Team P35

No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 2017

UNITED STATES OF AMERICA,

Petitioners,

v.

AMANDA KOEHLER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

Counsel for Petitioner

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STATEMENT OF THE ISSUES

1. Whether the search of Respondent's laptop at the Eagle City border station was unreasonable under the border search exception to the Fourth Amendment.

2. Whether the officers use of the PNR-1 drone and handheld Doppler radar device constituted a search in violation of Respondent's Fourth Amendment Rights.

STATEMENT OF THE FACTS

On August 17, 2016, at 3:00 A.M., Scott Wyatt was attempting to cross the United States-Mexico border through a border station in Eagle City, Pawndale. R. at 2. As is custom at that early hour, U.S. Border Patrol Agents stopped Mr. Wyatt's vehicle. R. at 25. Agents Christopher Dwyer and Ashley Ludgate proceeded to approach Mr. Wyatt's vehicle and asked him why he was crossing the border. R. at 2. Upon being questioned, Mr. Wyatt became extremely agitated and uncooperative. *Id*. The agents noticed that Mr. Wyatt was avoiding eye contact, fidgeting with the steering wheel, and very pale. R. at 26. The agents then asked Mr. Wyatt if he was transporting $10,000 or more of U.S. currency, Mr. Wyatt stated that he was not. *Id*. The agents informed Mr. Wyatt that they were going to do a routine search of his vehicle. *Id*.

Agent Dwyer asked Mr. Wyatt to step out of the vehicle and open the trunk. *Id*. Upon inspection of the trunk, Agent Dwyer found $10,000 in $20 bills. *Id*. Agent Dwyer also found a laptop with the initials "AK" inscribed into it. *Id*. When asked if the laptop was his, Mr. Wyatt stated that he shared the laptop with his fiancé, Amanda Koehler. *Id*. The agents proceeded to run the name Amanda Koehler through the criminal intelligence and border watch database. *Id*. The search of the database revealed two things: 1) Amanda Koehler had been convicted of multiple felony level crimes of violence; and 2) Amanda Koehler was a person of interest in a recent high-profile kidnapping case of three children. *Id*.

The kidnapping case in which Ms. Koehler was a person of interest had garnered national attention because the kidnapped children were the kids of billionaire tech mogul Timothy H. Ford. R. at 27, 44. The Ford children had been kidnapped on their way to school and were being held for ransom. *Id*. Although the Ford children were originally kidnapped in San Diego,

California, the FBI and Eagle City Police Department had received information that led them to believe the children were being held in Eagle City. *Id*. On August 17, the same day that Mr. Dwyer's vehicle was stopped at the border station, the kidnappers had agreed to give proof of life in the form of a phone call from one of the children. R. at 2. In exchange for the proof of life call, the kidnappers were to receive $10,000 in $20 bills. *Id*. The money was due to the kidnappers by noon the following day, August 18. *Id*. Like every Border Patrol Agent at the Eagle City border station, Agent Dwyer and Agent Ludgate had been briefed on the Ford children kidnappings. R. at 27. The agents were aware that the kidnappers had recently demanded $10,000 in $20 bills in exchange for proof of life. *Id*.

Agent Ludgate opened the laptop that was found in the trunk of Mr. Wyatt's vehicle. R. at 2. The laptop was not password protected. R. at 28. Agent Wyatt found several documents already open in the desktop of the laptop. *Id*. Agent Ludgate noticed that many of the documents already open in the desktop contained Timothy H. Ford's personal information such as his personal address, bank statements, personal schedule, and his employee's names and schedules. R. 3, 28. The only document which was already open in the desktop that did not contain Mr. Ford's information was a lease agreement. *Id*. The lease agreement had the name "Laura Pope" on it and contained an address that did not match Mr. Ford's address. *Id*. Agent Ludgate proceeded to run the name "Laura Pope" through the criminal intelligence and border watch database. R. at 28. The search of the database revealed that Laura Pope was an alias used by Amanda Koehler. *Id*. Agent Ludgate then placed Mr. Wyatt under arrest for failing to declare in excess of $10,000, a violation of 31 U.S.C. § 5136. R. at 3.

Agent Ludgate proceeded to contact Detective Raymond Perkins, lead detective on the Ford kidnappings, to report their findings. *Id*. Detective Perkins traced the address found on the

lease agreement to an estate called Macklin Manor. *Id*. Macklin Manor is a large estate that sits atop Mount Partridge on the outskirts of Eagle City. *Id*. The top of Mount Partridge is perpetually cloudy and foggy, causing aircraft to often avoid the mountain when coming or going from Eagle City. *Id*. Macklin Manor sat vacant since 2015, until around six months ago, when a company called R.A.S. purchased the estate. *Id*. Law enforcement learned that R.A.S. was owned by "Laura Pope," a known alias for Amanda Koehler. *Id*.

