**Team No. 36**

No. 4-422

IN THE
**Supreme Court of the United States**

United States of America,
*Petitioner*,
v.
Amanda Koehler,
*Respondent*,

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

# Brief for Respondent

The University of San Diego School of Law
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## ISSUES PRESENTED

I. Did the Government's search of Ms. Koehler's laptop constitute a valid search, pursuant to the border search exception, where the agents found her laptop in Mr. Wyatt's trunk and then pried through her personal information, violating her privacy and dignity interests to such an extent that it ceased to be a routine search?

II. Did the Government's search of Ms. Koehler's laptop constitute a valid search, pursuant to the border search exception, where the alleged reasonable suspicion to search Ms. Koehler's laptop was based loosely upon Mr. Wyatt's conduct, the $10,000 in Mr. Wyatt's trunk, an unassociated crime where Ms. Koehler was only considered a person of interest, knowledge of Ms. Koehler's unrelated criminal history and the fact that Mr. Wyatt was stopped at the Eagle City border?

III. Did the Government's use of a PNR-1 drone constitute a search, in violation of Ms. Koehler's 4th Amendment rights, when the aerial surveillance was conducted from non-navigable airspace that was not accessible to the public or routinely used and the drone's high definition camera was used to capture detailed photographs of Ms. Koehler?

IV. Did the Government's use of a handheld Doppler radar device constitute a search, in violation of Ms. Koehler's 4th Amendment rights, when the device was used to obtain intimate details that could only be discovered by physical intrusion into the home, such as how many individuals were inside and where each individual was located within the home?

## STATEMENT OF FACTS

On August 17, 2016, around 3:00 A.M., Scott Wyatt was making his way back to the United States from Mexico when he was stopped by U.S. Border Patrol Agent Christopher Dwyer and Agent Ashley Ludgate at the Eagle City border station. R. at 2. Agent Ludgate began probing Mr. Wyatt about why he was crossing the border and whether he was transporting more than $10,000. R. at 2. Agent Ludgate purported that Mr. Wyatt appeared agitated and uncooperative, while fidgeting with the steering wheel. R. at 26. However, Mr. Wyatt had already verbally identified himself and indicated that he was not carrying $10,000. R. at 26.

Despite Mr. Wyatt's efforts to be cooperative, Agent Ludgate still decided to conduct a search of Mr. Wyatt's vehicle. R. at 26. Mr. Wyatt complied with the request to exit his vehicle and open the trunk of his vehicle. R. at 2. Upon opening the trunk, Mr. Wyatt discovered $10,000 in $20 bills and a laptop with the initials "AK." R. at 2. Mr. Wyatt then informed Agent Ludgate that he shared the laptop with his fiancé and that the initials belonged to Ms. Koehler. R. at 26. Although the agents had no further indicia of suspicion, they decided to run Ms. Koehler's name through their database. The database reported that Ms. Koehler had a criminal history and was listed as a person of interest in an ongoing - but unrelated - investigation into a kidnapping. R. at 27. Recently, the kidnappers agreed to provide proof of life in exchange for $10,000 in $20 bills that was to be delivered at noon the following day, August 18. R. at 2.

Based on this limited information, Agent Ludgate pried into Ms. Koehler's laptop - without her knowledge or consent. R. at 2. She searched through a document which contained private information relating to Timothy H. Ford, the father of the kidnapped individuals. R. at 3. Agent Ludgate did not discover any evidence of criminal wrongdoing but continued searching anyway. R. at 3. She found a lease agreement with the name, "Laura Pope," which the Eagle City

Police Department confirmed was Ms. Koehler's aliases. R. at 3. The lease agreement showed that Ms. Pope acquired the property six months prior. R. at 3. However, the address of the lease agreement did not match Mr. Ford's. R. at 3. After Mr. Wyatt's arrest, Agent Ludgate then contacted Detective Raymond Perkins, the lead investigator for the kidnappings with the private information she obtained from Ms. Koehler's laptop. R. at 3.

Detective Perkins decided to further investigate the lease agreement found on Ms. Koehler's laptop and headed to an estate known as Macklin Manor. R. at 32. Macklin Manor was located on the outskirts of Eagle City, atop a mountain, which was known to have heavy clouds and fog year-round. R. at 3. In fact, due to the perpetual fog and lack of visibility, aircrafts intentionally avoid flying over the mountain. R. at 3.

