definition camera also photographed a woman near the pool house. R. at 33. The police ran the picture through their database and identified the woman as Amanda Koehler. R. at 33.

The Doppler Device. After determining that Koehler was present, officers approached the front door of the estate with a Doppler scanning device to determine how many people were inside. R. at 33. A Doppler device sends radio waves through walls and doors to detect the presence of people inside a building. R. at 33. The device keys in on a person's breathing, making it nearly impossible to hide from the device if within fifty feet. R. at 4. While popular among police, the devices are expensive (starting at $400) and have not caught on among the broader public. R. at 35. The police used the Doppler device to scan both the main house and the pool house. R. at 5. Through the scan, the police determined that there was one individual in the

main house a few feet from the front door. R. at 5. They further determined that there were three unmoving individuals and one moving individual in the pool house. R. at 5.

The Warrant. The police used information gathered from the border stop and the warrantless drone and Doppler surveillance to obtain a search warrant for Macklin Manor. R. at 5. Upon finding the Ford children in the pool house, the police arrested Koehler and charged her with kidnapping and illegal possession of a firearm. R. at 5.

SUMMARY OF THE ARGUMENT

I.

This Court should find that the laptop search violated the Fourth Amendment because a laptop search is so invasive that the border search exception does not apply and a warrant is required. Law enforcement officers are generally required to have a warrant before performing a search. U.S. Border Patrol agents, however, may perform suspicionless searches at the nation's borders to prevent contraband from entering the United States. This border search exception has limits. When a search is particularly invasive, border patrol agents must have *at least* reasonable suspicion to perform the search.

The search of a laptop is so invasive and so unrelated to the rationales for the border search exception that it falls outside the bounds of the exception. As this Court has recognized, electronic devices carry large quantities of sensitive, personal information. The amount and type of private information carried on these electronic devices is more akin to the information traditionally stored in a home than the information traditionally carried in luggage or a vehicle. Because of the significant privacy interest in these devices, this Court should hold that a warrant is required before a border patrol agent may search a laptop.

Alternatively, this Court should find that the laptop search violated the Fourth Amendment because the agents did not have reasonable suspicion that evidence of criminal activity would be found on the laptop. The agents simply had a hunch that it might contain evidence of criminal activity because Wyatt acted nervous, failed to declare the amount of money he was traveling with, and was associated with a person of interest in a kidnapping. None of that information was tied to the laptop. Without more, the agents had no reason to suspect the laptop contained evidence of criminal activity.

II.

This Court should find that the PNR-1 drone and Doppler radar device surveillance constituted searches that violated Koehler's Fourth Amendment rights.

The drone surveillance was a search because the drone observed Koehler's curtilage. Koehler had an objectively reasonable expectation of privacy in her curtilage because she lived in a secluded, fog-shrouded estate generally free from passing aircraft. Furthermore, the Eagle City police used a specialized, high-definition camera to see far more than they could have seen with the naked eye. Koehler therefore did not knowingly expose her curtilage to public view, and the drone surveillance was a search.

The Doppler scan was also a search because the Doppler device is not in general public use and the police used it to actively spy behind the doors and walls of Koehler's home to see things not otherwise visible without physically entering the home. Additionally, the police trespassed on Koehler's property to use the device without any traditional implied license to bring such a sophisticated device to her door.

Finally, no exigency justified these warrantless searches. The police knew they had more than a full day to perform further, legal surveillance before any significant danger arose.

STANDARD OF REVIEW

The reasonableness of searches under the Fourth Amendment is a question of law that this Court reviews de novo. *United States v. Andrus*, 483 F.3d 711, 716 (2007). This Court sets aside findings of fact only if they are clearly erroneous. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).

ARGUMENT

I. THE LAPTOP SEARCH VIOLATED THE FOURTH AMENDMENT BECAUSE SUCH A SIGNIFICANT INVASION OF PRIVACY REQUIRES A WARRANT.

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This Court has interpreted the Fourth Amendment to require a warrant before a search is conducted in most situations. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). One exception to the warrant requirement is the border search. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). The government may conduct searches at the nation's borders without probable cause or reasonable suspicion, as long as the search is routine. *Id.* at 537–38.

When a search is not routine, at least reasonable suspicion is required before the government can perform a search. *Id.* at 541. A search is not routine when it is so invasive that it would be unreasonable to perform the search without suspicion. *United States v. Johnson,* 991 F.2d 1287, 1291–92 (7th Cir. 1993).