Armed with this information, law enforcement was hesitant to approach Macklin Manor. R. at 2-3. Detective Perkins, Officer Kristina Lowe, and Officer Nicholas Hoffman were the first to near the estate at around 4:30 A.M. R. at 3. Due to the size of the estate and the safety concerns surrounding the situation, Detective Perkins's decided that loose surveillance of the estate was necessary. R. at 3, 32. Detective Perkin's assigned Officer Hoffman to patrol the area on foot and assigned Officer Lowe to conduct an aerial search of the estate using a drone. R. at 3. At dusk, Officer Lowe parked her car about two blocks away from Macklin Manor and deployed a PNR-1 drone over the estate. R. at 3-4.

The drone took about seven minutes to arrive at Macklin Manor, hovered above the estate for fifteen minutes, and took another seven minutes to return to Officer Lowe. R. at 4. While over the estate, the drone took twenty-two photos and recorded three minutes of video. *Id*. The photos and video provided the officers with the estate's layout which includes a large main house, a pool that is about fifteen feet away from the main house, and a single-room pool house that is about fifty feet away from the main house. *Id*. There is no fence or gate surrounding the estate. *Id*. The pictures also showed a young female near the pool house. R. at 33. After running the picture through the police database, Detective Perkins was able to confirm that the female in the photograph was Amanda Koehler. R. at 4, 33.

Having confirmed that Ms. Koehler was at the estate, Detective Perkins became concerned that alerting Ms. Koehler of the officer's presence would endanger the lives and safety of any potential hostages. R. at 4. To see if they were outnumbered and if it was safe to conduct a search, Detective Perkins and Officer Hoffman cautiously approached the front of the main house of Macklin Manor. *Id*. Detective Perkins then scanned the front door area of the main house with a Doppler radar device. *Id*. The Doppler radar device sends out a radio wave that can detect movements up to fifty feet away. *Id*. Typically zeroing in on a person's breathing, the Doppler radar reveals how many people are breathing within fifty feet of the scan and approximately where those people are located. *Id*. The Doppler radar device cannot reveal the layout of a home. *Id.*

The scan of the main house revealed what appeared to be one individual in the front room of the house, ten to fifteen feet away from the front door. R. at 34. The officers then worked around the main house towards the pool house. R. at 5. Detective Perkins scanned the pool house revealing what appeared to be three individuals in close proximity, breathing but not moving. *Id*. Another individual appeared to be pacing near the front of the pool house, presumably standing guard. *Id*. After confirming how many individuals were at the estate and how many officers would be required to conduct a safe search, the officers retreated and obtained a search warrant for the estate. R. at 5, 34.

At around 8:00 A.M. on August 17, Detective Perkins, Officer Lowe, and Officer Hoffman approached Macklin Manor accompanied by a SWAT team. R. at 5. As permitted by the warrant, the officers conducted a no-knock and notice entry into the main house of the estate. *Id*. With their weapons drawn, the officers entered the estate and detained two individuals in the living room. *Id*. The two individuals were later identified as Dennis Stein and Sebastian Little.

Id. A third individual, later identified as Amanda Koehler, fled out of the back door of the house. *Id*. Officer Lowe and Officer Hoffman gave chase and were able to detain Ms. Koehler before she was able to escape the estate. *Id*. The officers found a Glock G29 handgun on Ms. Koehler's person. *Id*. As also permitted by the warrant, the officers then used force to enter the pool house. *Id*. Upon entering the pool house the officers detained the individual standing guard, later identified as Jamison Erich. *Id*. Inside the pool house, the officers found the three missing Ford children tied to chairs but otherwise unharmed. *Id*.

On October 1, 2016, a federal grand jury indicted Amanda Koehler on three counts of kidnapping under 18 U.S.C. § 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1). *Id*. Ms. Koehler filed a motion to suppress evidence seized on the day of the arrest, pursuant to Rule 12(b)(3)(c) of the Federal Rules of Criminal Procedure. R. at 1. In her motion, Ms. Koehler argued that her Fourth Amendment rights were violated when: 1) Agent Ludgate searched her laptop at the Eagle City border station; 2) Officer Lowe used the PNR-1 drone to fly over Macklin Manor; and 3) Detective Perkins used the handheld Doppler radar device to scan the main house and the pool house at Macklin Manor. R. at 5. On November 25, 2016, the United States District Court for the Southern District of Pawndale denied Ms. Koehler's motion. R. at 1.

On July 10, 2017, the United States Court of Appeals for the Thirteenth Circuit reversed and remanded the district court's ruling. The Court held that Ms. Koehler's Fourth Amendment rights were violated when: 1) Agent Ludgate searched the laptop at the Eagle City border station; 2) Officer Lowe used the PNR-1 drone to fly over Macklin Manor; and 3) Detective Perkins used the handheld Doppler radar device to scan the main house and the pool house at Macklin Manor.

R. at 15. Thereafter, the Supreme Court of the United States of America granted certiorari for the November 2017 term. R. at 2.

