R. 34

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 Appeal
for the Thirteenth Circuit

BRIEF FOR RESPONDENT,
AMANDA KOEHLER

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STATEMENT OF ISSUES

1. Whether the search of Amanda Koehler's laptop was valid under the border search exception when such a search implicates heightened privacy interests.

2. Whether the use of a PNR-1 drone and a Doppler radar device constituted Fourth Amendment "searches" when the officers entered and surveyed constitutionally protected areas without a search warrant through surreptitious and unfamiliar means.

STATEMENT OF FACTS

Customs and Border Patrol ("CBP") Agents Dwyer and Ludgate stopped Scott Wyatt's car at the Eagle City border station at 3:00 A.M. on August 17, 2016. R. at 24. Mr. Wyatt was compliant but not making eye contact and fidgeting with the steering wheel. R. at. 26. Agent Ludgate claims that this gave her reason to search his vehicle. R. at. 26. During the course of the search, agents discovered in the trunk $10,000 in $20 bills and a laptop with the initials "AK" on it. R. at 26. Mr. Wyatt indicated that he shared the laptop with his fiancé, Amanda Koehler. R. at 2. The agents ran Ms. Koehler's name, discovering that she was a person of interest in the kidnappings of the Ford children. R. at 27. Recently, the kidnappers agreed to give prove of life in exchange for $10,000 in $20 bills. R. at 44. While Mr. Wyatt was detained for failure to declare $10,000, Agent Ludgate opened the laptop and intrusively began looking through its contents without a warrant. R. at 27-28. On the laptop she found documents that contained Mr. Ford's personal information and a lease agreement under the name "Laura Pope." R. at 28. She subsequently relayed this information to the Eagle City Police Department ("ECPD"). R. at 31.

The address on the lease agreement was that of Macklin Manor a large estate atop Mount Partridge on the outskirts of Eagle City. R. at 32. At the mountain's peak, Macklin Manor is perpetually shrouded in fog and clouds, and aircraft eschew flying over Mount Partridge due to the extremely limited visibility. R. at 3. Detective Perkins discovered that Macklin Manor was purchased six months prior by a company owned by Amanda Koehler's alias, "Laura Pope." R. at 32. Detective Perkins assigned Officers Lowe and Hoffman to conduct warrantless surveillance of the property. R. at 3.

First, Lowe, ECPD's technology expert, deployed a PNR-1 drone ("drone") to fly over the property at dawn. R. at 32. The drone comes with a maximum flight altitude of 1,640 feet,

the legal limit in Pawndale. R. at 38. However, as result of network connectivity errors, 60% of these drones break the law by exceeding the limit, flying as high as 2,000 feet. R. at 39, 41. During the fifteen-minute surveillance period over Macklin Manor, Lowe lost track of the drone for approximately five minutes due to a network connectivity error, during which the altitude of the drone is unknown. R. at 41. Notwithstanding, the drone provided intimate photo and video surveillance of Macklin Manor's layout, including a photograph of Amanda Koehler on the patio. R. at 33.

Then officers surreptitiously converged on the home and scanned the front door area with a handheld Doppler radar device ("Doppler") that is popular only amongst law enforcement. R. at 33, 35. Dopplers let officers scan for individuals inside of buildings by emitting radio waves, which are disrupted by a person's breathing revealing his or her general location. R. at 33. The Doppler allowed officers to discover the presence of the defendants and Ford children. R. at 34. Officers then retreated and obtained a search warrant for the entire residence. R. at 34. After executing the warrant, they recovered the Ford children and arrested Amanda Koehler. R. at 5.

As the result of an unlawful search of her laptop, Ms. Koehler was charged with kidnapping and felon in possession of a firearm. Ms. Koehler filed a motion to suppress the evidence which the District Court denied. R. at 5, 13. She appealed. The United States Court of Appeal for the Thirteenth Circuit reversed, finding that the search of the laptop at the border, use of the drone, and use of the Doppler ran afoul of the Fourth Amendment. R. at 15. The United States appealed and this Court granted certiorari. R. at 22.

SUMMARY OF ARGUMENT

Law enforcement violated Ms. Koehler's Fourth Amendment rights, and the Thirteenth Circuit correctly reversed the District Court's denial of her motion to suppress. First, because the

border search at issue fell outside the border search exception, and second, because the use of the drone and Doppler constituted unreasonable searches. For the reasons below the Court should affirm.

The warrantless border search of Ms. Koehler's laptop was so offensive that it fell outside the bounds of the border search exception. While the government has an interest in protecting national security at the border, it is outweighed by the privacy interests implicated by warrantless intrusions into electronic devices. Due to society's ever-increasing reliance on technology, the information gleaned from an individual's electronic device can reveal more to the government than the most intrusive searches of a home.

The search in question was non-routine due to its intrusiveness. Because of the information they contain, searches of computers are not analogous to other types of searches that are considered routine for purposes of border searches, such as searches of vehicles or luggage. Accordingly, non-routine searches further require reasonable suspicion.

