TEAM 32
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No. 4-422

In The Supreme Court of the United States

United States of America,
Petitioner
v.

Amandа Koehler,
Respondent

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

BRIEF FOR THE RESPONDENT,
AMANDA KOEHLER

TEAM 32
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STATEMENT OF THE ISSUES

1. Considering the extreme privacy intrusion associated with the search of a computer, does the warrantless search of the internal data of a computer at the United States-Mexico border violate a person's reasonable expectation of privacy?
2. Did the warrantless searches using a PNR-1 drone and handheld Doppler radar device of the Respondent's home and curtilage constitute a search in violation of the Respondent's Fourth Amendment rights?
3. Does the Respondent have Fourth Amendment standing to raise the exclusionary rule when the Respondent is a co-owner of the laptop searched at the border but is not present at the time of the search?

STATEMENT OF FACTS

On August 17, 2016, Scott Wyatt ("Wyatt") was stopped at the Eagle City border station located in the State of Pawndale on the United States-Mexico border. R. at 2. Agents Ludgate and Dwyer asked Wyatt if he was carrying $10,000 or more in cash, to which he answered no. R. at 2. Agent Dwyer then proceeded to search Wyatt's car. R. at 2. The search revealed $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it. R. at 2. Agent Ludgate asked Wyatt to whom the computer belonged to which Wyatt "stated that he shared the laptop with his fiancé, Amanda Koehler ("Koehler")." R. at 2. Following a search of Koehler's name in the criminal intelligence and border watch database, the agents discovered that Koehler is a felon and a person of interest in the kidnapping of John, Ralph, and Lisa Ford, the children of Timothy H. Ford, a billionaire. [1] R. at 2. Next, Agent Ludgate opened the laptop and searched through various open documents. R. at 2. The search revealed Mr. Ford's personal schedule, the names of his staff members, and a lease agreement with the name "Laura Pope" and an address that did not match Mr. Ford's. R. at 3. Wyatt did not consent to either the search of his car nor the search of his laptop. R. at 28. Wyatt was then arrested for failure to declare $10,000 in violation of 31 U.S.C. § 5316 (2016). R. at 3.

The address from the lease agreement was "traced to a large estate atop Mount Partridge on the outskirts of Eagle City known as Macklin Manor." R. at 3. Macklin Manor was purchased six months ago by R.A.S., a shell company discovered by the FBI to be owned by Laura Pope, an alias of Koehler. R. at 3. The top of Mount Partridge is relatively secluded and visibility is extremely limited because of the fog and clouds which surround the mountain year around. R. at

[1] The kidnappers recently gave proof of life in exchange for $10,000 in $20 bills; however, the money was not due until August 18th at noon. R. at 2.

3. The perpetual fogginess and limited visibility force all aircraft to avoid flying over Mount Partridge. R. at 3.

At around 4:30 A.M., law enforcement began surveillance on Macklin Manor. R. at 3. Officer Lowe, from her parked squad car two blocks from Macklin Manor, deployed a PNR-1 drone to fly over and search the property. R. at 3. The PNR-1 drone has a battery life of 35 minutes and enough data storage for 30 photos and 15 minutes of video. R. at 3. The PNR-1 drone comes with a pre-programed maximum flight altitude to comply with Pawndale drone laws, but it is common for the feature to fail, allowing the drone to fly higher than the legal limit 60% of the time. R. at 4, 41. The PNR-1 drone hovered over Macklin Manor for 15 minutes, taking 22 photos and 3 minutes of video. R. at 4. The photos revealed the image of a single, young female outdoors which law enforcement later confirmed to be Koehler. R. at 4. The drone was also able to detect the layout of the property, which contains a main house, open pool, patio area, and a pool house. R. at 4.

After identification of Koehler was confirmed, Detective Perkins scanned the main house and backyard pool house using a handheld Doppler radar device. R. at 4. Doppler radar devices are able to detect a person's breathing within a fifty-foot range making it impossible to hide from. R. at 4. The scan revealed one individual in the front room of the main house and four individuals in the pool house. R. at 5.

Finally, the officers obtained a search warrant for the entire residence based on the information uncovered by the previous three searches. R. at 5. Importantly, the border search, drone search, and Doppler radar search were conducted without a warrant. *See* R. at 2-5. The officers executed the search warrant, located the three Ford children, and detained Koehler. R. at 5. Koehler was found with a Glock G29 handgun on her person. R. at 5.

On October 1, 2016, Koehler was indicted by a federal grand jury for three counts of kidnapping under 18 U.S.C. § 1201(a) (2016) and one count of a felon in possession of a handgun under 18 U.SC. § 922(g)(1) (2016). R. at 5.