A laptop search is so invasive that it should require *at least* reasonable suspicion. Because of the significant privacy interest in electronic devices, however, this Court should hold that reasonable suspicion is not sufficient. *See Riley v. California,* 134 S. Ct. at 2488–89. This

Court should hold that a warrant is required to search a laptop. Therefore, the warrantless search of Wyatt and Koehler's laptop violated the Fourth Amendment.

Alternatively, this Court should hold that the search violated the Fourth Amendment because the agents did not have reasonable suspicion that evidence of criminal activity would be found on the laptop. Without reasonable suspicion, only a routine search was permitted.

A. The search of a laptop is not routine and therefore cannot be conducted without some suspicion.

"Routine border inspections are those that do not pose a serious invasion of privacy and that do not embarrass or offend the average traveler." *Johnson,* 991 F.2d at 1291. Routine searches include searches of luggage, outer clothing, and wallets. *Id.* at 1292. These searches are reasonable without any suspicion. *Id.* at 1291.

This Court "has identified three situations in which [a border search] might not be per se reasonable, i.e., *at least* reasonable suspicion is required: (1) 'highly intrusive searches of the person;' (2) destructive searches of property; and (3) searches conducted in a 'particularly offensive' manner." *United States v. Cotterman*, 709 F.3d 952, 973 (9th Cir. 2013) (quoting *United States v. Flores-Montano*, 541 U.S. 149, 152–56, 154 n.2 (2004) (emphasis added). For example, body cavity searches and strip searches are not routine because they are highly intrusive searches of the person. *Johnson*, 991 F.2d at 1292.

A laptop search is not routine because it is highly invasive. Laptops contain vast amounts of private information that could easily embarrass or offend the traveler. A laptop might contain years of diary entries, household budgets, internet search history, medical prescriptions, photos, and correspondence. *Riley v. California*, 134 S. Ct. at 2489–90. Accessing this information might reveal that a person is nearly broke, suffers from a particular medical condition, or holds certain political affiliations. Such a search is much more invasive than a superficial search of clothing,

luggage or a vehicle. "[H]aving perfect strangers rummage through one's diary, personal correspondence, medical prescriptions or other private writings would seriously harm one's 'dignity and privacy interests.'" *United States v. Seljan*, 547 F.3d 993, 1015 (9th Cir. 2008) (Kozinski, J., dissenting).

Therefore a laptop search is not routine. An invasion of this kind is well outside the bounds of a routine search and cannot be conducted without suspicion. The agents needed *at least* reasonable suspicion to search Wyatt and Koehler's laptop.

B. A warrant is required because a laptop search invades significant privacy interests that outweigh the government interest in seizing contraband.

The permissibility of a particular law enforcement practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Montoya de Hernandez*, 473 U.S. at 537. The rationale for considering suspicionless searches at the border to be reasonable is that the government has a strong interest in keeping contraband out of the country. *Id.* at 536. This rationale does not support suspicionless searches of laptops because the privacy interest in a laptop is so significant that it outweighs the government interest in suspicionless searches.

In *Riley v. California*, this Court considered the privacy interests in electronic devices. 134 S. Ct. at 2473. In *Riley*, two cell phone searches were conducted under the search incident to arrest exception to the warrant requirement. *Id.* at 2482. This Court held that cell phones differed so significantly from other physical objects that they carried a higher expectation of privacy, which could not be violated without a warrant. *Id.* at 2494–95. In other words, the search incident to arrest exception did not apply. *Id.* Similarly, this Court should hold that because of the strong privacy interest in laptops, law enforcement cannot search a laptop without a warrant.

1. Applying the border search exception to laptop searches would untether the rule from its rationale.

In *Riley*, this Court asked whether applying the search incident to arrest exception to the search of a cell phone would "untether the rule" from its rationale. *Id.* at 2485. Because of the difference between electronic devices and physical objects, this Court found that the rationales that support the search incident to arrest exception for physical objects do not support a search incident to arrest exception for electronic devices. *Id.* at 2484. The search incident to arrest exception is based, in part, on the risks that an arrestee may harm officers or destroy evidence. *Id.* at 2484–85. But this Court held that unlike other physical objects, a cell phone does not carry a significant risk of harming officers and cannot easily be destroyed. *Id.* at 2485–86. The search incident to arrest exception is also based on the rule that arrestees have a lower expectation of privacy than other citizens. *Id.* at 2488. But this lower expectation of privacy does not mean any search is acceptable. *Id.*

Similar to the search incident to arrest exception, the border search exception is based on the rationale that the government has a strong interest in preventing contraband from entering the country and that individuals have a lower expectation of privacy at the border. But that does not mean any search at the border is acceptable. Just as officers do not need to search a cell phone to determine it is not a weapon or to prevent the destruction of evidence, agents do not need to access the information on a laptop to ensure it is not contraband. A cursory examination can ensure that a laptop is not a bomb or a shell transporting drugs. Just as the higher expectation of privacy in electronic devices overcomes the lower expectation of privacy of an arrestee, it overcomes the lower expectation of privacy at the border.