Detective Perkins arrived at the estate just before 4:30 A.M. with officers Kristina Lowe and Nicholas Hoffman. R. at 3. The officers proceeded to conduct surveillance on Macklin Manor to determine its layout and obtain information about possible residents. R. at 3. At the break of dawn, Officer Lowe deployed the department's PNR-1 drone over Ms. Koehler's property. R. at 3. Due to its discreet design and available enhancements, the PNR-1 was advertised as being "specifically designed for law enforcement." R. at 46. The drone was equipped with a digital single-lens reflex ("DSLR") camera that had the ability to zoom in up to fifteen feet, capture high definition photos and video, and allowed Officer Lower to view exactly what the drone saw. R. at 39. This drone model had been experiencing network connectivity problems for years, which caused the drones to override the preprogrammed altitude limit. R. at 39-40. In fact, Officer Lowe admitted that there had been "a lot of network connectivity errors lately" and there were numerous reports of the PNR-1 drone going "haywire." R. at 40.

Despite these numerous errors, Officer Lowe decided to deploy the drone for the first time in Eagle City Police Department's history. R. at 40. The police department had been wary of using its drone and had thus far only conducted a few test runs at its headquarters. R. at 40. According to Officer Lowe, the department's drone had never experienced any network errors during these test runs. However, the same cannot be said about the drone's flight over Ms. Koehler's property, as Officer Lowe later testified to having difficulties deploying the drone. R. at 41. In fact, Officer Lowe, who controlled the drone from her squad car, entirely lost track of the drone for approximately five minutes. R. at 4, 41. Officer Lowe testified to the possibility that, during this lapse in tracking, the drone flew outside of the preprogrammed and state-imposed altitude limits. R. at 41.

Eventually, Officer Lowe regained network connectivity and used the drone to capture twenty-two photos and three minutes of video as it hovered over Ms. Koehler's property for fifteen minutes. R. at 4. The surveillance revealed a main house, an open pool and patio area, and a single-room pool house. R. at 4. The pool and patio area were directly adjacent to the main house and there were no gates or enclosures on the property. R. at 4. The drone also captured a photo of Ms. Koehler walking from the pool house to her home, a distance of only fifty feet. R. at 4.

After obtaining the layout of the property and determining that Ms. Koehler was home, Detective Perkins and Officer Hoffman secretly approached the front door. R. at 4. The two then used a Doppler radar to peer inside Ms. Koehler's home. R. at 4. The Doppler radar, which has only recently become popular amongst law enforcement agencies, was specially ordered directly from the manufacturer. R. at 33, 35. Since the Doppler detects breathing, rather than movement, it is nearly impossible to hide anywhere within fifty feet of the device R. at 4. While a Doppler

may not be able to provide the layout of a home, it does reveal how many people are inside and where they are located. R. at 4.

In this case, the scan of Ms. Koehler's home detected one person in the front room. R. at 5. The Doppler showed that the person in the front room was standing to the left of the front door, approximately ten to fifteen feet away. R. at 34. Detective Perkins then decided to walk around to the pool house and conduct a second warrantless scan. R. at 33. The scan of the pool house showed three individuals, who were positioned about ten feet from the pool house entrance, and one individual who appeared to be pacing. R. at 34.

After obtaining information via drone and Doppler radar, Detective Perkins, Officer Lowe, and Officer Hoffman left Ms. Koehler's home and obtained a search warrant. R. at 5. Based on the search warrant, which included the pool house, the officers entered Ms. Koehler's home and detained her. R. at 5. A small handgun was found on Ms. Koehler's person and the three missing subjects were located in the pool house, unharmed. R. at 5.

## SUMMARY OF ARGUMENT

The Government violated Ms. Koehler's Fourth Amendment rights when it conducted the non-routine search of Ms. Koehler's laptop because the search exposed private and personal information about her identity and residence, which was unrelated to the purpose of the stop. Ms. Koehler had a heightened privacy expectation in her laptop because of its unrestricted capacity to store personal details - details not meant to be disclosed to the public. Such an invasion of Ms. Koehler's privacy and dignity interests transformed into a search that was no longer routine. Since the Government's search was non-routine, it further violated her Fourth Amendment rights because the search was conducted without reasonable suspicion. The Government's loose reliance on Mr. Wyatt's conduct, the $10,000 in his trunk, an unassociated crime where Ms.

Koehler was only considered a person of interest, knowledge of Ms. Koehler's unrelated criminal history; and the fact that Mr. Wyatt was stopped at the Eagle City border cannot justify the invasive search because it did not bear a reasonable relationship to the degree of suspicion.

The Government further violated Ms. Koehler's reasonable expectation of privacy when it deployed the drone to surveil curtilage, which has long been afforded the same protection as the home itself. The vantage point from which the aerial surveillance took place was not navigable or routinely used. The use of the drone became even more intrusive when the Government utilized the drone's high definition camera to capture photos and video of Ms. Koehler's face and specific details of the pool house's interior. The Government continued to invade Ms. Koehler's privacy rights by using a handheld Doppler radar to peer inside of her home. The Doppler radar, which is not in common use, was able to reveal intimate details of Ms. Koehler's home and pool house as if the agents were physically inside.