SUMMARY OF THE ARGUMENT

Law enforcement's search of Koehler's laptop at the border does not further any of the stated policy rationales for this Court's border exception to the Fourth Amendment warrant requirement. This Court has recognized the need for limited warrantless searches at the border because of the dangers posed by potential terrorists and the smuggling of illicit paraphernalia. The search in this case does not implicate either policy rationale. Further, the search of the internal data of a computer involves privacy concerns far beyond those found in a routine border search or in the search of a home. Because of the extreme intrusiveness of this search and the failure to further any border exception policy rationale, a warrant should generally be required to search the data contents of a computer at the border. Law enforcement's failure to obtain a warrant prior to searching the computer's contents violated Koehler's Fourth Amendment rights.

Eagle City Police Department's ("ECPD") surveillance of Macklin Manor via the PNR-1 drone constituted an unreasonable search under the Fourth Amendment. First, the backyard area observed by the PNR-1 drone is within the curtilage of Macklin Manor because it is located within close proximity to the home and is associated with the privacies of domestic life. Second, the PNR-1 drone more likely than not exceeded Pawndale's maximum altitude restriction when the ECPD lost track of the drone while the drone was flying over Macklin Manor. ECPD's use of the PNR-1 drone certainly violated Federal Aviation Administration ("FAA") regulations which restrict drone flights to a maximum altitude of 400 feet above a structure's immediate uppermost

limit. Therefore, the drone search occurred outside public navigable airspace in violation of the Fourth Amendment.

Even if the aerial surveillance occurred within the public navigable airspace, the aerial surveillance still violated the Fourth Amendment because it occurred in an area where a reasonable person would not expect an aerial device to be located. Unlike in *Ciraolo* and *Riley*, where public air travel was routine and expected over the defendant's property, air travel over Mount Partridge was not only rare, it was non-existent. Because law enforcement observed intimate details of the curtilage of Koehler's home without a warrant in a location where public air travel is non-existent, the use of the PNR-1 drone constituted an unreasonable search in violation of the Fourth Amendment.

ECPD's warrantless use of the Doppler radar device to see inside Koehler's home violated the Fourth Amendment. First, the Doppler radar device is not in "general public use." In fact, the device is not used by the public at-large and is only available for purchase from the manufacturer. Second, the search by law enforcement revealed intimate details of the home and its curtilage that would previously have been unknowable without physical intrusion. ECPD could not determine the number of persons located within the home and pool house and their location without being physically present within both locations. Thus, the use of the Doppler radar device constituted an unreasonable warrantless search.

Koehler has Fourth Amendment standing to invoke the exclusionary rule because she has a legitimate expectation of privacy in each location searched. The above searches by the ECPD violated Koehler's Fourth Amendment rights. Therefore, the evidence obtained via the computer search, drone search, and radar search must be excluded pursuant to the exclusionary rule. However, even if this court were to find the drone search and the radar search to be reasonable,

the evidence from these searches still must be excluded as fruit flowing from the poisonous tree of the initial border search.

STANDARD OF REVIEW

When reviewing a district court's denial of a motion to suppress, this Court reviews the lower court's findings of fact for clear error. *See e.g.*, *United States v. Graf*, 784 F.3d 1, 6 (1st Cir. 2015). Conclusions of law, including whether a set of facts constitutes probable cause, are reviewed de novo. *See Id.*; *see also United States v. Smith*, 820 F.3d 356, 359 (8th Cir. 2016).

ARGUMENT

I. The search of the computer at the border was a nonroutine, extremely intrusive search, which requires a warrant.

The Fourth Amendment of the United States Constitution provides "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Warrantless border searches are permitted by statute. *See e.g.*, 8 U.S.C. § 1357(c) (2016) (immigration officers at the border may conduct warrantless searches of any person seeking admission to the United States if there is reasonable cause to suspect that grounds for denial of admission would be disclosed by such search). While it is true that the border search exception is "grounded in the recognized right of the sovereign to control," a person is not stripped of all Fourth Amendment rights because a search occurs at a border. *United States v. Ramsey*, 431 U.S. 606, 620 (1977).

A. The search of the laptop's contents at the border frustrates the underlying purpose of the border search exception.

This Court explained in *United States v. Montoya de Hernandez* that "Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or warrant, in order to regulate the collection of duties and to prevent the

introduction of contraband into this country." 473 U.S. 531, 537 (1985) (*citing Ramsey*, 431 U.S. at 616-17). Further, the traditional balancing test of "the degree to which [a warrantless search] intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests" is no longer a controlling question in border search cases. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (*citing Wyoming v. Houghton*, 528 U.S. 295, 300 (1999)). Despite the intended goals of "collecting duties and prevent[ing] the introduction of contraband," the various government agencies have taken a very expansive view of their rights at the border for a warrantless search. *Montoya de Hernandez*, 473 U.S. at 537. When under search, the U.S. Customs and Border Protection ("CBP") provides a copy of an "Inspection of Electronic Devices" sheet which specifically, states "CBP must determine the identity and citizenship of all persons seeking entry into the United States, determine the admissibility of foreign nationals, and deter the entry of possible terrorists, terrorists weapons, controlled substances, and a wide variety of other prohibited and restricted items." U.S. CUSTOMS AND BORDER PROTECTION, PUB. NO. 0204-0709, INSPECTION OF ELECTRONIC DEVICES (2015).[2] Thus, the CPB has the right to search a phone or computer for a wide variety of reasons and does not even have to specifically mention the reason for the search.