2. The privacy interest in a laptop outweighs the government interest in seizing contraband.

The information contained on electronic devices is so personal and voluminous that it carries a higher expectation of privacy than traditional physical objects. *Id.* at 2489. This Court noted that a smart phone carries a higher expectation of privacy because it is similar to a mini-computer. *Id.* It can hold "millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* "[A] cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record." *Id.* "An internet search and browsing history, for example, . . . could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD." *Id.* at 2490. Additionally, searches of electronic devices allow access to information beyond the device itself. *Id.* at 2491. "The possibility that a search might extend well beyond papers and effects in the physical proximity of [a person at the border] is yet another reason that the privacy interests here dwarf those in [the Court's previous decisions]." *Id.*

Though the government has a strong interest in securing its borders, that interest does not justify searching a laptop without a warrant. The government interest in conducting suspicionless border searches is in keeping contraband out of the country. A superficial search of the device satisfies this interest. In most cases, a laptop simply contains electronic information. That information can easily enter the country through email whether the laptop enters the country or not. Carolyn James, *Balancing Interests at the Border: Protecting Our Nation and Our Privacy in Border Searches of Electronic Devices*, 27 Santa Clara Computer & High Tech. L.J. 219, 239–40 (2011). Therefore a laptop search does not serve the government interest.

On the other hand, the individual privacy interest in a laptop is extremely strong. A laptop search implicates Fourth Amendment protection for a person's house, papers, and effects. Laptops contain a wealth of private information, including medical records, prescriptions, personal notes, emails, and letters. This is far more information than could be contained in traditional luggage. Additionally, the information accessible through a laptop extends beyond the information on the laptop itself. Computer applications allow individuals to access their home security cameras to see into their houses from afar. Other applications allow individuals to monitor their heart monitors and insulin pumps. Ari B. Fontecchio, *Suspicionless Laptop Searches Under the Border Search Doctrine: The Fourth Amendment Exception That Swallows Your Laptop*, 31 Cardozo L. Rev. 231, 261 (2009). If an agent can access a computer, he can not only access years of documents, he can see into the person's home and body. This is precisely the type of information that led this Court to require a warrant in *Riley*. A warrant is even more necessary here. The privacy interest in a laptop is higher than the privacy interest in a cell phone because a laptop can contain much more information than a cell phone. Just as it did in *Riley*, this Court should hold that because of the strong privacy interest in electronic devices a warrant is required to search a laptop.

This warrant requirement may make it more difficult to uncover criminal activity, but that has always been the cost of protecting Fourth Amendment rights. "Privacy comes at a cost." *Riley v. California*, 134 S. Ct. at 2493. "[It] is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end." *Montoya de Hernandez*, 473 U.S. at 567

(Brennan, J., dissenting). This Court must protect the privacy of all Americans and hold that, even at the border, a warrant is required to search a laptop.

C. Even if this Court maintains the reasonable suspicion standard, the search was unconstitutional because the officers did not have reasonable suspicion.

Reasonable suspicion is a "particularized and objective basis for suspecting [a] particular person" of criminal activity. *Montoya de Hernandez*, 473 U.S. at 542. It requires more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Courts have established several factors to determine whether reasonable suspicion is satisfied, including (1) unusual conduct, (2) the discovery of incriminating evidence during a routine search, (3) knowledge of a propensity to commit relevant crimes, and (4) a suspicious itinerary. *United States v. Irving*, 452 F.3d 110 (2d Cir. 2006).

"Law enforcement 'cannot rely solely on factors that would apply to many law-abiding citizens.'" *Cotterman*, 709 F.3d at 969 (quoting *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (2007)). For instance, though nervousness may be a factor contributing to reasonable suspicion, *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), nervousness alone does not support reasonable suspicion because many people are nervous when confronted by law enforcement officers. *United States v. Salzano*, 158 F.3d 1107, 1113 (10th Cir. 1998).

The actions of law enforcement officers must be reasonably related to the justification for that action. *Montoya de Hernandez*, 473 U.S. at 542. If the officers have reasonable suspicion of criminal activity, their search must be related to that reasonable suspicion of criminal activity. *See id.* Therefore, their search must be limited to the objects in which they have a reasonable suspicion of finding evidence of criminal activity. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 570 (D. Md. 2014) (citing *Montoya de Hernandez*, 473 U.S. at 541–42).