Based on the Government's violations of Ms. Koehler's Fourth Amendment right to be free from unreasonable searches, this Court should find that the search of Ms. Koehler's laptop was not a valid search pursuant to the border search exception. Additionally, this Court should find that the Government's use of the PNR-1 drone and Doppler violated Ms. Koehler's reasonable expectation of privacy in her home and, thus, constituted a Fourth Amendment search.

## STANDARD OF REVIEW

On certiorari to review an appellate court's denial of a suppression motion regarding whether the government conducted a legal border search, the Supreme Court should apply a de novo standard of review. *United States v. Nava*, 363 F.3d 942. In determining whether a Fourth Amendment violation occurred, the Supreme Court should draw all reasonable factual inferences

in favor of the jury verdict, but should not defer to the jury's legal conclusion that those facts violate the United States Constitution. *Muehler v. Mena*, 544 U.S. 93.

ARGUMENT

## I. THE SUSPICIONLESS AND WARRANTLESS SEARCH OF MS. KOEHLER'S LAPTOP INVADES HER PRIVACY AND DIGNITY INTERESTS TO SUCH AN EXTENT THAT IT FALLS OUTSIDE THE SCOPE OF THE BORDER SEARCH EXCEPTION.

The Fourth Amendment guarantees the right of "people to be secure in their persons, houses, papers, and effects, against unreasonable searches. . ." U.S. Const. amend. IV. "What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search and seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). A warrantless search is "per se unreasonable…subject to only a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S 347, 357 (1967). The border search exception, while permitting some warrantless and suspicionless searches, does not mean "anything goes" at the border. *United States v. Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008).

### A. Officer Ludgate Conducted an Invasive Search of the Ms. Koehler's Laptop That Violated Her Privacy and Dignity Interests.

#### *1. The Search of Ms. Koehler's Laptop Was Non-Routine Because the Level of Intrusion into Ms. Koehler's Private and Personal Files Outweighed Any Suspicion of Wrongdoing.*

A border search ceases to be routine when the level of intrusion into an individual's privacy outweighs the level of suspicion. *United States v. Irving*, 452 F.3d 110, 123 (2nd Cir. 2006); *Montoya de Hernandez*, 473 U.S. 531 (1985) (holding the search of defendant's alimentary canal was beyond the scope of a routine customs search); *United States v. Ramos-Saenz*, 36 F.3d 59 (9th Cir. 1994) (discussing that strip searches, body cavity searches, and involuntary x-ray searches are *examples* of non-routine border searches) (emphasis added);

*United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002) (holding some searches of inanimate objects can be so intrusive as to be considered non-routine).

The invasion into Ms. Koehler's private affairs was far from routine. Here, Agent Ludgate decided to pry into Ms. Koehler's personal laptop after already confirming that Mr. Wyatt was transporting $10,000 in U.S. currency. R. at 2. This extended the search beyond the permissible scope of the stop because it did not relate to the government's interest in preventing the entry of terrorists or contraband. *United States v. Cotterman*, 709 F.3d 952, 980 (9th Cir. 2013) (Smith, J., dissenting). The unrestricted search exposed personal and intimate information about Ms. Koehler's alias and personal residence that otherwise would not have been available to the agents. R. at 3. The fact that private information about Timothy Ford was also discovered did not undermine Ms. Koehler's dignity and privacy interests because she kept the documents stored and away from public access. *See United States v. Arnold*, 454 F. Supp. 2d 999, 1003 (C.D. Cal. 2006) ("Opening and viewing confidential computer files implicates dignity and privacy interests…[because]…some value the sanctity of private thoughts memorialized on a data storage device above physical privacy."), *rev'd*, 523 F.3d 941 (2008).

The exposure of Ms. Koehler's personal details implicated privacy and dignity concerns despite the fact that it was not a strip or body cavity search. At no point in history has the Supreme Court explicitly limited the non-routine classification to only bodily searches. *Montoya de Hernandez,* 473 U.S. at 551 ("further investigation involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required."). Further, the Ninth Circuit recognized, "a border search goes beyond routine only when it reaches the degree of intrusiveness present in a strip search or body cavity." *Ramos-Saenz*, 36 F.3d at 61.

This suggests that the court was not unwilling to extend protection to other types of searches so long as the extent of intrusion could be akin to strip searches and body cavity searches.

Here, the unconstrained probe of Ms. Koehler's laptop was just as intrusive and offensive as the cavity search in *Montoya de Hernandez* because Agent Ludgate was privy to intimate aspects of Ms. Koehler's identity that were meant to be secure from prying eyes. R. at 2. *See United States v. Gourde*, 440 F.3d 1065, 1072 (9th Cir. 2006) ("For most people, their computers are their most private spaces."). Ms. Koehler's laptop had the capacity to store a voluminous amount of personal information. This fact likens the intrusiveness of computer searches to that of strip and body cavity searches. Such an amazingly powerful, yet dangerous, device became an intimate extension of Ms. Koehler's person beyond that of what her body or even her home could contain.