Furthermore, in 2009, the Department of Homeland Security ("DHS") drafted a Privacy Impact Assessment for the Border Searches of Electronic Devices, for both CBP and Immigration and Customs Enforcement ("ICE"), with a goal of "enhanc[ing] public understanding of authorities, policies, procedures, and privacy controls related" to border searches of laptops. U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER SEARCHES OF

[2] This source may be easily accessed at https://www.cbp.gov/sites/default/files/documents/inspection-electronic-devices-tearsheet.pdf.

ELECTRONIC DEVICES (2009).[3] The Privacy Impact Assessment ("PIA") is listed on CBP's website to answer questions regarding laptop searches at the border and reflects the current opinion of DHS. Thus, the position of CBP and ICE on the level of intrusion of a search of a laptop has not changed since 2009, despite the significant technological advances in the past eight years. The PIA indicates both CBP and ICE are able to "copy the contents of the electronic device for a more in-depth border search at a later time." *Id.* Further, the PIA recognizes that "new privacy risks may arise as the technology involved in this activity is ever-changing." *Id.*

While a principle of DHS is to "seek individual consent for the collection, use, dissemination, and maintenance of personally identifiable information," DHS also concludes "presenting one's self at the U.S. border seeking to enter has been equated with consent to be searched." *Id.* Further, the purposes of investigations of the searches at the border are to "make admissibility determinations or to provide evidence of violations of law, including importing obscene material, drug smuggling, other customs violations, or terrorism, among others." *Id.* Additionally, ICE may retain a device for up to 30 days." *Id.*

The reach of the CBP's technological searches is expanding at rapid rates. Cynthia McFadden ET. AL., *American Citizens: U.S. Border Agents Can Search Your Cellphone*, NBC NEWS, (Mar. 13, 2017).[4] In 2015, 4,664 electronic media searches were conducted at the border. *Id*. In just one month in 2017, 4,900 searches were conducted at the border. *Id*. The investigation by NBC News revealed that CBP has adopted a common practice of demanding passwords during the search of technology at the border. *Id.* DHS has published more than two dozen

[3] This source may be easily accessed at:
https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_laptop.pdf .

[4] This source may be easily accessed at: https://www.nbcnews.com/news/us-news/traveling-while-brown-u-s-border-agents-can-search-your-n732746.

reports detailing its extensive technological capability to access deleted call logs, videos, photos, and emails in addition to social media applications regardless of password protections. *See e.g.*, U.S. DEPARTMENT OF HOMELAND SECURITY, TEST RESULTS FOR MOBILE DEVICE ACQUISITION TOOL (2017).[5]

While there is a clear concern for the people and types of goods entering the country, this court still must consider the Fourth Amendment right to a reasonable search. *Montoya de Hernandez*, 473 U.S. 531. This Court has recognized the need for limited warrantless searches occurring at the border because of the "national crisis. . . cause[d] by smuggling of illicit narcotics." *Id*. at 538. In the case at hand, there was never a concern regarding an illegal substance of any type but rather the concern was regarding the amount of money. *See* R. at 1. The officers conducted a search of the computer unrelated to the core principle of this court's Fourth Amendment border exception precedent. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376-77 (1971) ("Custom officials characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with *excluding illegal articles from the country*.") (emphasis in original).

This Court has created Fourth Amendment exceptions specific to the border "to prevent smuggling and to prevent prohibited articles from entry." *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 125 (1973). Prior to the adoption of the Fourth Amendment, courts considered a search to be reasonable "by the single fact that the person or item in question had entered into our country from outside. . . ." *Ramsey*, 431 U.S. at 619. However, this Court has insinuated that some searches at the border require a warrant. *See United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) ("the Government's authority to conduct suspicionless

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[5] This source may be easily accessed at: https://www.dhs.gov/publication/mobile-device-acquisition.

inspections at the border includes the authority to . . . disassemble, and reassemble a vehicle's fuel tank. While it may be true that some searches of property are so destructive as to require a different result, this was not one of them."); *see also Riley v. California*, 134 S. Ct. at 2488 ("The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment fall out of the picture entirely. . . . when privacy related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.").

B. The search of the internal contents of a computer and cell phone go beyond a routine search.

Non-routine searches require "reasonable suspicion, and the critical factor in determining whether a search is routine is the degree of intrusiveness." *Flores-Montano*, 541 U.S. at 149 (*citing United States v. Molina-Tarazon*, 279 F.3d 709, 712 (9th Cir. 2002)). Computers and cell phones implicate privacy concerns far beyond those implicated by normal items expected to be the fruits of a routine border search. *See Riley*, 134 S. Ct. at 2489. Cell phones and computers "differ in both quantitative and a qualitative sense from other objects which might be kept on a[] . . . person." *Id*. Therefore, this Court has held that a warrant is generally required before law enforcement can search the internal data contained on a cell phone or computer. *Id.* at 2493.