SUMMARY OF THE ARGUMENT

Border Search

The border search exception deems any search of persons and their effects reasonable if it occurs at the United States border. The government's interest in protecting its borders and stopping an influx of criminal activity is paramount to the individual's lowered expectation of privacy when crossing into the country. Due to these competing interests, reasonable suspicion is the highest level of Fourth Amendment protections afforded to the individual against the most intrusive searches.

During a routine search at the border, border patrol agents can search persons and all their effects without possessing reasonable suspicion. Agents Ludgate and Dwyer performed a routine search of Mr. Wyatt's vehicle and a cursory search of his laptop. The laptop is a container which could be used to hide contraband and upon opening the top of the laptop incriminating evidence was revealed to Agent Ludgate.

Even if the laptop search constitutes a significant intrusion on the Respondent's privacy rights, the agents had reasonable suspicion based on the totality of the circumstances to conduct a non-routine search. Mr. Wyatt had a suspicious demeanor, the exact amount and denomination of money the kidnapper's requested, and was engaged to the Respondent, who was a known person of interest in the Ford kidnappings. This finding of reasonable suspicion allows for searches that significantly intrude on the privacy rights of the individual.

Finally, the lower court erred when it relied on *Riley v. California* as the basis for granting the Respondent's motion to suppress. The *Riley* limitation on searches incident to arrest was explicitly limited to the search incident to arrest exception to the warrant requirement.

Drone Surveillance

The Fourth Amendment provides protections to the home and its curtilage because these areas are a safe haven for the intimate activities associated with the sanctity of a man's home and the privacies of life. Whether an area is protected under the homes umbrella of Fourth Amendment protection is determined by whether an individual reasonably should expect the area to be treated as the home itself. Curtilage is generally determined by four factors : 1) the proximity of the area to the home; 2) whether there are any enclosures surrounding the home; 3) how the area is used; and 4) the steps taken by the resident to protect the area form observation.

The area observed by the PNR-1 drone was not close to the main house. There were no enclosures surrounding Macklin Manor or the main house. The area was not used for the intimate activities associated with the sanctity of a man's home and the privacies of life. The Respondent took no steps to protect any part of Macklin Manor from observation. Therefore, the area the drone observed was not intimately tied to the home itself; thus, it was caught out in the rain, without the Fourth Amendment's umbrella as protection.

Even if an area is deemed to be curtilage, what a person knowingly exposes to the public, even in his home, does not warrant Fourth Amendment protection. Law enforcement does not have to shield their eyes when making observations from a public vantage point where they have a right to be. In an age where private and commercial flight in navigable air space is routine, it is unreasonable for an individual to expect that their property will not be viewed from people on such flights.

The PNR-1 drone was flying from navigable airspace where it had every right to be. Any member of the public could have legally flown a drone over Macklin Manor and observed what the PNR-1 drone observed. Officers do not have to obtain a warrant to observe what is clearly visible to any drone flown by the public. Thus, the Respondent had no societally-recognized reasonable expectation of privacy in the area observed by the PNR-1 drone.

Doppler Scan

Obtaining by sense-enhancing technology any information in regard to the interior of a home that could not otherwise have been obtained without physically entering the house constitutes a search, unless the technology is in general public use. Doppler radar devices similar to the one in question are readily available in today's society. Similar devices can and are being purchased by the general public at an insignificant price on mobile phones. Therefore, the Doppler radar device used to scan Macklin Manor is in general public use.

Probable Cause

Under the Fourth Amendment, a search warrant will only be issued upon a showing of probable cause. Probable cause turns on the assessment of probabilities in particular factual contests. To determine if an officer had probable cause to search, courts look at the events which occurred leading up to the search and whether they would amount to probable cause to an objectionably reasonable officer. Probable cause determinations are always made base on the totality of the circumstances.

Before the officers used the PNR-1 drone or the Doppler radar device: 1)Mr. Wyatt was acting suspiciously; 2) Mr. Wyatt lied to the border agents; 3) Mr. Wyatt was in possession of the exact amount of money and denomination demanded by the Ford children's kidnappers; 4) Mr. Wyatt was the fiancé of a person of interest in the Ford kidnappings, Amanda Koehler; 5)

Mr. Wyatt was in possession of a laptop containing documents with Mr. Ford's personal information and a lease agreement for Macklin Manor; and 6) the lease agreement was in the name of a known alias of Ms. Koehler. Viewing these historical facts in their totality, an objectionably reasonable officer would believe that probable cause existed.

STANDARD OF REVIEW

"Whether police conduct amounts to a 'search' within the meaning of the Fourth Amendment is a mixed question of law and fact. In such a case however, consideration of abstract legal principles which inform constitutional jurisprudence is required. Thus, de novo review is appropriate." *United States v. Broadhurst*, 805 F.2d 849, 852 (9th Cir. 1986). Determinations of reasonable suspicion and probable cause are reviewed de novo on appeal. *Ornelas v. United States,* 517 U.S. 690, 699 (1996). "[A] reviewing court should take care both to review findings of historical fact only for clear error and give due weight to inferences drawn from those facts by residing judges and local law enforcement." *Id*. "[T]he question of whether an area is within the curtilage is ultimately a legal one, and thus is subject to de novo review, while antecedent factual findings are reviewed for clear error." *United States v. Breza*, 308 F.3d 430, 435 (4th Cir. 2002).