To deduce reasonable suspicion, law enforcement must be able to point to some articulable indicia that criminality is afoot, and the CBP agents lacked such indicia in this case. While border agents claim that Mr. Wyatt was agitated and uncooperative at the border, these actions could be indicative of a number of human emotions not tied to criminality.

Moreover, this Court's recent opinion in *Riley v. California* recognizes the inherent privacy interests posed by cell phones, acknowledging that the search incident to arrest exception to the warrant requirement did not allow for the search of cell phones absent some other exigent circumstance. This logic should be extended to the border search exception and laptop computers. The breadth and depth of highly personal information individuals store on their electronic devices implicates a higher reasonable expectation of privacy.

Since law enforcement officers lacked probable cause and never obtained a search warrant to conduct the drone surveillance of Macklin Manor or the Doppler radar search, the searches were unconstitutional for purposes of the Fourth Amendment. These devices invoke concerns regarding law enforcement's use of sophisticated technology to further encroach and minimize a reasonable person's expectation of privacy.

The search of Macklin Manor using the drone was unreasonable because it invaded on the curtilage of the home from an unlawful vantage point. The confluence of the high malfunction rate of drones exceeding the altitude limit, the network connectivity error that occurred during which the drone's altitude is unknown, and the fact that air traffic intentionally avoids Mt. Partridge due to lack of visibility supports that the drone surveilled at an unlawful vantage point.

The Doppler's use was unlawful on two grounds: first, because it revealed the intimate details from inside of the home, the inside of the body, and was not in common usage by the public; and second because the officers physically trespassed on the curtilage of the home while utilizing sense-enhancing technology to uncover incriminating information.

The fruit of the poisonous tree doctrine applies to the evidence obtained from laptop because there was not probable cause to support the Ford Children being held at Macklin Manor absent the intrusive Fourth Amendment "searches." The evidence on the laptop merely indicated that Ms. Koehler leased Macklin Manor for a period of six months.

Therefore, the Court should affirm that the search of Ms. Koehler's laptop violated her reasonable expectation of privacy, and that the searches of Macklin Manor using a PNR-1 drone and Doppler radar device violated the Fourth Amendment.

STANDARD OF REVIEW

The constitutionality of a border search is reviewed de novo. *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998) . Additionally, we review de novo the validity of a warrantless search. *See United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir.1996); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir.1994). Probable cause is reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THE GOVERNMENT'S SEARCH OF AMANDA KOEHLER'S LAPTOP WAS INVALID PURSUANT TO THE BORDER SEARCH EXCEPTION.

Custom and Border Patrol ("CBP") agents violated Ms. Koehler's Fourth Amendment rights when they searched her laptop. All warrantless searches and seizures are presumed to be unreasonable unless government can show that an established exception applies. In *Katz v. United States*, 389 U.S. 347, 357 (1967). While one of these exceptions applies to border searches, "[this] does not mean 'anything goes' at the international border." *United States v. Selijan*, 547 F.3d 993, 999 (9th Cir. 2008). Rather, privacy rights must be balanced against the government's interest. *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). Additionally, in *Riley v. California,* the Court held that a warrantless search of an electronic device was unreasonable because of the privacy interests implicated in digital data. 134 S. Ct. 2473, 2486 (2014). Accordingly, CBP agents violated Ms. Koehler's Fourth amendment rights when they conducted a non-routine border search without reasonable suspicion on her laptop.

A. Searching Ms. Koehler's Laptop was Non-Routine Because it Allowed the Government Access to the Most Revealing Aspects of Her Life—Abrogating Her Reasonable Expectation of Privacy.

Searches that seriously invade an individual's right to privacy are considered non-routine. *United States v. Johnson*, 991 F. 2d 1287,1291 (7th Cir. 1993)). The court held that, "if the

inspection exceeded the scope of what may be considered routine, [the] Fourth Amendment right to be free from unreasonable search and seizures was violated." *Id*. The abrogation of a suspect's reasonable expectation of privacy is indicative of a non-routine search. *United States v. Braks,* 842 F.2d 509, 512 (1st Cir. 1988). This Court previously found that cell phones invoke a heightened expectation of privacy due to massive amounts of intimate data they contain. *Riley v. California*, 134 S. Ct. 2473, 2486 (2014). There, the warrantless viewing of cell phones during a search incident to arrest, exceeded the scope of the warrant exception because the exigencies that would justify a search, such as officer safety and destruction of evidence, are not present in electronic devices. *Id*. at 2492.

While the search of Mr. Wyatt's car was clearly within a border patrol agent's discretion, Agent Ludgate exceeded the scope of her search by accessing files on Koehler's laptop. Although the Ninth Circuit found that manual searches of laptop computers were routine for purposes of a border search, in light of this Court's recent perception of data privacy, the search of Ms. Koehler's laptop was non-routine because her reasonable expectation of privacy was abrogated by the search of her computer.[1] Using the Ninth Circuit's logic, the search of Ms. Koehler's laptop would be routine because police only opened the device and began viewing documents on the desktop. However, this Court's contemporary view of personal data in *Riley* would render the search non-routine because of the heightened expectation of privacy in electronic devices. The *Riley* decision represents an evolution of the Court's jurisprudence regarding the reasonable expectation of privacy in electronic devices. *Id.*

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[1] *Compare Riley v. California* 134 S. Ct. 2473, 2486 (2014) *with United States v. Arnold*, 523 F.3d 941, 943 (9th Cir. 2008)

Therefore, in holding that the search of Ms. Koehler's laptop was invalid under the border search exception, this Court should overrule the Ninth Circuit's outdated opinion in *Arnold*.