Agent Ludgate forced her way into the private confines of Ms. Koehler's life with no regard for her privacy or dignity. Therefore, this Court should hold that the search of Ms. Koehler's laptop was non-routine because the intrusion into her laptop outweighed the suspicion that Mr. Wyatt was involved in the Ford kidnapping.

*2. Ms. Koehler's Laptop is Fundamentally Different from a Closed Container Because of Its Unrestricted Capacity to Store Private and Personal Information.*

The immense storage capacity of a digital device entirely changes a person's reasonable expectation of privacy. *Riley v. California*, 134 S. Ct. 2473, 2488-89 (2014) ("Digital devices implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse because of the information they can hold."). The Fourth Amendment is not necessarily satisfied by a simplistic likening of a computer to a searchable "container." *Id.* at 2491. Thus, the contents of a laptop may not be searched absent an exception to the warrant requirement. *Id.* at 2492.

Computers implicate something more than just a container because it can store an unprecedented amount of private information. When government agents search through files on an individual's laptop they are able to gather as much information as though they had conducted an extensive search of that individual's home. Since a search of a laptop is as intrusive as that of a home, which is afforded Fourth Amendment protection, it follows that people reasonably expect the same level of protection in their laptops.

Here, Agent Ludgate did not access just any object or piece of property. The search exposed personal information about Ms. Koehler's identity and residence in a way that a search of her luggage or purse could not. A search of a purse or luggage will only reveal the items that the individual chooses to pack and thus is likely aware of. Therefore, there is a limited invasion of the individual's privacy. On the other hand, the advances and complexities of technology allow a search of an individual's laptop to unravel a "warehouse full of information" including those that a person has either erased, forgotten about or is not aware exists. *Cotterman*, 709 F.3d at 964-65. A search of a laptop can therefore reveal even intimate details that the individual affirmatively tried to leave at home.

The analogy to a container is misplaced because it ignores the functional aspects of a laptop for the physical. *See Cotterman*, 709 F.3d at 964-65 ("Laptop computers, iPads and the like are simultaneously offices and personal diaries…that contain the most intimate details of our lives."). The courts in *Arnold* and *Roberts* both inaccurately likened laptop computers and electronic devices to containers and thus held that those searches were routine. 523 F.3d 941 (9th Cir. 2008) (reasoning that the expectation of privacy does not change because of the type of container that is carried.); 274 F.3d 1007 (5th Cir. 2001). The reasoning in *Arnold* is troubling because it essentially reduced an amazingly powerful device to nothing more than just a large

box or a gas tank. Computers and electronic devices often contain "vast amounts of private, personal and valuable information" that a person may intentionally store solely on their laptop because they expect it to be secure from the world in a way that placing in in a purse or luggage cannot. 523 F.3d at 1001. The same cannot be said of a container because a person can always remove those items that he or she does not wish to subject to a search. No other container can be said to share this property of lingering and pervasive data storage.

To reduce Ms. Koehler's laptop to an ordinary container would be to undermine and insult the value of her thoughts, her privacy, and the intimate details of her identity that she wanted to be kept confidential from the outside world. Therefore, because the invasion into Ms. Koehler's laptop exposed private and personal information that she sought to keep secure and was not equivalent to the suspicion of wrongdoing, the search was non-routine and invalid absent reasonable suspicion.

### B. The Fourth Amendment Requires Agent Ludgate to Possess Reasonable Suspicion to Conduct the Invasive Search that Implicated Ms. Koehler's Privacy and Dignity Interests.

#### *1. Agent Ludgate Did Not Have Reasonable Suspicion to Search Ms. Koehler's Laptop.*

"As a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing." *United States v. Aman*, 624 F.2d 911, 912–13 (9th Cir. 1980); *see Cotterman*, 709 F.3d 952 (holding defendant's previous molestation charge alone did not met requisite reasonable suspicion for a forensic search of defendant's laptop.); *see United States v. Price*, 472 F.2d 573 (9th Cir. 1973) (holding officer's reliance on defendant's nervousness during questions was insufficient to establish reasonable suspicion for a strip search). An officer's mere hunch will not excuse the unlawful search. *United States v. Arvizu*, 534 U.S. 266 (2002).

Officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981). This standard is only met when an officer can point to specific and articulable facts, which, when considered with rational inferences, indicate that criminal activity "may be afoot." *Terry v. Ohio*, 392 U.S. 1, 20, 30 (1968). The objective facts must bear some reasonable relationship to the degree of suspicion. *Price*, 472 F.2d at 574. Evidence of prior criminal conduct is not dispositive. *United States v. Kim*, 103 F. Supp. 3d 32, 45 (D.D.C. 2015). Courts must consider the totality of the circumstances and, in the context of border searches, may consider factors such as (1) unusual conduct, (2) discovery of incriminating matter during routine search, (3) computerized information showing propensity to commit relevant crimes, or (4) a suspicious itinerary. *Irving*, 452 F.3d at 124.

Although this case is against Ms. Koehler, the analysis focuses on Mr. Wyatt because he was the particular individual who was stopped at the Eagle City checkpoint. R. at. 2. Here, Mr. Wyatt's conduct when the agents stopped him did not lend to suspicion that the laptop would uncover evidence Mr. Wyatt was or was about to engage in any criminal activity. Agent Ludgate stated that Mr. Wyatt appeared "agitated and uncooperative" when she had asked him why he was crossing the border. R. at 26. However, Agent Ludgate could only point to the following facts to rationalize her suspicion: (1) Mr. Wyatt did not look at her; (2) he was fidgeting his fingers on the steering wheel; and (3) his responses were brief. R. at 26.

It is problematic to assume that these acts, even when considered together, could bear a reasonable relationship to criminal wrongdoing because as a matter of policy, it would encompass any innocent traveler who approaches the border not knowing if they will be searched. *See Arnold*, 454 F. Supp. 2d at 1000 ("nervousness is a common reaction to

questioning by government officials."); *see United States v. Guadalupe–Garza*, 421 F.2d 879, 879–80 (9th Cir. 1970) (holding the fact that the defendant "tilted his head," "shied away," and appeared nervous did not warrant the suspicion required for a strip search). Here, Mr. Wyatt's behavior, especially at 3:00 a.m. with no other cars or people present at the checkpoint, was no more indicative of criminal wrongdoing than a person being subject to an interrogation or a lie detector test; both situations elicit various emotional responses to cope with the conditions of the environment.

The $10,000 in Mr. Wyatt's trunk was not an incriminating discovery that justified Agent Ludgate's suspicion to search the laptop. Here, Mr. Wyatt denied that he was transporting $10,000 or more in U.S. currency, which a search of the trunk later revealed untrue. R. at 2. While Mr. Wyatt may have been untruthful, he was not guilty of violating the relevant federal statute, which only required that he declare currency that was *more than* $10,000. 31 U.S.C. § 5613 (emphasis added). Thus, it was not reasonable for Agent Ludgate to suspect that the laptop would contain any further evidence of criminal wrongdoing if Mr. Wyatt's possession of exactly $10,000 was lawful.

Agent Ludgate's assertion that the $10,000 in $20 bills was the same money the kidnappers demanded is not convincing. If Agent Ludgate suspected Mr. Wyatt of helping Ms. Koehler by picking up the money from the drop off, the timeline does not support this suspicion. According to the agents' intel, the alleged drop off was not supposed to occur until August 18, at noon, in Eagle City. R. at 2. Instead, the agents stopped Mr. Wyatt twenty-one hours before the alleged drop off, as he was driving back from Mexico. R. at 2. Even if Agent Ludgate had suspected that Mr. Wyatt was dropping off the amount on Mr. Ford's behalf, this suspicion is tenuous because, given the timeline, the money would more likely have been dropped off by Mr.

Ford since he had all the reason to verify that his children were alive. Therefore, any suspicion of criminal wrongdoing ceased upon discovering the $10,000.

There was no ongoing investigation into Mr. Wyatt that would have prompted suspicion to search the laptop. Most of the cases that have recognized reasonable suspicion involved an ongoing investigation into the defendant at the time of the laptop search. *Irving,* 452 F.3d 110*; Cotterman,* 709 F.3d 952; *Robert*, 274 F.3d 1007. Here, Agent Ludgate was aware of a separate investigation into the Ford kidnapping but neither Mr. Wyatt nor Ms. Koehler were named suspects or had a warrant out for their arrest. R. at 2. Thus, it was unreasonable for Agent Ludgate to assume that Ms. Koehler's laptop would provide any relevant information related to an unassociated crime.

Ms. Koehler's previous criminal history did not establish reasonable suspicion to search her laptop. The court in *Kim* reasoned that even though the agents knew the defendant was connected to previous criminal activity, the search of his laptop "did not [grow] out of observations made during the [initial stop]" and therefore was not prompted by anything that could raise the agent's level of concern. 103 F. Supp. 3d at 47. Here, Agent Ludgate only knew that Mr. Wyatt's fiancé, Ms. Koehler, had a previous criminal history. R. at 27. However Ms. Koehler was not present at the checkpoint for Agent Ludgate to confirm Ms. Koehler's propensity to commit an ongoing or imminent crime. R. at 2.