ARGUMENT

I. THE BORDER SEARCH OF RESPONDENT'S LAPTOP WAS REASONABLE UNDER THE BORDER SEARCH EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

A. The Border Search Was Routine Because The Cursory Search Of The Laptop Was Not A Significant Intrusion On The Respondent's Privacy Rights.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Not all searches are forbidden under the Fourth Amendment,

however. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The Constitution forbids only those warrantless searches deemed unreasonable. *Id*. Further, any search is reasonable if it fits within one of the generally accepted exceptions to the Fourth Amendments warrant requirement. *See Kentucky v. King*, 563 U.S. 452, 460, (2011).

Border searches are a recognized exception to the warrant requirement and deems any search occurring at one of our nation's borders "reasonable by the single fact that the person or item in question had entered our country from outside." *United States v. Rams*ey, 431 U.S. 606, 619 (1977). At the border, "the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004). This Court has held the government's superior interest at the border allows for routine searches and seizures of the person and effects without requiring reasonable suspicion, probable cause, or a warrant. *United States v. Montoya De Hernandez*, 473 U.S. 531, 541 (1985). Therefore, border patrol agents are permitted to search a travelers' closed containers without any level of suspicion. *See Flores-Montano*, 541 U.S. at 152-53; *Montoya De Hernandez*, 473 U.S. at 538.

Agents Dwyer and Ludgate performed a routine search of Mr. Wyatt's vehicle and effects at the Eagle City border station. *Ramsey* at 617; R. at 2. This routine search was reasonable because Mr. Wyatt was attempting to cross the border into the United States. *Id*. Upon discovering the laptop, Agent Ludgate performed a search of the laptop by opening the top and conducting a brief cursory search only of plainly visible information. R. at 3. Agent Ludgate treated the laptop like any other container or piece of luggage capable of hiding contraband. This search was appropriate because the inside of a laptop can be hollowed out to hide drugs or other contraband like a traditional container. Further, once the top of the laptop was open, the

evidentiary value of the already opened documents on the desktop was immediately apparent. R. at 3. Agent Ludgate did not perform a highly intrusive search of the laptop, such as an exhaustive forensic search of the hard drive. *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013). Agent Ludgate merely opened the top of the laptop and conducted a brief cursory search of plainly visible information. R. at 3.

B. The Border Agents Possessed The Reasonable Suspicion Necessary to Conduct A Non-Routine Search.

If this Court finds that the border search of the laptop was non-routine, this Court's analysis of the constitutionality of the border search should not end with that determination. Border agents may conduct a non-routine search which may substantially infringe upon an individual's privacy rights if they possess reasonable suspicion. *Montoya De Hernandez*, 473 U.S. at 541. Reasonable suspicion is determined by a totality of the circumstances and is defined as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cotterman*, 709 F.3d at 968 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, (1981)). This Court has held that the government's interest in protecting its borders is so great that even in cases where the intrusions on an individual's privacy rights would otherwise require an independent finding of probable cause in the interior, only reasonable suspicion is required to permit the most intrusive intrusions at the border. *Montoya De Hernandez*, 473 U.S. at 538.

In *Flores-Montano*, this Court clarified that the only time a border search can be non-routine is when it is a "highly intrusive search of the person." 541 U.S. at 152. This Court refused to apply a complex balancing test of interests when determining if a search of a traveler's property is routine or non-routine. *Id*. Nonetheless, the Petitioner is cognizant of the fact that current technology now gives individuals the ability to travel with large amounts of data on their personal electronic devices such as laptops and smartphones. The issue of whether there are

limits to a non-routine border search of such personal electronic devices, is one of first impression for this Court. However, the Ninth Circuit Court of Appeals has directly addressed this issue and its holding is instructive. *See Cotterman*, 709 F.3d at 966. In *Cotterman*, the Court addressed whether an exhaustive forensic examination of a laptop capable of storing large amounts of data is permitted during a non-routine search at the border. *Id*. The Court held that property, such as a laptop and other personal electronic devices capable of storing large amounts of data, are subject to exhaustive forensic examinations when border patrol agents conduct a non-routine search based on reasonable suspicion. *Id*.

Here, the border patrol agent's search of the Respondent's laptop was reasonable because it occurred at the border where the highest level of Fourth Amendment protection against the most intrusive searches is reasonable suspicion. *Montoya De Hernandex*, 473 U.S. at 538. Here, the border agents had reasonable suspicion allowing for a non-routine search of Mr. Wyatt's laptop. The agents gathered the reasonable suspicion necessary for the most intrusive searches at the border, based on a totality of the circumstances, obtained during the stop and routine search of Mr. Wyatt. *Id*. The circumstances rose to reasonable suspicion because Mr. Wyatt: 1) upon questioning, became extremely agitated and uncooperative; 2) avoided eye contact, fidgeted with the steering wheel, and was very pale; 3) lied and told the agents he was not transporting $10,000 or more in U.S. currency; 4) had the exact amount of money and denomination demanded by the Ford children's kidnappers; 5) was the fiancé of a person of interest in a high-profile kidnapping. R. at 2, 26. Based on the totality of the circumstances, border agents Dwyer and Ludgate gained "a particularized and objective basis" for suspecting Mr. Wyatt and Ms. Koehler of criminal activity allowing the agents to perform a more intrusive non-routine search of the laptop. *Cortez*, 449 U.S. at 417-18; R. at 2-3.