B. CBP Agents Lacked a Particularized and Objective Basis to Suspect Mr. Wyatt of Committing a Crime Because His Conduct Failed to Give Rise to Reasonable Suspicion.

Since the search of Ms. Koehler's laptop was non-routine, CBP agents, at minimum, needed reasonable suspicion to perform the search considering the privacy interests implicated by the nature of the search. *United States v. Afanador*, 567 F.2d 1325, 1329 (1978). This Court held that reasonable suspicion is measured under the totality of the circumstances, providing evaluative factors such as "unusual conduct of the defendant, discovery of incriminating matter during routine searches, computerized information showing propensity to commit relevant crimes, and suspicious itinerary," which would lean in favor of finding reasonable suspicion. *United States v. Irving*, 452 F.3d 110, 124 (2005).

In *Montoya De Hernandez* this Court held that customs agents had reasonable suspicion to search and detain a suspect because they had a "particularized and objective basis for suspecting the particular person" of smuggling cocaine into the United States. *United States v. Montoya De Hernandez*, 473 U.S. 531, 541 (1985). The Court examined the facts that proceeded respondent's arrest to determine reasonable suspicion. *Id.* Respondent was traveling from Bogota, Colombia, a "source city" for trafficking cocaine. *Id. at* 533. Additionally, respondent claimed that she was coming to the United States to purchase goods for her husband's store but had no appointments with vendors, no hotel reservations, inappropriate clothing for the climate, and only $5,000 with no other forms of legal tender. *Id.* The Court found that all of these facts constituted adequate reasonable suspicion to perform a non-routine border search of the person.

Here, CBP agents stated that their initial suspicion arose from Mr. Wyatt acting agitated and uncooperative. R. at 2. Subsequently, agents asked Mr. Wyatt to open the trunk of his vehicle, exposing Ms. Koehler's laptop and $10,000. R. at 2. While the agents state that Mr. Wyatt's initial behavior is what prompted the search, his conduct was not unusual. In Officer Ludgate's testimony, she stated that Mr. Wyatt was using his fingers to fidget with the steering wheel and his lack of eye contact were suspicious. R. at 26. Furthermore, she stated that Mr. Wyatt was uncooperative even though he answered each one of her questions. R. at 25-26. While this conduct is indicative of someone in a hurry, it is not conduct that is readily identifiable with criminality. Additionally, according to Agent Ludgate's testimony, the peak hours of criminal activity at border stations is generally during rush hour. However, this search was conducted at 3:00 AM. R. at 25. All of these facts support the that the search was unnecessary because Mr. Wyatt's actions were not necessarily indicative of wrongdoing.

Furthermore, the events that led up to the search of Mr. Wyatt's vehicle do not reach the standard of particularized and objective basis for suspecting the particular person. CBP agents' basis to search Mr. Wyatt's vehicle was completely behavioral. R. at 26. Conversely, in *Montoya De Hernandez*, the basis for reasonable suspicion was some form of an individualized suspicion as a result of the defendant's arrival city. *Montoya De Hernandez*, 473 U.S. at 533. Here, there was no prior individualized basis for suspecting Mr. Wyatt considering he was crossing the border at an hour when there would be less of a presumption of criminal behavior and was compliant with the questions posed to him. R. at 25-26. Relatively normal behavior, absent an individualized basis for suspecting Mr. Wyatt, did not give rise to reasonable suspicion. However, even if the Court finds that reasonable suspicion did exist to search Wyatt's car, that suspicion did not warrant the search of Koehler's laptop.

C. Regardless of the Border Search Exception, CBP Agents Needed a Warrant to Search Ms. Koehler's Laptop Because of the Heightened Privacy Interests.

Regardless of the border search exception, the search performed on Ms. Koehler's laptop required a search warrant. Generally, warrantless searches of cell phones are unconstitutional because of the highly private data which they contain. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014). There, the Court held that the search incident to arrest exception to the warrant requirement did not permit the search of a cell phone. *Id*. The border search exception is analogous to the search incident arrest exception in the context of a cell phone, and computers invoke the same, if not greater, privacy interests than cell phones. Thus, electronic devices deserve a higher level of protection because such searches are more invasive than those conducted in a home.

1. The border search exception is analogous to the search incident arrest exception in the context of a cell phone for purposes of Riley v. California.