In assessing whether or not the search of the laptop was routine, this court must look at the level of intrusion on the privacy of the party whose property was searched. *Molina-Tarazon*, 279 F.3d at 712. Because of the capabilities of modern technology, the degree of intrusion on a computer or cellphone is to the upmost degree, "reveal[ing] the privacies of life." *Riley*, 134 S. Ct. at 2473. While *Riley* addressed a search incident to arrest, this Court in *Ramsey* noted that the border exception is "a longstanding historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained, and in this respect is *like the seminal 'search incident to lawful arrest'* exception." *Ramsey*, 431 U.S. at 621 (emphasis added). In

Riley, this Court analyzed the officer's search and seizure of a smart phone, "a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and internet connectivity . . . a minicomputer," in a search incident to arrest. 134 S. Ct. at 2480, 2489. In determining whether or not the warrantless seizure of the phone was appropriate under the Fourth Amendment, this Court noted that it was not the officer's seizure of the phone which was questionable, but rather it was the search of the data on the phone. *See Id.* at 2485. If there was any concern as to whether there "is a razor blade hidden between the phone and its case," a search of the "physical aspects of a phone to ensure that it will not be used as a weapon" is appropriate. *Id.* However, because the data on the phone is extremely sensitive and private and because the data cannot endanger an officer, "officers must generally secure a warrant before conducting" a search of the data on the phone. *Id.* In its analysis, this Court specifically looked at the qualitative and quantitative capabilities of a cell phone. *Id*. at 2498.

Riley was decided in 2014, when the average amount of storage on the most popular cell phone on the market, an Apple iPhone 5s, was about 16 GB. David Price, *What's the true formatted storage capacity of an iPhone, iPad, or iPod?*, MACWORLD (Feb. 9, 2016).[6] Meanwhile, a computer, just on its desktop, can hold 4 terabytes of data, which equates to 1 million photos or 526 hours of HD video, not to mention the amount of data which can now be stored on the cloud. Lucas Mearian, *Data Storage: Then and Now*, COMPUTERWORLD (Mar. 14, 2014).[7] With storage capacities growing by 175% annually, the amount of information being opened up to an officer through the search of a computer seems never ending. *Id.* Thus, by just a

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[6] This source may be easily accessed at: https://www.macworld.co.uk/feature/ipad/whats-iphone-ipod-ipads-true-formatted-storage-capacity-3511773/.

[7] This source may be easily accessed at: https://www.computerworld.com/article/2473980/data-storage-solutions/data-storage-solutions-143723-storage-now-and-then.html.

few clicks, an officer is able to open the private closet door, to investigate the
hidden skeletons deep within, all without any regard for Fourth Amendment protections. It is extremely unlikely that if Wyatt was not carrying around the laptop he shared with Koehler, that Wyatt would have been carrying hard copies of the various documents found on the computer. *See Riley*, 134 S. Ct. at 2489 ("most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read . . . and if they did, they would have to drag behind them a truck of the sort held to require a search warrant in *Chadwick*). Furthermore, officers might not know whether the data which they are viewing is stored on the cloud or from the hard drive during the search. *Id.* at 2491 ("The United States concedes that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely—that is, a search of files stored in the cloud. Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house.") (citation omitted).

In addition to the mass amounts of information, the data contained on smart phones and computers "reveal a broad array of private information never found in a home in any form" such as a person's interests, thoughts, pictures, and mail. *Id.* In fact, the information on a cell phone "would typically expose . . . the government [to] far *more* than the most exhaustive search of a house." *Id.* Thus, the search of a computer or cell phone at the border is not comparable to a search of a vehicle or a single piece of mail. *See United States v. Flores-Montano*, 541 U.S. 149 (2004); *see also United States v. Ramsey*, 431 U.S. 606 (1977).

While there is little debate as to the existence of the border search exception, just because a person has "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 134 S. Ct. at 2488. The search of a person's technology is the most

intrusive of searches, such that it is even more intrusive "than the search of a home," and for this reason, this Court in *Riley* concluded that officers "must generally secure a warrant before" conducting a search on technology. *Id*. at 2485. The same holds true at the border because "a person is not stripped of all Fourth Amendment rights because a search occurs at a border." *Ramsey*, 431 U.S. at 620.

II. The use of the PNR-1 Drone constituted an unreasonable search in violation of the Fourth Amendment.

Furthermore, this Court has continually recognized "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (*quoting Silverman v. United States*, 365 U.S. 505, 511 (1961)). To establish a Fourth Amendment violation for the search of her home and backyard, Kohler must show that she had a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). An expectation of privacy is only reasonable where the person "exhibited an actual (subjective) expectation of privacy" and "the expectation be one that society is prepared to recognize as reasonable." *Id.* at 361 (Harlan, J., concurring). "[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited." *Id.*

A. This Court should consider the capabilities of the PNR-1 Drone used in this case and the capabilities of more sophisticated drones which are already in use or in development.