The agents did not have reasonable suspicion to search the laptop because Wyatt's actions were not unusual. Agent Ludgate testified that Wyatt was fidgety, didn't make eye contact, provided brief answers, and was pale. None of this behavior is unusual. Many innocent people are nervous when confronted by law enforcement. Innocent nervousness easily explains fidgeting and lack of eye contact. Brief answers and pale skin do not necessarily indicate nervousness at all. A brief answer is often all that is required in interactions with law enforcement, and pale skin may be a result of fair skin, tiredness, or illness.

Perhaps more importantly, the agents did not have reasonable suspicion that the laptop was related to criminal activity. There was no indication that the laptop was a weapon or concealed contraband. The only reason the agents searched the laptop is because it was in the possession of Wyatt, who they suspected of being involved in the kidnapping. The agents knew his fiancée was a person of interest and that he had money in amounts matching the description of the kidnapper's request. They had no *particular* reason to suspect that information related to the kidnapping would be found on the laptop. Therefore, they had no reasonable suspicion that the laptop contained evidence of criminal activity.

II. THE DRONE SURVEILLANCE AND DOPPLER SCAN WERE SEARCHES IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE KOEHLER HAD A REASONABLE EXPECTATION OF PRIVACY FROM THESE INTRUSIONS.

A Fourth Amendment search occurs "when government violates a subjective expectation of privacy that society considers objectively reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The "touchstone" of Fourth Amendment analysis is "whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Oliver v. United States*, 466 U.S. 170, 177 (1984) (citing *Katz*, 389 U.S. at 360). The *Katz* test for determining whether a person has a reasonable expectation of privacy protected by the Fourth Amendment has two prongs: (1) whether an individual manifests a subjective expectation of

privacy in the area or object searched; and (2) whether society recognizes that expectation as reasonable. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

The parties agree that Koehler had a subjective expectation of privacy in her home, satisfying the first prong of the *Katz* test. The parties dispute the second prong of the test: whether Koehler had an objectively reasonable expectation of privacy from aerial and Doppler surveillance in and around her home—that is, an expectation that society would recognize as reasonable.

As shown below, Koehler did have an objectively reasonable expectation of privacy from aerial and Doppler surveillance. The Eagle City police violated the Fourth Amendment when they used the PNR-1 drone to search Koehler's property because she had an objectively reasonable expectation of privacy in her secluded, fog-shrouded estate. The Eagle City police also violated the Fourth Amendment when they used the Doppler device to search behind the doors and walls of Koehler's home and pool house because she had an objectively reasonable expectation of privacy in those traditionally private areas.

A. The Eagle City police violated the Fourth Amendment when they used the PNR-1 drone to search Koehler's property because the drone photographed areas within the curtilage of her home that Koehler did not knowingly expose to the public.

In applying the Fourth Amendment, this Court has long recognized that privacy interests are highest in the home and its surrounding curtilage. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the Fourth Amendment draws a firm and bright line "at the entrance to the house"); *Oliver*, 466 U.S. at 180 (noting that curtilage "warrants the [same] Fourth Amendment protections that attach to the home"). While cautioning that people have no privacy interest in what they knowingly expose to the public, even in the home, this Court has also recognized that the key to determining whether something is exposed *knowingly* is whether the

public can be expected to see it. *See Florida v. Riley*, 488 U.S. 455, 467 (1989) (Blackmun, J., dissenting). And this Court has indicated that just because something is observable with visual aids like telescopes or cameras, it may not be "knowingly exposed" if the public cannot discern it with the naked eye. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986) (recognizing that using sophisticated surveillance equipment to reveal intimate details may be "constitutionally proscribed").

The Eagle City police therefore violated the Fourth Amendment when they used the PNR-1 drone to search Koehler's property because (1) the drone photographed intimate areas within the curtilage of her home; (2) Koehler did not knowingly expose those areas to public view because she had a reasonable expectation of privacy in her secluded estate; and (3) Koehler did not knowingly expose details that required a specialized, high-definition camera to discern.

1. The drone photographed areas within the curtilage of Koehler's home, which receives strong protection under the Fourth Amendment.

Curtilage is "the land immediately surrounding and associated with the home." *Oliver*, 466 U.S. at 180. The Fourth Amendment protects a person's curtilage as it does the home because intimate activities occur in the curtilage. *Id.* Courts typically examine four factors to determine whether property falls within curtilage: (1) the proximity of the area to the home; (2) whether the area is within an enclosure around the home; (3) the nature of the uses to which the area is put; and (4) measures taken by the resident to protect the area from public observation. *United States v. Dunn*, 480 U.S. 294, 301 (1987). This Court has rejected tests that rely too heavily on whether the area is enclosed, stating that the "primary focus" in identifying curtilage is "whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home." *Id.* at 301 n.4.