The border search exception fails to invoke the necessary exigencies to permit a warrantless search of a computer. *Riley v. California* held that the search incident to arrest exception to the warrant requirement does not justify a search of a cell phone. *Id.* The Court's reasoning can be extended to the border search exception as well. The justification for the search incident to arrest exception is that it allows for the prevention of destruction of evidence and officer safety. *Id.* Since neither of these concerns is present with a cell phone, the court reasoned that the search incident to arrest exception should not extend to the personal information contained within a cell phone. *Id.*

Similarly, these concerns are not present at the international border with electronic devices. The laptop posed no danger to CBP agents and CBP policy requires that the car's occupants be detained away from the vehicle, posing no concern for destruction of evidence. The

border search exception was founded on the principle of protecting our borders and maintaining national security. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). However, the concerns cannot be absolute when weighed against the significant privacy interest in the contents a laptop. Considering that Mr. Wyatt was removed from reaching distance from the laptop, he posed no threat to erasing its contents. As such the government had ample time to obtain a warrant if there were truly national security concerns at issue. Although exigent circumstances such as "prevent[ing] the imminent destruction of evidence . . . pursu[ing] a fleeing suspect, and assist[ing] persons who are seriously injured or are threatened with imminent injury," could justify the search of a digital device, none of these exigencies existed here. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014). Therefore, the only way the search of Ms. Koehler's laptop would have been lawful is with a search warrant.

2. Computers should be afforded the same, if not more, of a reasonable expectation of privacy because of the massive amounts of intimate personal data they contain.

As the Thirteenth Circuit noted below, "[t]he immense storage capacity of a digital device entirely changes a person's reasonable expectation of privacy." R. at 16. (citing Riley v. California, 134 S. Ct. 2473, 2489 (2014)). The Court reasoned that "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.* at 2489. The Court further found that "[while] the sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet." *Id.* Based on this reasoning, the Court noted that there is a categorical difference between searches of containers versus cell phones. *Id.* While *Riley* directly addressed cell phones, the court noted that these devices are effectively mini-computers. *Id.*

The Sixth Circuit extended the *Riley* reasoning to the search of a laptop computer. *United States v. Lichtenberger*, 786 F.3d 478, 488 (6th Cir. 2015). The court recognized that laptops and cell phones fundamentally serve the same function as electronic devices and deserve a heightened expectation of privacy. *Id.* Moreover, intrusions into electronic devices are more revealing than the most invasive searches of the home, and as such, require a heightened expectation of privacy. *Riley v. California*, 134 S. Ct. 2473, 2491 (2014). The Court noted "[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *Id.*

Here, the search at the port of entry involved a computer, which implies the same, if not more of a privacy interest. It is not uncommon for computers to be receptacles of personal data from multiple electronic accessories, including cell phones, cameras, and thumb drives. Considering that the crux of *Riley v. California*'s holding turns on the immense storage capacity for personal data on cell phones, this reasoning logically extends to laptops given their immense storage capacity. Personal data could include medical records, attorney correspondence, and intimate details of the home—all of which the government should not be privy to. Furthermore, with the evolution of cloud storage and wireless backup technology, many of the privacy concerns previously distinct to a cell phone are now shared with a laptop in real time, e.g. locations, photographs, text messages, etc. Accordingly, individual's expectation of privacy in a computer should be equal to, if not greater than, in a cell phone.

While historically the Fourth Amendment protection was at its apex in the context of the home, in modern times this interest is superseded by the privacy interests in a cell phone or laptop. However, that is not to say that the government is without recourse in obtaining information off of electronic devices. In addressing this inquiry, the Court stated, "[o]ur answer

to the question of what police must do before searching [an electronic device] . . . [is] simple—get a warrant." *Id.* During cross-examination, Ms. Koehler's attorney asked Agent Ludgate if she had time to get a warrant before searching Ms. Koehler's computer, to which she responded, "yes." R. at 28.

Thus, because of the wealth of personal data in the hands of the CBP agents, Ms. Koehler had a reasonable expectation of privacy in her laptop. As such, CBP agents' warrantless search of Ms. Koehler's laptop was not justified by the border search exception to the warrant requirement.

II. THE GOVERNMENT'S USE OF THE PNR-1 DRONE AND DOPPLER RADAR DEVICE CONSTITUTED UNREASONABLE SEARCHES UNDER THE FOURTH AMENDMENT.

The State heinously violated Ms. Koehler's reasonable expectation of privacy by utilizing new technology not yet contemplated by the general public to encroach upon her privacy. The Fourth Amendment provides "the right of the people to be secure in their persons [and] houses . . . against unreasonable searches . . . shall not be violated." U.S. Const. amend. IV. A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., Concurring). The State violated Ms. Koehler's Fourth Amendment right when it used the PNR-1 Drone and Doppler radar device to intrude on her privacy interests, and absent these unreasonable searches the State lacked probable cause for a warrant.

A. The Drone Flyover Constituted a Search Because it Invaded on the Curtilage of Ms. Koehler's Home Whilst Failing to Occupy Navigable Airspace.