"In the far distance, a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." G. ORWELL, 1984, at 4 (Harcourt Brace Jovanovich ed. 1949). Advancements in technology have the undeniable potential to erode society's reasonable

expectations of privacy. "[A] mechanical interpretation of the Fourth Amendment . . . would leave the homeowner at the mercy of advancing technology" including "technology that could discern all human activity in the home." *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001). In determining whether the drone search in this case violated the Fourth Amendment, this Court may not close its eyes to the fact that this drone is "just advance[d] ripples to a tidal wave of technological assaults on our privacy." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, J., dissenting). As Justice Bradley cautioned long ago, "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

In *Kyllo*, this Court was faced with a "relatively crude" thermal imaging device which converted radiation into images based on relative warmth. 533 U.S. at 36. The device was used to scan a home to determine whether the defendant was using high-intensity lamps to grow marijuana indoors. *Id.* at 29-30. Justice Scalia, writing for the majority, noted that "it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no significant compromise of the homeowner's privacy ha[d] occurred." *Id.* at 40. However, Justice Scalia went on to state that this Court, in crafting its holding, "must take the long view" and consider "more sophisticated systems that are already in use or in development." *Id.* at 36, 40.

Modern drones come in a variety of shapes and sizes ranging from as large as a business jet to as small as a golf ball. *See* John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 HARV. J.L. & PUB. POL'Y 457, 465 (2013). Small drones have the ability to fly inside a building, peer through windows, or even maneuver throughout curtilage undetected like a small insect. *See* S. Alex Spelman, *Drones: Updating the Fourth Amendment*

and the Technological Trespass Doctrine, 16 NEV. L.J. 373, 379-80 (2015). Larger solar powered drones have the capability to remain in the air for weeks at a time gathering vast amounts of intimate and private data while targeting a single individual or focusing on city-wide surveillance. *Id.* Drone operators can install cameras with high powered zoom lenses, video recorders, infrared and ultraviolet imaging devices, see-through radar technology, laser optical microphones, and even face and body recognition technology. *See* Jonathan Olivito, *Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy*, 74 OHIO ST. L.J. 669, 677-78 (2013). For the first time, the surveillance and information gathering capabilities of drones raise the specter of the Orwellian state where "[t]here was of course no way of knowing whether you were being watched at any given moment.". G. ORWELL, 1984, at 4 (Harcourt Brace Jovanovich ed., 1949).

In *Boyd*, this Court stated that its Fourth Amendment motto should be "*obsta principiis*" meaning "resist the opening wedge." 116 U.S. at 535; *see also* Wayne LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 294 (1986). This Court should "resist the opening wedge" and consider not only the capabilities of the PNR-1 drone but also the capabilities of "more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36.

B. *The area surveilled by the PNR-1 drone was a part of the curtilage of the home.*

The Fourth Amendment protections that attach to the home extend only to the curtilage but not to neighboring open fields. *See Oliver v. United States*, 466 U.S. 170, 180 (1984). Curtilage is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Id.* (*quoting Boyd*, 116 U.S. at 630). This Court considers four factors when defining the extent of a home's curtilage: "the proximity of the area claimed to

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

This Court has previously held that areas within the backyard of a home are considered curtilage. *See California v. Ciraolo*, 476 U.S. 207, 210 (1986) (finding that a fifteen by twenty-five foot garden located in the backyard is within the curtilage of the home); *see also Florida v. Riley*, 488 U.S. 445, 449 (1989) (finding that a greenhouse located ten to twenty feet behind the home is within the curtilage of the home). Other courts have also generally held that a backyard that is accessible only by walking around the side of the home is a part of the home's curtilage. *See Widgren v. Maple Grove Township*, 429 F.3d 575, 582 (6th Cir. 2005) (holding that a cleared area surrounding a home is curtilage of the house despite the lack of fencing); *Brocuglio v. Proulx*, 67 F.. App'x 58, 61 (2nd Cir. 2003) (stating that "it was clearly established that . . . a fenced-in backyard is curtilage entitled to Fourth Amendment protection."); *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 602-03 (6th Cir. 1998) (concluding that a home's entire backyard was within the curtilage of the home even though neighbors could see a portion of the backyard).

In the present case, the backyard area observed by the officer via the PNR-1 drone is within the curtilage of Koehler's home for a variety of reasons. First, the outer edge of the area observed by the drone is located directly behind the home and is only a mere fifty feet from the home itself. R. at 4. Second, while the backyard lacked any fencing, Koehler's backyard was protected by natural barriers. The home was located on the outskirts of Eagle City, on the top of a mountain, and is usually covered by fog and clouds year-round. R. at 3. The erecting of a fence or other man-made barrier was unnecessary because it would have added minimal privacy in this remote location. Third, the close proximity of the home and the presence of the pool and pool

house show that the area had been used for "the activities and privacies of domestic life" such as swimming, sun-bathing, and other recreational family activities. *Dunn*, 480 U.S. at 303. Thus, under *Dunn*, the first, third, and fourth factors weigh heavily in favor of a finding that Koehler's backyard was located within the curtilage of the home. Because the area searched in this case was within the curtilage, it "should be treated as the home itself" and is afforded the protections of the Fourth Amendment. 480 U.S. at 300.