Furthermore, the fact that Mr. Wyatt and Ms. Koehler were engaged is not dispositive to suspect Mr. Wyatt of being involved in the kidnapping because at the time, there was no explicit indication that he had been criminally involved in her past offenses, was aware of the kidnapping, or that he was helping to facilitate the crime. Therefore, Ms. Koehler's criminal history cannot be used to justify the search of her laptop because Agent Ludgate did not discover

or observe anything further that would denote Mr. Wyatt "was or was about to be engaged in criminal activity." *Kim*, 103 F. Supp. 3d at 46.

The reasonableness of a search is measured by the information on which the search was conducted, not by its results. *Price*, 472 F.2d at 574. A careful examination of the alleged specific and articulable facts do not support Agent Ludgate having any reasonable suspicion that the invasion of Ms. Koehler's laptop would reveal that Mr. Wyatt was or was about to be engaged in criminal activity. Therefore, because Agent Ludgate did not have reasonable suspicion for the invasive search of Ms. Koehler's laptop, the search falls outside the scope of the border search exception.

*2. Requiring Reasonable Suspicion to Search Private Information on Laptops at the Border Strikes the Appropriate Fourth Amendment Balance Between Securing the Border and Preserving Individual Liberty.*

"The border search doctrine is grounded in the recognized right of the sovereign to control, *subject to substantive limitations imposed by the Constitution*, who and what may enter the country." *United States v. Ramsey*, 431 U.S. 606, 620 (1977) (emphasis added); see *Kim*, 103 F. Supp. 3d at 35 (stating the border search doctrine is not without borders). Therefore, even at the border, individual privacy rights are not abandoned but must be balanced against the individual's rights. *Montoya de Hernandez*, 473 U.S. at 539. By taking a balanced, common sense approach to border searches, we both protect our nation from harm and preserve the rights that we hold dear. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1128 (9th Cir. 2005) (Thomas, J., dissenting).

Even if this Court determines that the invasive search of Ms. Koehler's private affairs was routine and thus did not require a showing of suspicion, this Court is urged to consider the long-term implications of permitting border agents unrestricted access into a traveler's personal

and private files without any showing of suspicion. Individuals crossing the border will inevitably expect some routine searches, such as a pat down or luggage check, which reveal very little about the individual. However, the same individual does not expect that an officer would pry through personal files on their electronic device that could reveal that person's entire life. Such intrusive searches expose intimate aspects that people do not expect to reveal to the public and which do not advance the broader safety interests.

Here, it was very likely that Ms. Koehler wanted to keep her alias confidential – for safety and even business reasons. Further, it was just as likely that Ms. Koehler did not want anyone to know where she lived, especially considering that the lease agreement was not in her real name. R. at 3. The fact that Ms. Koehler had intimate information relating to her alias, residence, and that of Timothy Ford stored on her personal laptop, as opposed to be printed out on paper and left in the truck, indicates that Agent Ludgate's intrusion was unexpected, unwelcomed, and unwarranted.

Such invasive border searches of laptops cast too large a net, entangling many innocent people. Hundreds of thousands will cross the border with their personal laptops, and the vast majority will not be storing child pornography or terrorist plans. *See Arnold*, 454 F. Supp. at 1004 ("People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records."). While the security of the nation is paramount, as a matter of public policy these individuals are equally entitled to their dignity and privacy.

Requiring reasonable suspicion would not undermine the government's fundamental interest in border security. *See Cotterman*, 709 F.3d at 966 ("Reasonable suspicion is a modest, workable standard…that would not impede law enforcement's ability to monitor and secure our

borders or to conduct appropriate searches of electronic devices."). The vast majority of case law demonstrates that border agents are capable of identifying persons carrying contraband on their laptop based on specific and articulable facts using ordinary investigative techniques. Thus, the reasonable suspicion standard will hardly render laptops immune from search.

Before there were automobiles and airplanes, there was no need for laws prohibiting theft. Before there were communications systems, there was no need for laws preserving the integrity of private conversations. And before there were electronic devices such as laptops, iPads, and cellphones, there was no reason to be concerned about the government's overzealous invasion into those devices. Therefore, to ensure that our citizens' civil liberties are not being deleted, bit by bit, this Court is urged to require a showing of reasonable suspicion.

Our case would allow this Court to draw the proper boundaries to balance the still critical needs for security and liberty. For the reasons that the invasive search of Ms. Koehler's laptop was beyond routine and that agents did not have the requisite showing of reasonable suspicion to justify the search, the search is not valid pursuant to the border search exception.

## II. THE GOVERNMENT'S USE OF THE PNR-1 DRONE AND DOPPLER RADAR CONSTITUTES A SEARCH BECAUSE ITS USE VIOLATES MS. KOEHLER'S REASONABLE EXPECTATION OF PRIVACY IN HER HOME AND CURTILAGE.