C. Analyzing A Search Conducted At The Border In The Same Manner As A Search Incident To An Arrest Is Inappropriate.

Furthermore, while the Petitioner appreciates the 13th Circuit Court of Appeals reasoning in determining that the boarder search was in violation of the Fourth Amendment, the Court's reasoning was misguided. The lower Court's decision relies on *Riley v. California*, which offers a detailed analysis of the privacy concerns related to the search of electronic devices, however, *Riley* is factually distinguishable from this case. *Riley v. California*, 134 S. Ct. 2473 (2014). In *Riley*, the Fourth Amendment warrant requirement exception in question was a search incident to arrest. *Id*. at 2488. Here, the Respondent's laptop was searched at the border invoking the border search exception and not the search incident to arrest exception. *Id*. This Court has routinely emphasized that searches occurring at the border are unique and generally exempt from the limits imposed on domestic searches. *Flores-Montano*, 473 U.S. at 539. Furthermore, this Court, in *Riley*, explicitly limited the warrant requirement for cell phone searches to the search incident to arrest exception, stating that "even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Riley*, 134 S. Ct at 2494. The non-routine border search exception to the warrant requirement is an exception to the Fourth Amendment which justifies a warrantless search of personal electronic devices. *See Cotterman*, 709 F.3d at 956-57.

II. OFFICER LOWE'S USE OF THE PNR-1 DRONE DEVICE TO SURVEIL MACKLIN MANOR DID NOT VIOLATE MS. KOEHLER'S FOURTH AMENDMENT RIGHTS.

A. The Area Observed By The PNR-1 Drone was not Curtilage Subject to Fourth Amendment Protection.

The protections provided under the Fourth Amendment only extends to certain areas. *See Hester v. United States*, 256 U.S. 57, 59 (1924). For example, open fields do not warrant the

Fourth Amendment's protection because "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver v. United States*, 466 U.S. 170, 179 (1984). "An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Id*. at 176. If an "area harbors the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" it is afforded Fourth Amendment protection. *United States v. Dunn*, 480 U.S. 294, 301 (1987) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). One such area warranting Fourth Amendment protection is the curtilage of a home. *Dunn*, 480 U.S. at 300. The extent that curtilage is protected under the homes umbrella of Fourth Amendment protection, "is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *Id*. at 300-01.

In *Dunn*, this Court set forth four factors to help determine whether an area should be considered curtilage and thus subject to Fourth Amendment protection: 1) the proximity of the area to the home; 2) whether there are any enclosures surrounding the home; 3) how the area is used; and 4) the steps taken by the resident to protect the area from observation. *Id*. at 301. This Court cautioned, however, that mechanically combining these factors will not produce a "'correct' answer to all extent of curtilage questions." *Id*. Instead, "these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – 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*.

Whether the Respondent had a legitimate expectation of privacy in the area observed by the PNR-1 drone turns upon whether the area observed was within the curtilage of Macklin

Manor or, conversely, whether the area observed was an "open-field" not protected under the Fourth Amendment. To make this determination, an analysis of the *Dunn* factors is appropriate.

1. Proximity

First, much of the area the PNR-1 drone observed was not in close proximity to the main home. The pool house is approximately fifty-feet away from the main house and a pool lies in-between these two structures stretching from fifteen to fifty feet away from the main house. R. at 4. An individual cannot reasonably expect that areas this far away from the home be treated as the home itself. While the fact that the patio area lies adjacent to the main house could permit a conclusion that the patio area is within the curtilage, it does not compel such a conclusion. Even if this Court finds that the patio area is within the curtilage, an areas proximity to the home is only a single factor under *Dunn*, and is not determinative in most cases. *See Daughenbaugh v. City of Tiffen*, 150 F.3d 594, 598-99 (6th Cir. 1998); *United States v. Diehl*, 276 F.3d 32, 39 (1st Cir. 2002).

2. Enclosures

Second, there were no enclosures surrounding Macklin Manor or the main home. R. at 4. Generally, "[t]he proper focus of this factor is on whether interior fencing clearly demarcates the curtilage." *Breza*, 308 F.3d at 436 (quoting *United States v. Traynor*, 990 F.2d 1153, 1158 (9th Cir. 1993)). There was no fencing surrounding the estate or the main home to demarcate that the area was curtilage. R. at 4. A reasonable man would have put up a fence around the area if it was intended to be a safe haven for the "intimate activity associated with the 'sanctity of a man's home and the privacies of life." *Dunn*, 480 U.S. at 301 (quoting *Boyd*, 116 U.S. at 630). This factor, therefore, weighs against ruling that the area observed by the PNR-1 drone was within the curtilage of Macklin Manor.