Ms. Koehler was entitled to a reasonable expectation of privacy because she was subjected to drone surveillance that offends the sentiments of the reasonable person. An individual may not legitimately demand privacy for activities conduct outdoors in open fields,

except in the area immediately surrounding the home, the curtilage. *Oliver v. United States*, 466 U.S. 170, 173 (1984). The curtilage is protected by the Fourth Amendment because, "the intimate activity associated with the sanctity of a man's home and the privacies of life," extends to the area immediately surrounding the home. *Id.* at 180. While one may be entitled to a reasonable expectation privacy in the curtilage of the home from the ground, the Fourth Amendment does not preclude an officer from making observations of clearly visible activities from a public vantage point in which the officer has every right to be, such as the air above. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). Thus, the officer's naked eye observation into the curtilage from a fixed wing aircraft at 1,000 feet was permissible. *Id.* Therefore, non-intrusive searches conducted in *navigable* airspaces fully accessible to the public are reasonable and do not require a warrant. *Id.* (emphasis added). The use of the drone constituted a Fourth Amendment search because Ms. Koehler was within the curtilage of her home, while the drone failed to occupy navigable airspace. Finally the search at issue should not be analyzed under *Ciraolo* due to the inherently surreptitious nature of drones, as distinguished from an airplane.

1. Ms. Koehler was within the curtilage of her home, and as such had a reasonable expectation of privacy when the drone surreptitiously photographed her.

Every curtilage determination depends on its own unique set of facts. *United States v. Dunn*, 480 U.S. 294, 301 (1987). In *Dunn*, the Supreme Court determined that a barn located 50 yards from a fence surrounding the house, used for the manufacture of controlled substances, and visible to observers, was not within the protected curtilage. *Id.* at 302-305. The Court evaluated four factors to determine if an area is within a home's curtilage: (1) the proximity of the area to the dwelling; (2) whether there are enclosures surrounding the area; (3) how the area is used; and (4) how hard the area is being protected. *Id.* at 301. The ultimate question is whether the area in

question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection. *Id.*

The Ninth Circuit considered whether a separate garage where the respondent was growing marijuana was within the curtilage of the home. *United States v. Depew*, 8 F.3d 1424, 1427 (9th Cir. 1993). After applying the *Dunn* factors the court found that it was within the curtilage: first, while the garage was 50-60 feet away from the house in conjunction with the other factors it could still be found to be within the curtilage since there is no fixed limit; second, the court did not find it was dispositive that a small fence separated the garage from the home, rather it was readily identifiable that the adjacent parcel of land was part and parcel with the home; third, the respondent was a practicing nudist and often walked nude on the driveway by the garage, and in distinction from *Dunn* the government possessed no objective data that the garage was being used for illegal activities; and fourth, respondent chose the residence because it was in a remote and secluded area. *Id.* at 1428. It was secluded by natural effects due to a row of thick trees blocking the view and the lower elevation of the highway. *Id.* at 1427-28.

Applying the *Dunn* factors illustrates that the patio area and pool house are intimately tied to the main house. First, while *Depew* supports a finding of curtilage extending as far as sixty feet, what is relevant in that finding is that curtilage is dependent on the circumstances surrounding the home. The proximity of the pool house to the main house would lead one to conclude that they lay on the same contiguous parcel of land. R. at 4. They are connected by a pool and patio supporting that the main house is complemented by the presence of a pool house. R. at 4.

Second, due to Macklin Manor's location, exterior fencing and awnings to shield from aerial observation are unnecessary and should not dispel the homeowner's reasonable

expectation of privacy. Macklin Manor lies alone on the peak of Mt. Partridge. R. at 3. Therefore, it has a natural enclosure from public observation at lower elevations. R. at 3. Additionally, Macklin Manor is covered year round in fog and clouds, another naturally occurring enclosure from the prying eyes of the public. R. at 3. This is of particular relevance to aerial observations, as planes and other aircraft eschew Mount Partridge due to the extremely limited visibility. R. at 3. Therefore, a reasonable person at Macklin Manor would retain an expectation of privacy from aerial intrusions.

Third, the use of the area at issue is distinguishable from *Dunn* and analogous to *Depew*. In *Dunn*, the barn had objectively been discerned as a methamphetamine laboratory prior to the State's intrusion, and could not invoke the same privacy concerns as a pool in someone's backyard. Here, the officers lacked any objective facts to support a presumption that the pool area was used for anything other than pool-related activities. R. at 3-4. A pool and its attendant patio and pool house constitutes an area where intimate activities associated with the sanctity of a man's home may take place. A pool by its very nature involves intimate moments by requiring people to disrobe to enjoy it. Holding that the pool area lies outside the curtilage would result in a dangerous precedent that effectively would permit State officials to aerially survey backyard pools, thereby revealing those intimate activities, whether it be swimming nude or something more salacious. Furthermore, the curtilage should include the pool house, as many of the same intimate activities undertaken in pool would be likely undertaken in the pool house. Lack of permanent residence in the pool house is irrelevant to a curtilage determination considering that the respondent in *Depew* did not spend every waking hour nude on his driveway fifty feet from his home. Yet the court still found that he had a reasonable expectation of privacy when considering all the factors in totality, suggesting that the same should be the case here.