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz*, 389 U.S. at 360 (Harlan, J., concurring) (reasoning that no matter how advanced technology becomes, the question of whether a search is valid will always begin and end with reasonableness). A reasonable expectation of privacy exists when an individual has a subjective expectation of privacy that society is prepared to accept as reasonable. *Id.* at 361. Even in an area that may be accessible to the public, Fourth Amendment protections may still apply if an individual seeks to preserve the area as private. *Id.*

### A. The Government's Use of the PNR-1 Drone to Conduct Surveillance of Ms. Koehler's Property Constitutes a Search.

A Fourth Amendment "search" is a "physical intrusion" or "physical invasion" of a "constitutionally protected area." *United States v. Silverman*, 365 U.S. 505, 509-10, 512 (1961). For purposes of the Fourth Amendment, the area "immediately surrounding and associated with the home" is considered part of the home itself and is, thus, given the same protection as the home. *Oliver v. United States*, 466 U.S. 170, 180 (1984).

#### *1. Ms. Koehler Had a Reasonable and Legitimate Expectation of Privacy in the Pool Area Because It Falls Within the Home's Curtilage, Which is Afforded Fourth Amendment Protection.*

"The curtilage area immediately surrounding a private home has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to recognize." *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1985). The curtilage is the area to which the intimate activity associated with the "sanctity of a man's home and privacies of life" extends. *Boyd v. United States*, 116 U.S. 616, 630 (1886). The extent of a home's curtilage is determined by considering four factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

In *Dunn*, the Court considered whether a barn was within the curtilage of the house when it was located approximately fifty yards from a fence surrounding the main house. *Id.* at 296. From the house itself, the barn was even farther. *Id.* at 302. Here, the total space between the main house and the pool house is only fifty feet, rather than yards. R. at 4. After viewing the layout of the entire property, the *Dunn* Court found it significant that the barn did not lie within

the same enclosure as the main house. *Id.* at 302 (reasoning that the separation denoted distinct portions of the property). In contrast, Ms. Koehler's property did not have any fences or enclosures separating the property into distinct portions. R. at 4.

Before deploying the drone, the agents did not possess any data regarding Macklin Manor besides the fact that it was leased to a "Laura Pope." R. at 3. The agents did not know who, if anyone, would be present at the property or what activities might be occurring in the pool area. *Dunn*, 480 U.S. at 302 (reasoning that it was "especially significant that the law enforcement officials possessed objective data that the barn was not being used for intimate activities of the home."). Unlike a barn, a home's pool area is "so associated with the activities and privacies of domestic life" that it should be deemed as part of the home. *Id.* at 303. While the record does not indicate how exactly Ms. Koehler uses her pool area, some typical activities in such an area include swimming and sunbathing. *Oliver*, 466 U.S. at 182, n. 12 (noting that the definition of curtilage and the activities of the home that extend to curtilage can be "easily understood from our daily life experience.").

Lastly, it is important to consider what steps Ms. Koehler took to protect the pool area, and her property as a whole, from observation. Although the *Dunn* Court looked to whether the respondent erected fences to "prevent persons from observing what lay inside the enclosed areas," fences would not have prevented aerial surveillance of the pool area. *Id.* Instead, this Court should consider the location of Ms. Koehler's property, as well as the elements that would naturally prevent aerial surveillance. Macklin Manor sits atop a mountain on the outskirts of Eagle City, where it is particularly cloudy and foggy year-round. R. at 3. The cloud coverage and perpetual fog create a lack of visibility, so aircrafts opt to go around the mountain rather than fly

through the airspace above it. R. at 3. Thus, it is reasonable to infer that Ms. Koehler expected a great deal of privacy when she chose to lease Macklin Manor. R. at 3.

Ultimately, the question of curtilage becomes whether the area is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301. Here, the answer to such question is in the affirmative because the pool area is intimately tied to Ms. Koehler's home in both distance and use. There is no distinct separation between the main home and the pool area, such as a gate, fence, or any other enclosure. There was nothing to suggest that the area was being used for anything besides intimate home activities. Lastly, Ms. Koehler chose a property with characteristics that exhibit the desire to prevent observation from the outside world. Therefore, Ms. Koehler has a reasonable and legitimate expectation of privacy in her pool area, as it is within the home's curtilage.