C. *The warrantless aerial surveillance of a home and its curtilage using an unmanned aerial device outside the public navigable airspace is an unreasonable search in violation of the Fourth Amendment.*

The use of "public navigable airspace" is a threshold consideration in determining whether warrantless aerial observations are constitutional. *See Florida v. Riley*, 488 U.S. at 451 (stating that this Court's holding would have been different if the aerial observation would have occurred outside FAA regulations). "This is not to say that an inspection of the curtilage . . . from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law." *Id.* Instead, any aerial observation made from outside public navigable airspace is unconstitutional because it fails the threshold test. *Id.*

Pawndale restricts all drones to a maximum flight altitude of 1,640 feet. R. at 4. The PNR-1 drone is pre-programmed to stay below the altitude restriction.[8] R. at 4. However, it is common for the pre-programmed altitude restriction to malfunction and, when it does, the PNR-1 drone exceeds Pawndale's altitude restriction 60% of the time. R. at 39-41. Officer Lowe, the police department's technology specialist, admitted that she lost track of the drone for about four or five minutes while the PNR-1 drone was flying over Macklin Manor. R. at 41. Officer Lowe

[8] The PNR-1 drone is "connect[ed] to a network" which "pinpoints the drone's geographical location via satellite" and automatically imposes a max altitude based on the state's laws. R. at 39-40.

stated that it was possible that the drone exceeded the maximum flight altitude during those four or five minutes of lost connectivity. R. at 41. However, it is not only possible, it is more likely than not the PNR-1 drone exceeded Pawndale's altitude restriction because the manufacturer of the drone stated the drone will generally exceed the altitude limit during three out of every five flights.

While it is only probable that law enforcement exceeded Pawndale's altitude limitation, it is certain that law enforcement violated FAA regulations. The FAA generally restricts drone flights to altitudes no higher than 400 feet above ground level. 14 C.F.R. § 107.51(b) (2017). When a drone is within 400 feet of a structure, the drone can fly no higher than 400 feet above the structure's immediate uppermost limit. 14 C.F.R. § 107.51(b)(1)-(2) (2017). In this instance, for the drone to satisfy FAA requirements, Macklin Manor would have to be almost as tall as The Willis Tower skyscraper in Chicago, Illinois.[9]

In sum, because the flight path of the PNR-1 drone most likely violated Pawndale's altitude restrictions for drones and definitely violated the FAA's drone regulations, the use of the drone constituted an unreasonable search in violation of the Fourth Amendment.

D. *Even if the aerial surveillance occurred within the public navigable airspace, the warrantless aerial surveillance in this case still violated the Fourth Amendment because it occurred in an area where a reasonable person would not expect an aerial device to be located.*

While Fourth Amendment protections are extended to the curtilage, "all police observation of the curtilage is not necessarily barred by the Fourth Amendment." *Florida v. Riley*, 488 U.S. at 453. The Fourth Amendment "does not require law enforcement officers to shield their eyes when passing by a home [or its curtilage] on public thoroughfares." *Ciraolo*,

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[9] *See* Willis Tower, *An American Icon with a Rich History*, http://www.willistower.com/history-and-facts (noting that Willis Tower is 1,450 feet tall).

476 U.S. at 213. In other words, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. In determining whether something is knowingly exposed, this Court asks, "not what another person can physically and may lawfully do but rather what a reasonable person *expects* another might actually do." *U.S. v. Maynard*, 615 F.3d 544, 559 (D.C. Cir. 2010) (citing *California v. Greenwood*, 486 U.S. 35, 40 (1988)).

In *Riley*, Justice O'Connor, whose concurrence was necessary to the judgment, stated that the question for aerial observations is "whether the helicopter was in the public airways at an altitude at which members of the public *travel with sufficient regularity* that [defendant's] expectation of privacy from aerial observation was not 'one that society is prepared to recognize as reasonable.'" 488 U.S. at 454 (*quoting Katz*, 389 U.S. at 361) (emphasis added). In *Riley*, law enforcement made a naked eye observation of the defendant's greenhouse from a helicopter at an altitude of 400 feet. 488 U.S. at 696. The plurality opinion found that the search was reasonable because the aerial observation occurred at a lawful altitude based on FAA regulations. *Id.* at 451. In Justice O'Connor's view, mere compliance with FAA regulations does not equate to compliance with the Fourth Amendment. *Id.* at 453 ("Because the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy society is prepared to recognize as reasonable simply mirror the FAA's safety concerns."). Justice O'Connor found the search to be reasonable under the Fourth Amendment "[b]ecause there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet . . . and because Riley introduced no evidence to the

contrary."[10] *Id.* at 455; *see also id.* at 467 (Blackmun, J., dissenting) (noting that five justices agreed that "the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet.").