The Eagle City police used the PNR-1 drone to record and photograph areas within Koehler's curtilage. Factor (3), the nature of the uses to which the area is put, is determinative here. Because swimming pools are typically put to intimate, domestic uses such as swimming and sunbathing, they are within the curtilage of the home. Similarly, pool houses are typically places for intimate, domestic activities like changing into swim clothes or showering. Pool houses are therefore also within the curtilage. *See King v. La. Tax Comm'n*, No. 14-549, 2015 WL 13118963, at *2 (W.D. La. June 19, 2015) (finding pool houses "to be clearly within the curtilage of Plaintiffs' home").

Factor (1), the proximity of the area to the home, also supports finding that Koehler's swimming pool and pool house are within her curtilage. The pool is only fifteen feet from the house—just a few steps away. And while the pool house is farther—fifty feet from the house—it sits just on the other side of the pool and is therefore part of the same swimming pool complex.

That the area was not enclosed and not otherwise protected from public observation have little weight because Macklin Manor is on a high mountaintop frequently shrouded in clouds and fog. Koehler did not need enclosures or other protection when the public would so rarely see her house, let alone her swimming pool. The critical inquiry is whether a swimming pool and pool house "harbor[] those intimate activities associated with domestic life and the privacies of the home," and they do. The Eagle City police therefore invaded Koehler's curtilage by recording and photographing her property with the PNR-1 drone.

2. Koehler had an objectively reasonable expectation of privacy in her secluded, fog-shrouded estate and therefore did not knowingly expose it to public view.

This Court has generally held that warrantless aerial surveillance of curtilage is legal only if done in a physically nonintrusive manner from public, navigable airspace. *Florida v. Riley*,

488 U.S. at 451; *Ciraolo*, 476 U.S. at 213. In *Riley*, this Court held that police observations of a marijuana growing operation from a helicopter did not constitute a search under the Fourth Amendment. 488 U.S. at 451–52. A plurality of the Court suggested that these two conditions—physically nonintrusive observations from legal airspace—were sufficient to determine that anything observed was "knowingly exposed" to aerial surveillance and therefore not protected by the Fourth Amendment. *Id.* at 449–50.

But a majority of this Court disagreed with the plurality's bright-line test. Justice O'Connor, in a concurring opinion, rejected the plurality's conclusion that the non-invasive observations were not a search simply because the helicopter legally flew in FAA-approved airspace. *Id.* at 454 (O'Connor, J., concurring). Relying on the reasonable expectation of privacy test from *Katz*, she stated the proper question as whether the helicopter was in a part of public airspace where the public flew *regularly* (rather than legally) such that Riley had no reasonable expectation of privacy from the air. *Id.* Justice Blackmun noted that a majority of the Court (himself, along with three other dissenting justices and Justice O'Connor) agreed that whether the warrantless surveillance was a search "depend[ed], in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet" rather than on whether a helicopter could legally fly at that altitude. *See id.* at 467 (Blackmun, J., dissenting). A majority of the Court determined, therefore, that the correct inquiry as to whether something is "knowingly exposed" to aerial surveillance is not the bright-line question of whether the police are where the public has a *right* to fly, but whether the police are where one reasonably *expects* the public to fly.

Here the PNR-1 drone likely was *not* in public, navigable airspace when it observed Koehler's property. After all, it illegally flies above the FAA-imposed maximum altitude limit of

1640 feet more than half of the time. Therefore the warrantless surveillance likely violated the Fourth Amendment even under the *Riley* plurality's bright-line legal-or-illegal test.

But even if the drone flew at legal altitudes, the drone surveillance was still a search in violation of the Fourth Amendment because Koehler could not reasonably expect a drone to survey her curtilage and photograph her from the air. Macklin Manor, sitting on Mount Partridge, is almost always shrouded in clouds and fog—so much so that planes and other aircraft usually steer around the mountain. Even Officer Lowe, who deployed the drone, described Mount Partridge as "constantly cloudy, foggy, stormy, just all kinds of visibility issues all the time." The day in question was no different. It was so cloudy and foggy that the drone had to spend extra time flying before it could take pictures, and the officers at the scene heard no other aircraft while they were there. No reasonable person would expect drones or any other aircraft to fly over cloudy Mount Partridge generally, let alone on the day in question. Koehler therefore had an objectively reasonable expectation of privacy at her fog-shrouded estate, and the drone surveillance constituted a search in violation of the Fourth Amendment.