3. Use

Third, the areas observed by the PNR-1 drone are not used for "the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Dunn*, 480 U.S. at 301 (quoting *Boyd*, 116 U.S. at 630). A pool house, although deceptive in title, is simply a structure used to store pool equipment. A swimming pool, as the name implies, is used for swimming. A patio, is generally used for recreation. Not a single one of these uses involve the intimate activities associated with the "sanctity of a man's home and the privacies" of life warranting that the area be treated as the home itself. *Boyd*, 116 U.S. at 630. Therefore, this factor weighs against ruling that the area observed by the PNR-1 drone was within the curtilage of Macklin Manor.

4. Visibility

Fourth, the Respondent took no steps to protect the area the PNR-1 drone observed from observation. Nothing in the record suggests that the Respondent did a single thing to prevent persons from observing what lay inside the estate. A reasonable man would have taken steps to protect the area from observation if the area was intended to be shielded from the "intimate activity associated with the 'sanctity of a man's home and the privacies of life." *Dunn*, 480 U.S. at 301 (quoting *Boyd*, 116 U.S. at 630). This factor also weighs against ruling that the area observed by the PNR-1 drone was within the curtilage of Macklin Manor.

5. Conclusion

Applying the four *Dunn* factors to the area observed by the PNR-1 drone demonstrates that the area observed was not curtilage warranting Fourth Amendment protection. Therefore, the Respondent did not have a societally-recognized reasonable expectation of privacy against a warrantless search of the area. The area the drone observed was not intimately tied to the home

itself, thus, it was caught out in the rain, without the Fourth Amendment's "umbrella" as protection. *Dunn*, 480 U.S. at 301.

B. The Respondent's Expectation of Privacy From the PRR-1 Drone's Observations is not One that Society is Prepared to Recognize as Reasonable Under The Fourth Amendment.

If this Court finds that the area observed by the PNR-1 drone is curtilage, this Court's analysis of the constitutionality of the PNR-1 drone's surveillance should not end with that determination. Under the guidance of this Court's prior holdings, and as articulated below, although an area is curtilage, that itself does not bar if from all police observation. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). On two occasions, this Court has addressed the question of whether aerial surveillance of property violates an expectation of privacy that society is prepared to recognize as reasonable. *See California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989). This Court's decisions in *Ciraolo* and *Riley* are instructive in evaluating the government's use of drones for aerial surveillance.

In *Ciraolo*, this Court first analyzed aerial observation in the context of the Fourth Amendment. *Ciraolo*, 476 U.S. at 207. The police, acting on a tip, flew over the backyard of a particular house in a plane at 10,000 feet. *Id*. at 209. With the naked eye, the officers observed marijuana growing in the yard. *Id*. A search warrant was obtained based on the officer's observations, and marijuana plants were found upon execution of the warrant. *Id* at 209-10. Upon granting certiorari, this Court was left to decide whether the warrantless police observation, of an enclosed area, within the curtilage of the home, from an airplane at 1,000 feet, violated the Fourth Amendment. *Id*.

This Court held that the officer's observations did not violate the Fourth Amendment. *Id*. at 215. Although the marijuana grower's subjective expectation of privacy was undisputed, this

expectation was not a reasonable one. *Id*. This Court reasoned that although the area observed was curtilage, that alone did not bar it from all police observation. *Id*. at 213. This Court stated that "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection.'" *Id*. at 213 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Ciraolo*, 476 U.S. at 213. If an officer makes "observations from a public vantage point where he has a right to be and which renders the activities clearly visible" no Fourth Amendment violation has occurred. *Id*. at 213. "[T]he police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was." *Riley*, 488 U.S. at 449-50. This Court went on to acknowledge and appreciate the technological advancements that society has made in recent years, articulating that:

> In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.

Id. at 215.

In *Riley*, the police, acting on an anonymous tip, flew over a particular residence twice in a helicopter hovering at 400 feet. *Id*. at 448. With the naked eye, the officer observed marijuana growing through the openings in the roof of a greenhouse. *Id*. A search warrant was obtained off of the officer's observations, and marijuana plants were found in the greenhouse upon execution of the search. *Id*. at 448-49. Upon granting certiorari, this Court was left to decide

whether the warrantless police observation, within the curtilage of the home, from a helicopter hovering at 400 feet, violated the Fourth Amendment. *Id*. at 449-450.

This Court held that the officer's observations did not violate the Fourth Amendment. *Id*. at 452. Although the marijuana grower's subjective expectation of privacy was undisputed, this expectation was not a reasonable one. *Id*. at 450. This Court reasoned that in light of the *Ciraolo* decision, the marijuana grower "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter" hovering at 400 feet. *Id*. at 450-51. "Any member of the public could legally have been flying over [the] property in a helicopter at the altitude of 400 feet and could have observed [the] greenhouse." *Id*. at 451. This Court noted in its opinion, the importance of the helicopter not "flying at [an] altitude contrary to law or regulation." *Id*. This Court also factored in that the helicopter did not interfere with the normal use of the greenhouse or any other curtilage and no "intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury." *Id*. at 452.