Further, this Court re-affirmed Justice O'Connor's concurrence from *Riley* in *Bond v. United States* where a Border Patrol agent squeezed a passenger's luggage which was placed in an overhead bin on a bus to determine whether the luggage contained drugs. 529 U.S. 334, 335-36 (2000). This Court, in assessing the reasonableness of the search, found that "a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-39. This Court's analysis did not focus on what other passengers could have lawfully done or what the passengers may have done. Instead, this Court's analysis focused squarely on what a reasonable bus passenger *expects* other fellow passengers or bus employees might do.

In the present case, no reasonable person would expect an unmanned aerial vehicle or any type of aircraft to be located over the top of Mount Partridge. Unlike in *Ciraolo* and *Riley*, where public air travel was "sufficiently routine," *Ciraolo*, 476 U.S at 215; *Florida v. Riley*, 488 U.S. at 450, air travel over Mount Partridge was not only rare, it was non-existent. R. at 3. Year-round fog and cloud cover rendered any air travel over Mount Partridge unsafe and dangerous. R. at 3. All aircraft steered clear of flying over Mount Partridge and instead opted to fly around the mountain where visibility is much improved. R. at 3. As such, no reasonable person would expect a home and its curtilage located on top of Mount Partridge to be subject to routine

[10] Justice O'Connor's analysis applies equally to *California v. Ciraolo*, where this Court held that "in an age where private and commercial flight in the public airways is routine," it was unreasonable for defendant to expect his curtilage to be protected by the Fourth Amendment. 476 U.S. at 215. As in *Riley*, this Court found no evidence that it was unusual for an airplane to be seen over defendant's backyard. *Id.* at 213-14.

observation from the air by public travelers. *See* R. at 42 (Detective Perkins stated that she "didn't see or hear a single plane the entire time [she] was there."). As Justice O'Connor noted in *Riley*, "[i]f the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and [defendant] cannot be said to have 'knowingly expose[d]' his [curtilage] to public view." 488 U.S. at 455. Thus, Koehler had a subjective expectation of privacy "that society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361.

Because law enforcement observed intimate details of the curtilage of Koehler's home without a warrant in a location where public air travel is non-existent, the use of the PNR-1 drone constituted an unreasonable search in violation of the Fourth Amendment.

III. The use of the Doppler radar device constituted an unreasonable search in violation of the Fourth Amendment.

Warrantless searches of the home and its surrounding curtilage conducted outside the judicial process "are per se unreasonable under the Fourth Amendment." *Katz*, 389 U.S. at 357. In *Kyllo*, this Court was asked whether the warrantless use of a thermal-imaging device aimed at a private home from a public street violated the Fourth Amendment. *Kyllo*, 533 U.S. at 29. This Court held that, when law enforcement uses an advanced technological device, a presumptively unreasonable Fourth Amendment search occurs when: (1) the device is not in general public use; (2) is used to explore details of the home; and (3) where said details would previously have been unknowable without physical intrusion. *Id.* at 40.

A. The Doppler radar device is not in general public use.

In *Dow Chemical Co.*, this Court stated that "surveillance of private property by using highly sophisticated surveillance equipment *not generally available to the public* may be unconstitutional." 476 U.S. 227, 238 (1986). Fifteen years later, in *Kyllo*, this Court refined that

statement by holding that an unreasonable search occurs when "the Government uses a device that *is not in general public use* to explore details of the home that would previously have been unknowable without physical intrusion." 533 U.S. at 40 (emphasis added). While the "general public use" determination has been largely unexplored by courts, the *Kyllo* court found that a thermovision thermal imager was not in general public use. *Id.*

In this case, law enforcement used a Doppler radar device to see inside Koehler's home. The use of Doppler radar devices was virtually unknown until December 2014. *See* Brittany Puckett, *Mighty Morphin' Power Range-R: The Intersection of the Fourth Amendment and Evolving Police Technology*, 8 ELON L. REV. 555, 560 (2016). The Doppler radar device is not available for purchase on sites such as Amazon and must be specially ordered from the manufacturer. R. at 35. While the record notes that Doppler radar devices have "become popular amongst law enforcement agencies in recent years," the devices are not popular amongst the general public. R. at 35. Therefore, the Doppler radar device used by the agents is not in general public use.

B. The search using the Doppler radar device revealed intimate details of the home and its curtilage.

The warrantless observation of the intimate details of the home and its curtilage is impermissible. *See Kyllo*, 533 U.S. at 36; *see also Oliver*, 466 U.S. at 180 ("courts have extended Fourth Amendment protection to the curtilage"). "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 37. When it comes to the home under the Fourth Amendment, "all details are intimate details, because the entire area is held safe from prying government eyes." *Id.* Thus, this Court has found intimate details in:

- *United States v. Karo*, 468 U.S. 705 (1984) (where the only thing observed was a can of ether in the home)
- *Arizona v. Hicks*, 480 U.S. 321 (1987) (the only thing detected by a physical search was the registration number of a phonograph turntable), and
- *Kyllo*, 533 U.S. at 31, 37-38 (the only thing revealed was "amorphous 'hot spots' on the roof and exterior wall.").