Fourth, the particular location of Macklin Manor represents the effort that the occupier has taken to protect their privacy. The home sits alone on the top of a mountain that no planes fly over and is perpetually shrouded in clouds and fog. R. at 3. The District Court failed to consider these facts in the curtilage analysis, but the court in *Depew* considered them determinative. *Depew,* 8 F. 3d at 1428. The remote location of Macklin Manor serves as a natural barrier to the incursions by the public. There is a reduced need for artificial shielding of the property. While the pool and pool house are not enclosed, the officers viewed these areas through surreptitious means that members of the general public would not use. They were unable to initially view these areas until they received pictures and video of the layout of the home. Only then did they begin to intrude on the curtilage of the home and proceed with their Doppler radar device to uncover the presence of the defendants. The remote and secluded nature of Macklin Manor represents the efforts that the owner took to protect it from public view.

The patio area and pool house were within the curtilage of the main house and Ms. Koehler had a reasonable expectation of privacy in that area.

2. ECPD's aerial surveillance violated Ms. Koehler's reasonable expectation of privacy because the prosecution failed to prove that the drone surveillance abided by altitude regulations or was conducted in a reasonable manner.

The aerial surveillance was unreasonable because the drone operated outside of navigable airspace when it surveyed Macklin Manor. A plurality found that aerial surveillance occurred in navigable airspace because the officers had complied with applicable laws and regulations. *Florida v. Riley*, 488 U.S. 445, 451 (1989) (affirming *Ciraolo* when surveillance was conducted from a helicopter at 400 feet within FAA regulations). However, Justice O'Connor in concurrence reasoned what constitutes navigable airspace is whether the aerial surveillance is conducted in a public airway at an altitude that the public used with sufficient regularity such

that defendant's expectation of privacy from aerial observation would be unreasonable. *Id.* at 455. (O'Connor, J., Concurring). As such, the determination as to whether the aerial surveillance constituted an intrusive search conducted outside of navigable airspace is a twofold inquiry: (1) whether the aerial surveillance failed to comply with applicable laws and regulations; and (2) whether the aerial surveillance was in an airspace at an altitude at which members of the public travel with insufficient regularity that the defendant's expectation of privacy from aerial observation was one that society is prepared to recognize as reasonable. *United States v. Breza*, 308 F.3d 430 (4th Cir. 2002).

Regarding the first question from *Florida v. Riley*, the PNR-1 drone violated Pawndale's altitude regulation—prohibiting drones from exceeding an altitude of 1,640 feet—thus, it cannot be considered to have been in the navigable airspace when it was observing Ms. Koehler. R. at 4. The drone operator lost track of the drone for four to five minutes, during which the operator, Officer Lowe, stipulated that it was possible that the drone exceeded the altitude limit. R. at 41. Statistics support this conclusion because the PNR-1 drone exceeds altitude limits 60% of the time. R. at 41. The State must be able to categorically prove that they abided by all applicable laws and regulations in order to show that were conducting surveillance in navigable airspace. Unlike *Ciraolo* and *Florida v. Riley*, the ECPD officers were not occupying the aircraft so they cannot affirmatively show that they abided by all regulations considering they lost track of the drone's altitude. R. at 41. As such, the State lacks affirmative proof of compliance with Pawndale altitude limits, and empirical data suggests they may not have complied with the limit.

Regarding the second question from *Florida v. Riley*, the PNR-1 drone was not in navigable airspace because members of the general public did not use the airspace around Macklin Manor with sufficient regularity. Living in an area exempt from aerial flyovers lessens

the presumption that the government would use such airspace for surveillance purposes. Here, Macklin Manor is a decidedly quiet and remote location for a home due to its geographic position on top of a mountain on the outskirts of town. R. at 3. These facts alone would support an assumption that planes rarely fly over the home. This assumption is bolstered by the fact that the home is perpetually shrouded in clouds and fog, and airplanes purposely eschew the location. R. at 3. Officer Lowe confirmed on both accounts that the airspace surrounded the home had poor visibility and that not a single plane had flown over the home during the course of the surveillance. R. at 42. Therefore, the airspace above Macklin Manor is not navigable because it not used by the public with sufficient regularity such that Ms. Koehler's expectation of privacy from aerial surveillance is not unreasonable.

It would be incompatible with *Ciraolo* and *Florida v. Riley* to say the use of the drone is reasonable when the officers viewed Ms. Koehler from an illegal vantage point that is never utilized by members of the public.

3. The Court must find the drone search unreasonable because drones represent "future 'electronic' developments that could stealthily intrude upon an individual's privacy."