Under the guidance of *Ciraolo* and *Riley*, the PNR-1 drone surveillance of Macklin Manor did not violate the Fourth Amendment. Here, as in *Ciraolo* and *Riley*, the surveillance aircraft was flying in navigable airspace. The state of Pawndale allows members of the public to legally fly drones at an altitude below 1640 feet. R. at 39. Therefore, a drone flying over Mount Partridge at 1640 feet or below is not contrary to any law or regulation. Furthermore, although aircraft often avoid flying over Mount Partridge, nothing in the record indicates that aircraft never fly over Mount Partridge or that doing so would be illegal. Any member of the public could have legally been flying a drone over Macklin Manor at an altitude below 1640 feet and observed the property. "In an age where private and commercial flight in the public airways is

routine", the Respondent could not reasonably expect that Macklin Manor was constitutionally protected from being observed by a drone at an altitude below 1640 feet. *Ciraolo* at 215. Therefore, the Fourth Amendment simply does not require a drone traveling in the public airways at this altitude to obtain a warrant in order to observe what is clearly visible.

It is worth noting that the fact the PNR-1 drone's camera was more enhanced than the naked-eye is insignificant. This Court has articulated that "[the mere fact that human vision is enhanced somewhat, at least to the degree [of the finest precision aerial camera available],[1] does not give rise to constitutional problems." *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986). The camera used in this case was comparable to the camera this Court authorized in *Dow Chemical Company.*[2] In addition, the PNR-1 drone did not interfere with the normal use of the pool house, pool, patio, or any other curtilage and "there was no undue noise, and no wind, dust, or threat of injury." *Riley*, 488 U.S. at 452.

C. The Proposed "Significant Regularity" Standard Would be Untenable and Inappropriate.

Furthermore, while the Petitioner appreciates Justice O'Connor's concurrence in *Riley*, the standard it proposes to create would be untenable. In her concurrence, Justice O'Connor contended that the standard should be "whether the [aircraft] was in public airways at an altitude at which members of the public travel with significant regularity." *Id*. at 454 (O'Connor, S., concurring). Determining the constitutionality of an aircraft's flight based on "significant

[1] "The camera used cost in excess of $22,000.00 and is described by the company as the finest precision aerial camera available." *Dow Chem. Co.*, 476 U.S. 252 n.4 (citations omitted) (internal quotation marks omitted).

[2] "The PNR-1 comes with an attachable DSLR camera. The DSLR is state of the art, capable of taking multiple action shots in high definition. The zoom lens on the camera allows the user to zoom in on a target up to 15 feet away." R. at 46.

regularity" instead of on the laws and regulations of aircraft, is a misplaced approach. Such a standard would not appropriately balance the public's Fourth Amendment interests against the interests of law enforcement to enforce the law in the community's protection. This standard would unduly burden law enforcement to make a determination of what constitutes a "significant regularity" of flights before doing any aircraft surveillance from any vantage point. *Id*. It would force law enforcement to perform guesswork or obtain a crystal ball.

A more manageable approach is the one set forth by the majority in *Riley*, which based the constitutionality of an aircraft's flight on the flight not being contrary to any law or regulation. *Riley*, U.S. 445 at 451. This standard provides law enforcement and the public a bright-line rule. It also prevents the judicial system from being flooded with a slew of litigation requiring determinations of what constitutes a "significant regularity" of flights. *Id*. at 454 (O'Connor, S., concurring). The majority's standard puts the ball in the legislatures court, to do what the legislature is accustomed to doing, making laws when and where appropriate.

D. The Use of the Doppler Radar did not Violate Ms. Koehler's Fourth Amendment Rights.

Over sixteen years-ago, in *Kyllo v. United States*, this Court judged whether the use of a thermal imaging device to detect levels of heat in a home constituted a Fourth Amendment search. 533 U.S. 27, 33 (2010). Until the *Kyllo* decision, this Court had "reserved judgment as to how much technological enhancement of ordinary perception from public vantage point if any, is too much." *Id*. In *Kyllo*, officers suspected an individual of growing marijuana in his home. *Id*. From across the street of the home, officers used a thermal scanner to detect infrared radiation in an attempt to find out if the amount of heat emanating from the house was consistent with indoor marijuana growth. *Id*. The scan revealed that part of the house was significantly hotter than the rest. *Id* at 30. A search warrant was obtained based on the officer's observations,

tips from informants, and utility bills. *Id*. Marijuana plants were found in the home upon execution of the search. *Id*. Upon granting certiorari, this Court was left to decide whether "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment." *Id*. at 29.