In the present case, law enforcement observed both the intimate details of the home and the home's curtilage. *See* R. at 5. The ECPD determined how many people were present within the home and their rough location in relation to the Doppler radar device. R. at 5. However, all that is required for a Fourth Amendment violation is the observation to invade the home "by even a fraction of an inch." *Id.* at 37 (quoting *Silverman*, 365 U.S. at 512); *see also Kyllo*, 533 U.S. at 37 ("there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor").

Therefore, the use of the Doppler radar device by law enforcement in the present case revealed intimate details of the home and its curtilage.

C. The information obtained by law enforcement using the Doppler radar device would previously have been unknowable without physical intrusion.

The final requirement of *Kyllo* is that the device obtain information that "would previously have been unknowable without physical intrusion." 533 U.S. at 40. The information obtained in *Kyllo* violated this final requirement because only a person physically present within the home could discern the temperature or level of heat emanating from the defendant's home. *Id.* at 39. Similarly, in this case, there was no way for law enforcement personnel to discern the number of persons located within the home and pool house and their location without being physically present within both locations.

Because the Doppler radar device is not in "general public use" and the search by law enforcement revealed intimate details of the home and its curtilage that "would previously have been unknowable without physical intrusion," an unreasonable warrantless search occurred in this case in violation of Koehler's Fourth Amendment rights. *Id.* at 40.

IV. Koehler has Fourth Amendment standing to raise the exclusionary rule because she has a reasonable expectation of privacy in the contents of the laptop and the curtilage of the home.

"Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133 (1978). Therefore, a person seeking to exclude evidence must show more than that he was "aggrieved by an illegal search and seizure *only* through the introduction of damaging evidence secured by a search of a third person's premises or property." *Rakas*, 439 U.S. at 134 (*citing Alderman v. United States*, 394 U.S. 165, 174 (1969)). "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, against whom the search was directed." *Rakas*, 439 U.S. at 134. Koehler has Fourth Amendment standing if her "claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances," which focuses more on the "purposes of the Fourth Amendment than a test focusing solely or primarily on whether the defendant was legitimately present during the search." *Rakas*, 439 U.S. at 152 (Powell, J., concurring). In analyzing whether Koehler's privacy expectation is reasonable:

> The first [question] is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy . . . whether . . . the individual has shown that "he seeks to preserve [something] as private. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" – whether . . . the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740 (1979) (*quoting Katz*, 389 U.S. at 353).

Individuals generally possess a reasonable expectation of privacy in their home and personal computers. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (recognizing a reasonable expectation of privacy in a personal computer attached to a university network); *see also United States v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004) (recognizing that individuals generally have a reasonable expectation of privacy in their home computers); *United States v. Buckner*, 473 F.3d 551, 554 n.2 (4th Cir. 2007) (recognizing a reasonable expectation of privacy in computer files); *United States v. Ziegler*, 474 F.3d 1184, 1190 (9th Cir. 2007) (recognizing a reasonable expectation of privacy in work computer). Koehler's reasonable expectation of privacy exists because she has both a property interest in the computer and because the search of the laptop was extremely intrusive. R. at 2. Further, a search of a computer is more intrusive than a search of the home, *Riley v. California*, 134 S. Ct. at 2491, and thus, it follows that a computer would have an equal, if not a higher expectation of privacy, than a home. Koehler's lack of presence at the initial search is not a controlling inquiry in regards to her privacy interest in the contents of the laptop. *United States v. Taketa*, 923 F.2d 665, 672 (9th Cir. 1991) (*citing Rakas*, 439 U.S. at 142-43) (analyzing *Rakas* and finding that presence at the search site is relevant, but not central to the inquiry into the legitimate expectation of privacy).

Because Koehler has standing and Fourth Amendment violations occurred, the exclusionary rule applies; thus, the evidence obtained via the computer search, drone search, and radar search must be excluded. However, even if this court were to find the drone search and the radar search to be reasonable, the evidence from these searches is still excluded as fruit flowing from the poisonous tree of the initial border search.

CONCLUSION

This Court should affirm the opinion of the Thirteenth Circuit Court of Appeals that the border search, drone search, and Doppler radar search violated Koehler's Fourth Amendment privacy rights. The search of the contents of Koehler's laptop was unreasonable because of the extreme intrusiveness of the search of the laptop and the failure to further any border exception policy rationale. The warrantless search using the PNR-1 drone occurred outside the public navigable airspace and occurred in an area where a reasonable person would not expect an aerial device to be located in violation of the Fourth Amendment. ECPD's warrantless use of the Doppler radar device to see inside Koehler's home constituted an unreasonable search because the device is not in general public use; the search exposed intimate details; and the details discovered would previously have been unknowable without physical intrusion. Because Koehler has Fourth Amendment standing and Fourth Amendment violations occurred, the exclusionary rule applies; thus, the evidence obtained via the computer search, drone search, and radar search must be excluded.

Respectfully submitted,

Team 32

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