3. The drone used a specialized, high-definition camera to discern intimate details not visible to the naked eye and therefore not knowingly exposed to the public.

The drone surveillance here is further distinguishable from *Ciraolo* and *Florida v. Riley* because unlike the naked eye police observations the Court upheld there, the Eagle City police used a high-definition camera on an unmanned drone to detect more than the naked eye could see. Koehler therefore did not knowingly expose to the public those details discernable only with this sophisticated visual aid. The drone surveillance of those details was therefore a search in violation of the Fourth Amendment.

Courts have long barred the use of magnification to aid observations, holding that details are not knowingly exposed if sophisticated visual aids are required to discern them. *See, e.g.*, *United States v. Taborda*, 635 F.2d 131, 138–39 (2d Cir. 1980) (holding that using a telescope to discern otherwise-unidentifiable objects in the home is unreasonable); *United States v. Kim*, 415 F. Supp. 1252, 1254 (D. Haw. 1976) (search occurred where detectives used "sophisticated visual aids" including a telescope and high-powered binoculars to observe what defendant was reading in his apartment from a quarter mile away).

This Court has similarly recognized Fourth Amendment limitations on photography, even along an unobstructed line of sight. *Dow*, 476 U.S. at 238. In *Dow*, the Environmental Protection Agency hired a photographer to photograph Dow's chemical plant from an airplane using a standard aerial mapping camera. *Id.* at 229. Dow alleged that the photography constituted an unreasonable intrusion that violated the Fourth Amendment. *Id.* at 230. Although the Court disagreed, it relied heavily on its finding that the industrial complex was more like open fields than curtilage. *See id.* at 239 (noting that a massive, two-thousand acre industrial complex was "not analogous to the 'curtilage' of a dwelling" and "as such [was] open to the view of persons lawfully" in airspace near enough for photography). The Court also found no privacy intrusion where vision enhancing photography was "limited to an outline of the facility's buildings and equipment." *Id.* at 238. But the Court expressly acknowledged that using vision enhancing photography to capture more intimate details like "an identifiable human face" would "implicate more serious privacy concerns." *Id.* at 238 n.5.

The drone surveillance at issue here violated the Fourth Amendment because it relied on a sophisticated visual aid. The Eagle City police did not simply observe Koehler from the air with the naked eye. They sent an unmanned drone with a specialized, high-definition camera to

photograph her and her property instead. Because a high-definition camera can magnify images to discern details not otherwise visible to the naked eye, it is the type of "sophisticated visual aid" that courts have rejected in cases like *Taborda* and *Kim*.

The high-definition photographs of Koehler also violated the Fourth Amendment because they went far beyond what this Court allowed in *Dow*. There, the Court suggested that it might have reached a different result had the EPA photographed Dow's curtilage; here, the drone photographed Koehler walking through her curtilage. In *Dow*, the Court recognized that photographing a human face instead of buildings and equipment would raise "serious privacy concerns"; here, the drone photographed Koehler herself, not just her property. Finally, the camera in *Dow* simply mapped the layout of Dow's plant. It saw little more than the naked eye could have seen. But a police officer looking down from more than one-thousand feet above Mount Partridge could not have identified Koehler without some visual aid. The drone took high-definition photographs, and the police then matched these high-definition photographs to Koehler in a database. This was far more than the naked eye could detect, and the observations extended beyond the outline of Koehler's property to intimate details like her own face and identity. Koehler did not publicly expose these intimate details to the public, and the drone surveillance therefore constituted a search that violated her Fourth Amendment rights.

The Eagle City police therefore conducted a search in violation of the Fourth Amendment by surveilling Koehler's curtilage with an unmanned device using a sophisticated visual aid.

B. The Eagle City police violated the Fourth Amendment when they used a Doppler device to spy behind Koehler's doors because it revealed things not visible to the naked eye in places that receive the highest Fourth Amendment protection.

A Doppler radar device is a handheld tool that actively shoots radio waves into a structure to peer behind walls and doors and determine how many people are inside and where

they are located. Few courts have yet considered how this relatively new technology could violate the Fourth Amendment. But the one federal appeals court to consider it recognized that using a Doppler device to determine how many persons are inside a house raises "grave Fourth Amendment questions." *United States v. Denson*, 775 F.3d 1214, 1218 (10th Cir. 2014).

The Eagle City police violated the Fourth Amendment when they used the Doppler device to spy behind the doors of Koehler's home and pool house because (1) the Doppler device permitted the police to see things otherwise undetectable to the naked eye in Koehler's home, and (2) the police physically trespassed onto Koehler's property to use the device.