This Court held that the officer's thermal-imaging scan violated the Fourth Amendment. *Id*. at 41. This Court stated that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search – at least where … the technology is not in general public use." *Id*. at 34-5 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)). Therefore, whether the Doppler radar scan of Macklin Manor violated the Fourth Amendment hinges on a two-factor test: 1) whether the information the Doppler radar revealed could not otherwise have been obtained without entering the house; and 2) whether a Doppler radar is in general public use. *Kyllo*, 553 U.S. at 34-5.

E. <u>The Doppler Radar Device is in General Public Use.</u>

Applying the two-part test set forth in *Kyllo* demonstrates that the Doppler radar scan of Macklin Manor did not violate the Fourth Amendment. The second factor of the *Kyllo* test proves determinative – the Doppler radar device is in general public use. The Doppler radar device used in this case and the thermal image device used in *Kyllo* are comparable because they reveal fungible information about the inside of a home – where people are located inside, if at all. In *Kyllo*, this Court reasoned that because it could "quite confidently say that the thermal imaging is not 'routine,'" it did not need to reexamine whether the thermal image device is in general public use. *Id*. at 52 n.6. It is important to take into account that *Kyllo* was decided over

sixteen years ago. In the modern age of rapid technological advances, the use of different technologies can increase extremely rapidly. For instance, the first ever iPhone was released just over ten years ago and is now a staple of American society.[3] Relatively cheap thermal imaging devices have been selling online for a few years now and there are phone apps and attachments that put a thermal imaging camera at the public's fingertips and into their pockets.[4] In terms of a scan of a home, a thermal imaging device reveals the same information that the scan in *Kyllo* and the scan in this case revealed – where people are located inside, if at all. Sixteen years after *Kyllo*, this Court should "quite confidently" be able to say, that the Doppler radar scan is "routine," because it is in general public use. *Kyllo* 553 U.S. at 52 n.6. Therefore, the officer's use of the Doppler radar was not in violation of the Fourth Amendment.

F. Probable Cause was Established Before the Use of the PNR-1 Drone And Doppler Radar.

Under the Fourth Amendment, a search warrant shall be issued upon a showing of probable cause. *Illinois v Gates*, 462 U.S. 213, 232 (1983). If evidence is obtained as a result of a search in violation of the Fourth Amendment, it is subject to exclusion. *Segura v. United States*, 468 U.S. 796, 804 (1984). The exclusionary rule extends not only to evidence obtained as a result of an illegal search, "but also evidence later discovered and found to be derivative" of the illegal search or "fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341 (1939). This Court has acknowledged that creating a "precise definition" of probable cause

[3] Richard Menta, *iPhone: Hundreds Come, Lines Orderly*, MP3 Newswire, http://www.mp3newswire.net/stories/7002/iPhone-line.html (last visited Oct. 15, 2017).

[4] Katie Barlow, *Thermal Imaging Gets More Common But The Courts Haven't Caught Up*, NPR, http://www.npr.org/sections/alltechconsidered/2014/02/25/282523377/thermal-imaging-gets-more-common-but-the-courts-havent-caught-up (last visited Oct. 15, 2017).

[upon which a warrant shall be issued] is impossible." *Maryland v. Pringle,* 540 U.S. 366, 370 (2003). Probable cause is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. Probable cause takes into account "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 176 (1990).

To determining whether an officer had probable cause to search, courts examine two things: 1) the events which occurred leading up to the … search; and 2) whether these historical facts, viewed from the standpoint of an objectionably reasonable officer, amounted to probable cause. *Ornelas*, 517 U.S. at 696. In making a determination of probable cause, the relevant inquiry is the degree of suspicion that attaches to particular types of non-criminal conduct, not whether particular conduct is "innocent" or "guilty." *Gates* 462 U.S. at 295 n.13. As the name implies, probable cause always deals probabilities, and therefore will always be determined by a totality of the circumstances. *Id*. at 230.

Even if this Court finds the use of the PNR-1 drone and Doppler radar search violated the Fourth Amendment, the evidence should not be excluded because probable cause was established before the use of either device. Here, upon being stopped and questioned, Mr. Wyatt was extremely agitated, uncooperative, avoided eye contact, fidgeted with the steering wheel, and was very pale. R. at 2, 26. Mr. Wyatt lied to the border patrol agents about not transporting $10,000 or more in U.S. currency. R. at 2. Mr. Wyatt had the exact amount of money and denomination demanded by the Ford children's kidnappers. *Id*. Mr. Wyatt was the fiancé of a person of interest in the Ford kidnappings, Amanda Koehler. *Id*. In the trunk of Mr. Wyatt's vehicle, border agents found a laptop that Mr. Wyatt and Ms. Koehler shared. *Id*. The laptop

possessed documents containing Mr. Ford's personal information and a lease agreement for Macklin Manor. *Id*. The lease agreement was in the name of a known alias of Ms. Koehler. R. at 3. Viewing these historical facts in their totality, an objectionably reasonable officer would believe that probable cause existed.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the ruling of the Thirteenth Circuit Court of Appeals be reversed.