Drones are by their nature surreptitious and stealthy, and they cannot be considered under the same standard utilized for airplanes and helicopters. The Court reasoned that airplanes were not in the category of future electronic developments that could stealthily intrude upon an individual's privacy that Justice Harlan was concerned with in *Katz*. *Ciraolo,* 476 U.S. at 215. While private and commercial flight in public airways have become routine, drones represent the stealthy electronic developments that Justice Harlan was concerned with. *Id.*

The use of drones for domestic surveillance purposes invoke the concern of *Katz* because of the undetected ease of access they can provide their operator into the personal lives of

individuals they are observing. In *Ciraolo*, the Court reasoned that airplanes do not represent the sort of technology that would permit the government to stealthily intrude on the privacy of individuals. *Ciraolo,* 476 U.S. at 215. However, drones by their very nature are stealthy and provide the government with ample opportunity to intrude on the privacy of individuals without detection. While it could be said that drone usage has become so pervasive that no one can have a reasonable expectation of privacy from being observed by a drone, their use is still highly regulated. Several states are contemplating various forms of legislation that would limit the uses of drone technology for surveillance activities—certain states would require probable cause to use a drone for surveillance.[2] Furthermore, drone surveillance is monumentally cheaper to employ than surveillance via helicopter or aircraft. Accordingly, treating a drone similarly under the Fourth Amendment would lead to an exponential increase in their surveillance usage. These concerns illustrate how drone searches are fundamentally different than those searches contemplated by *Ciraolo* and *Florida v. Riley*, and as such cannot be analyzed under the same paradigm.

Given the implications surrounding their use, the Court finding that drone surveillance is analogous to airplane surveillance would be anomalous and contrary to popular sentiment of the American public.

Under established precedents the drone search was unreasonable because it violated the curtilage of Macklin Manor when it operated outside of navigable airspace. Notwithstanding such analysis, this Court should find the drone surveillance unreasonable because drones are not

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[2] Allie Bohm, *The Year of the Drone: An Analysis of State Legislation Passed This Year*, ACLU (Nov. 7, 2013) https://www.aclu.org/blog/privacy-technology/year-drone-analysis-state-legislation-passed-year?redirect=blog/technology-and-liberty/year-drone-roundup-legislation-passed-year

the aircraft contemplated by *Ciraolo* and *Florida v. Riley*, and invoke much greater privacy concerns.

B. The Doppler Radar Device's Use Violated Ms. Koehler's Fourth Amendment Right to be Free from Unreasonable Searches.

The Doppler's use violated the Fourth Amendment because it invaded on Ms. Koehler's reasonable expectation of privacy. Furthermore, in using the Doppler, the officers violated the Fourth Amendment by physically trespassing on the curtilage of her home.

1. The Doppler's use offends the notions of the reasonable expectation of privacy in the home and the body by allowing police officers to peer into the vital functions of an individual to detect their presence.

The use of the Doppler allows officers to determine information about the inside of the home without actually going in—this sort of technology has always been highly scrutinized by the Court. The Court held that the use of sense-enhancing technology to gather information regarding the interior of a home that could not have been retrieved without actually going inside is prohibited under the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 40 (2001). However, a person's reasonable expectation of privacy may be lowered when the police use devices of common usage to conduct the search. *Id.* The Court found the use of thermal imaging technology was unreasonable because it allowed law enforcement officials access to details of the interior of the home that could not be gathered without going inside, and it was not in common use. *Id*. That the Tenth Circuit failed to reach the issue of whether the use of a Doppler was prohibited under the Fourth Amendment is not to say they did not opine as to the implications of the use of such technology: "[i]t's obvious to us . . . that the government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions." *United States v. Denson*, 775 F.3d 1214, 1218 (10th Cir. 2014). Those grave Fourth Amendment questions are now before this Court, and to which Ms. Koehler answers that: (1) the

Doppler gained information that would not otherwise be obtainable without entering the house; and (2) the Doppler is not in common public use, and as a result its use in a search is unreasonable.

First, the exact location and number of individuals within the home could have never been determined without using the Doppler. The State's argument is premised on the grounds that mere observation would have uncovered the same information that the Doppler did, as the individuals would have inevitably walked outside. However, this is a false equivalence because the Doppler expedited the discovery of such information. Mere observation would have taken hours if not days to discover how many individuals were in the home. This assertion also fails to take into account that mere observation would have never been able to provide law enforcement with the exact number of individuals that were within the home. R. at 11. Furthermore, mere observation either by way of ground or aerial surveillance is not able to uncover the exact position of the individuals within the home. Conversely, the Doppler obtains information from within a subject's body by measuring lung function, which is beyond its subject's control. Thus, its use constitutes a two-fold invasion of privacy of both home and the intimate bodily functions of its subject.

Second, the device is not in common use such that it would reduce one's reasonable expectation of privacy. Detective Perkins admitted that this technology is used almost exclusively by law enforcement, and would not serve a purpose to an average citizen. R. at 35. Moreover, the police department purchased the device directly from the manufacturer (they are not available on common carriers such as Amazon) further supporting the notion they are not in common use. R. at 35. The very purpose of *Kyllo*'s holding was to protect individual's

expectation of privacy from incursions via sophisticated technology used exclusively by law enforcement officials.

The Doppler scan was a search under the Fourth Amendment because it revealed information about the inside of the home and the inside of the body that could not be obtained without a highly invasive search, and the device itself is not in public use.

2. The officers' conduct while using the Doppler constituted a violation of the Fourth Amendment because they physically trespassed on the curtilage of Ms. Koehler's home.