1. The Doppler scan was a search because it allowed the police to see things in Koehler's home that are otherwise undetectable to the naked eye.

This Court held in *Kyllo* that a search occurs when the government uses a technological device not in general public use to explore intimate details of the home otherwise unknowable without physical intrusion. 533 U.S. at 40. The fact-intensive "not in general public use" requirement is often the focus when applying the rule. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 15 (2013) (Kagan, J., concurring) (noting that drug-sniffing dogs were not in general public use).

But the Court went further in *Kyllo*, distinguishing between passive, "off-the-wall" technology (like the thermal imager that detected heat radiating from a home) and active, "though-the-wall" technology. 533 U.S. at 35–36. The majority emphasized that either kind of technology raised serious Fourth Amendment concerns if it could detect intimate details inside the home including how warm Kyllo was heating his residence. 533 U.S. at 37–38. But even the dissent—arguing that passive, "off-the-wall" technology saw no more than the public could detect—acknowledged that active, "through-the-wall" technology was entirely different. *See id.*

at 41 (Stevens, J., dissenting) (referring to the difference between off-the-wall and through-the-wall technologies as "a distinction of constitutional magnitude").

In *Kyllo*, this Court also doubled down on the strong Fourth Amendment protections given to the home. It established that "*all* details [in the home] are intimate details" and that even a police officer "who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor" would violate the Fourth Amendment by infringing on the sanctity of the home. *Id.* at 37. It concluded by noting that the Fourth Amendment draws "a firm line at the entrance to the house," and underscored its strong protection of the home by noting that the line should also be bright. *Id.* at 40.

The Doppler scan was a search in view of *Kyllo*, and it therefore violated the Fourth Amendment. Applying *Kyllo*, the Doppler device "explore[s] intimate details of the home otherwise unknowable without physical intrusion"—it looks directly through walls and doors to see people otherwise hidden inside. And it is hardly in public use. Such devices are prohibitively expensive, starting at $400, and the Eagle City police acknowledged that the public rarely uses them. "Public use" cannot include the police, or the exception would swallow the rule: police departments could make the most invasive technologies legal by simply investing in them and making sure they were in widespread use among police departments. That is not what this Court intended in *Kyllo* when it proscribed the routine use of such devices.

Even apart from "public use," however, the Doppler device is the kind of "through-the-wall" technology that both the majority and dissent in *Kyllo* agreed posed serious Fourth Amendment issues. By actively sending radio waves through doors and walls, the Doppler device detects very intimate details inside the home. It is so sensitive that it keys in on the slightest breathing of otherwise unmoving occupants. It is so invasive that the only way to hide

from it (even when standing behind doors or walls) is to hold one's breath and stand absolutely still. This device is therefore far more invasive than the off-the-wall thermal imager in *Kyllo*. If the police can determine how many people are in a home, where they are, and whether they are moving, they can discern the most intimate details in the home, even including sexual activity.

This Court warned against this exact technology in *Kyllo*, noting that it must adopt a rule to prevent intrusive searches by handheld radar technology then in development. 533 U.S. at 36 n.3 (describing projects including "a 'Radar-Based Through-the-Wall Surveillance System,' 'Handheld Ultrasound Through the Wall Surveillance,' and a 'Radar Flashlight'" that would enable the police to detect individuals through interior walls in buildings). The Doppler device in question therefore motivated this Court's holding in *Kyllo* that this kind of surveillance "is a 'search' and *is presumptively unreasonable without a warrant*." *Id.* at 40 (emphasis added).

Not only did the Doppler device reveal details otherwise totally invisible to the naked eye, but those details were inside the most highly protected area under the Fourth Amendment—the home. The Eagle City police approached Koehler's front door and used the Doppler device to peer directly into her home and count the number of persons present. These details are far more intimate than simply seeing a rug in the vestibule, yet this Court stated in *Kyllo* that observing the rug alone would violate the Fourth Amendment. The Eagle City police also peered inside Koehler's pool house with the Doppler device. While a pool house is not a residence, it is a private, enclosed place where a person might shower or change into swimwear. Koehler's pool house was part of Macklin Manor, where Koehler lived. The pool house should therefore be entitled to the same level of Fourth Amendment protection that applies to the house itself. The police therefore conducted a search because they used the Doppler device to see things otherwise undetectable to the naked eye in areas receiving the highest Fourth Amendment protections.

2. The Doppler scan was also a search because the Eagle City police trespassed on Koehler's property and had no implied license to spy behind her door using a sophisticated technological device.

This Court recently revived its centuries-old Fourth Amendment trespass doctrine, holding in *United States v. Jones* that police violated the Fourth Amendment when they used a GPS receiver to track Jones's SUV because they had to touch the SUV to install the receiver. 565 U.S. 400 (2012). More recently, the Court took its trespass doctrine one step further, holding in *Florida v. Jardines* that police officers violated the Fourth Amendment when they trespassed on Jardines's property by bringing a drug-sniffing dog to his front door to sniff for contraband. 569 U.S. at 11–12. There was no question that the police trespassed when they brought the dog onto Jardines's front porch. *Id.* at 7. The question was whether the police had an implied license or other implicit permission to be there. *Id.* at 8.

The Court held that the police did not have an implied license to bring a drug-sniffing dog onto the porch. *Id.* It acknowledged that passersby, including police officers, have an implied license to walk up the front path to a person's door and knock. *Id.* But that license is limited to particular purposes, and the Court held that there is no implied license to bring a drug-sniffing dog onto one's property to search for incriminating evidence. *Id.* at 9. The majority rejected the dissent's argument that police had used forensic dogs for centuries, noting that when the police physically intrude onto private property, "the antiquity of the tools that they bring along is irrelevant." *Id.* at 11. The Court declined to apply *Katz*'s expectation of privacy test, noting that it could decide the case on the physical trespass alone: the police trespassed on Jardines's property and had no implied license to bring a drug-sniffing dog to his front door. *Id.* The officers' conduct therefore violated the Fourth Amendment. *Id.*

The Doppler search here is analogous to the search in *Jardines*, and therefore violated the Fourth Amendment independent of Koehler's reasonable expectation of privacy. Just as the

officers in *Jardines* physically intruded onto private property when they approached Jardines's front door, the Eagle City police physically intruded on Koehler's property by approaching her front door. Just as the officers in *Jardines* had no implied license to bring a drug-sniffing dog to Jardines's door to sniff for contraband, the Eagle City police had no implied license to bring a Doppler scanning device to Koehler's door to search for people inside her home. Unlike forensic dogs, Doppler scanning devices are a recent innovation, so even the dissent in *Jardines* would likely acknowledge that there is no traditional implied license to bring such a sophisticated device to a stranger's front door to scan for people inside the home.

Whether based on the *Katz* reasonable expectation of privacy reiterated in *Kyllo*, or based on the recently revived trespass doctrine developed in *Jardines*, the Eagle City police violated Koehler's Fourth Amendment rights when they used the highly invasive Doppler device to spy behind the walls of her home without a warrant.

C. Neither the drone nor Doppler searches met the exigency exception for warrantless searches because the police had more than a day to perform further legal surveillance of the home.

Exigencies sometimes provide an exception to the general warrant requirement. *Warden v. Hayden*, 378 U.S. 294, 298 (1967). Exigencies may include concerns for officer safety or imminent destruction of evidence. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). But police must have probable cause to believe that an exigency exists. *Id.* An exigency generally does not exist when the subjects of the search do not realize they are under surveillance. *See United States v. Santa*, 236 F.3d 662, 669 (11th Cir. 2000) (finding no exigency where drug suspects were unaware of DEA surveillance). And the police have the burden to show that some exigency existed such that they did not have time to obtain a valid warrant. *Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970).

No exigency justified these warrantless searches by the Eagle City police. The officers did not have probable cause to believe that the kidnapped individuals were in imminent danger or that they might be moved. The officers conducted the drone search at dawn on August 17 and the Doppler search shortly thereafter. But the proof of life call, in which Ford would speak with one of the children, was not scheduled until noon on August 18—the next day. The officers had more than twenty-four hours to conduct legal surveillance with little risk to the Fords.

Nor did the officers have probable cause to believe they themselves were in imminent danger. They did not even know whether Macklin Manor was occupied prior to conducting the drone search. The manor had been abandoned for two years, and no one had seen any residents there prior to the officers' arrival. And the drone search revealed just one occupant: Koehler, walking between the main residence and the pool house. So even when the officers conducted the Doppler search, they knew of only one person at the entire estate. The officers said they feared being outnumbered, but if fear alone were sufficient, without further substantiation, the exigency exception would totally swallow the Fourth Amendment.

Finally, no evidence suggests that Koehler or anyone else at Macklin Manor had any idea they were under surveillance by the police. Therefore the Eagle City policy cannot meet their burden to show that any exigency justified these searches.

CONCLUSION

For the above reasons, Respondent asks this Court to affirm the Thirteenth Circuit and hold that the government violated the Fourth Amendment both because (1) the border search exception does not apply to laptops, and (2) the warrantless drone surveillance and Doppler scan constituted searches in violation of the Fourth Amendment.