In addition to the Fourth Amendment protecting the reasonable expectation of privacy of the person, there are some places, namely the home, that are so fundamentally sacred that were a trespass to occur it would constitute a search under the Fourth Amendment regardless of whether the person had a reasonable expectation of privacy. *United States v. Jones*, 565 U.S. 400, 407-08 (2012). Moreover, this Court has consistently held that the curtilage is part of the home. *Oliver v. United States*, 466 U.S. 170, 178 (1984). Thus, when the officers approached the front door with the Doppler, it was a trespassory invasion of the curtilage which constituted a "search" for Fourth Amendment purposes. *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (observing that curtilage should receive the same protections as the home). The Court applied this rationale when the police used a drug-sniffing dog to roam around the front of the house to detect marijuana—the scope of the implied license is limited in purpose: "[t]o find a visitor knocking on the door is routine; to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to . . . call the police." *Id. Jardines* is directly applicable to Ms. Koehler's case, as both involved invasions on the curtilage of a home, while utilizing sense-enhancing methods in hopes of discovering incriminating evidence.

Here, while officers had an implied license to be within the curtilage (because anyone could knock on the door), there was no customary invitation for officers to employ the Doppler and scan the area around the home in hopes of discovering incriminating evidence. This sort of physical trespass has never been tolerated under Fourth Amendment jurisprudence. The number and location of the individuals in the home was critical information because the officers were able to discover that the Ford children were actually in the home, and how many people were in on the plot. R. at 34. An assertion that the officers were beyond the curtilage is meritless because Detective Perkins moved throughout the whole property with his Doppler radar device. R. at 34. In order for Detective Perkins to scan the pool house, he would have to had intruded on the curtilage at some point during his scans. This scan illustrates the concerns of *Jardines* because it involves the officers trawling around the intimate areas of the exterior of the home probing with sense-enhancing methods for incriminating evidence. The Fourth Amendment's protection of the home would be of little practical value if the Court upholds this flippant and intrusive behavior.

The search violated the Fourth Amendment under the common law trespass doctrine, as the Officers intruded on the curtilage of the home whilst using sense-enhancing methods.

C. Since the State Lacked Probable Cause to Search Macklin Manor from the Information Obtained from the Laptop at the Border, the Information Collected Through the Use of Advanced Technology Were Fruits of Unreasonable Searches.

The facts indicate that the officers lacked probable cause for a search warrant prior to their intrusive searches of Macklin Manor. Furthermore, the notion that officers had ample time to obtain a search warrant and failed to do so, suggests that they understood that they lacked probable cause, as immediately obtaining a search warrant would have been the prudent thing to do. R. at 28. Probable cause is a fluid concept that turns on "the assessment of probabilities in particular factual concepts—not readily, or even usefully, reduced to a neat set of legal rules.

Illinois v. Gates, 462 U.S. 213, 232 (1983). Probable cause is determined by a totality of the circumstances. *Id*. The principal components of probable cause are (1) the events leading up to the search and (2) whether these facts, viewed from an objectively reasonable officer, resulted in probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

Upon viewing the facts, an objectively reasonable officer would not be able to find probable cause because there was nothing linking Macklin Manor to the kidnapping. The attenuation between the lease agreement and all of the other facts is significant. The lease began six months prior to the events that unfolded, and before the Ford children had been kidnapped supporting the conclusion that Macklin Manor was being used for benevolent and reasonable purposes—not as a staging area for a larger conspiracy. R. at 3. Ms. Koehler is a felon that much is undisputed, which would naturally impact her ability to rent a home. Thus, she unfortunately had to resort to fraudulent means to obtain housing. R. at 3. Furthermore, the presence of Mr. Ford's personal information does not support the conclusion that Ms. Koehler was involved in the kidnapping because the documents viewed did not contain any information about his children's schedules. R. at 3. This information could only lead a reasonable officer to deduce that Ms. Koehler had an interest in Mr. Ford, but without any sort documentation linking the Ford children to Ms. Koehler it is hard to support the notion that there was probable cause to believe that the children were at Macklin Manor.

The record indicates that Officers had ample time to obtain a warrant. R. at 27. If they had probable cause, they could have quickly gotten a warrant and then conducted intrusive technological searches to account for their "safety" concerns. Detective Perkins attested to the fact that there was an additional accomplice in the house after they returned with a warrant following their preliminary searches. R. at 34. This points to an underlying issue: if the officers

were truly concerned for their safety or that of the children, why did they leave Macklin Manor unattended? R. at 34. Thereby failing to account for any additional people entering (or leaving) the house for the duration of time between conducting the preliminary searches and returning with the search warrant. The officers did themselves a disservice by relying on such outdated information in such a sensitive situation if safety was their primary purpose for conducting the preliminary searches. This supports the conclusion that the information was ultimately irrelevant in the context of officer safety and was only necessary to find sufficient probable cause for a warrant to search the home.

Therefore, the Officers could not have established probable cause for a search warrant without the intrusive technological searches they employed, and as such any evidence retrieved would be fruits of the poisonous tree.

CONCLUSION

For the foregoing reasons, Ms. Koehler respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit's reversal of the District Court’s decision to deny Ms. Koehler’s motion to suppress.