*2. The Government's Use of the PNR-1 Drone Constituted an Unreasonable Search Because the Surveillance Did Not Occur from a Lawful Vantage Point and the Observations Were Not Made with the Naked Eye.*

Aerial surveillance is unreasonable unless the surveillance took place within public, navigable airspace that is routinely used by other aircrafts and conducted in a nonintrusive way. *California v. Ciraolo,* 476 U.S. 207, 213 (1986). Aerial surveillance is made from a lawful vantage point when law enforcement is traveling in public airways and observe what is visible to the *naked* eye. *Florida v. Riley*, 488 U.S. 445, 450-52 (1989) (holding that the observation of the respondent's marijuana greenhouse from a helicopter, flying 400 feet above the property, was lawful but cautioning that its holding would likely be different if the observation occurred from an altitude that was contrary to law or regulation) (emphasis added). However, the *Riley* Court noted that merely flying within navigable airspace was not dispositive of lawfulness. *Id.*

There is a great deal of uncertainty as to whether the drone made its observations from a lawful vantage point because recent and recurring network malfunctions had caused the drones to fly outside of its pre-programmed flight altitude, which correlate to the maximum level imposed by the state of Pawndale. R. at 4, 39. In fact, Officer Lowe admitted she lost track of the drone for approximately five minutes and that there is a possibility that the drone did not stay within navigable airspace. R. at 41. While the Government may try to argue that this particular drone did not have a history of network problems, the Eagle City Police Department had only conducted a total of six test runs. R. at 41. It is possible that the drone exceed the maximum flight level, just as it is possible that the drone flew at an altitude lower than the state imposed level. Either way, the drone would have made its observations of Ms. Koehler and her property from an altitude in violation of state law.

Even if the drone managed to stay with navigable airspace, the surveillance still did not take place from an area routinely used by aircrafts. Due to the lack of visibility and perpetual fog, aircrafts intentionally avoid flying over Mount Partridge. R. at 3. During the entire time Officer Lowe conducted the drone surveillance, she did not "see or hear a single plane." R. at 42.

Unlike the law enforcement officials in *Ciraolo* and *Riley*, who were able to make naked-eye observations, the detailed observations here could not have been made without use of the drone's ability to zoom in and take high definition photos. R. at 46. The surveillance was not conducted on an open field or greenhouse full of marijuana, but rather the drone captured photos of Ms. Koehler as she walked from her pool house to her home, in the early hours of the morning. R. at 4. In fact, the photo taken of Ms. Koehler's face provided so much detail that the officers were able to make a positive identification. R. at 4. It would be nearly impossible for officers to obtain this level of detail - with the naked eye - from an aircraft flying 1640 feet

above Ms. Koehler's property. It is simply implausible that – without the use of enhanced technology – one would be able to observe an individual's facial features with enough detail and clarity to make a positive identification.

The Government used the PNR-1 drone to surveil Ms. Koehler's home and curtilage, where she had a long-recognized reasonable expectation of privacy. Therefore, the Government's actions constituted a search in violation of the Fourth Amendment.

### B. The Government's Use of the Doppler Radar Constituted a Search Under Both *Kyllo* and the Traditional Trespass Doctrine.

"'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United* States, 533 U.S. 27, 31 (2001) (quoting *Silverman*, 365 U.S. at 511).

#### *1. A Fourth Amendment Search Occurred Because the Government Used Intrusive Technology, Not in General Public Use, to Obtain Intimate Details of a Constitutionally Protected Area.*

"[O]btaining 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 (as here) the technology in question is not in general public use." *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (quoting *Silverman* 365 U.S. at 512). In the home, all details are intimate details and even the slightest physical invasion is too much. *Id.* (finding the level of warmth of a residence to be a detail of the home).

The Doppler did not only determined whether there were people in Ms. Koehler's home and pool house. The information it provided was much more intrusive, as it was able to show how many people were inside each structure and where each person was standing. R. at 34. The warrantless scan of the pool house was even able to show what each of the four individuals

inside were doing. R. at 34. This level of detail simply would not be knowable to the officers unless they were physically inside Ms. Koehler's property.

Even if the officers had set up long-term surveillance outside of Ms. Koehler's residence, they would never be able to know where each individual in the home was standing. Even assuming arguendo that there was another way to ascertain equivalent information, alternate lawful means does not render intrusive means lawful. *Kyllo*, 533 U.S. at 35, n. 2 (reasoning that although police could learn how many people were inside a home by setting up year-round surveillance, breaking and entering to obtain the same information would be unlawful). Thus, the information obtained by the Government's use of the Doppler would not be knowable without physical intrusion. In fact, the Doppler reported information that may not even be knowable despite physical entry into the home, as an individual in the living room may not know just where the individual in the bedroom is standing.

Furthermore, the Doppler radar is not in *general* public use. The Doppler may be common among law enforcement, but the average citizen does not possess one of these advanced devices. R. at 35. The average citizen cannot simply stroll into a local store and purchase a Doppler radar, as law enforcement specially orders the devices from the manufacturer. R. at 35. Thus, the Doppler is not general public use. The Government's use of the Doppler fails *Kyllo* and constituted an invalid search.

2. *A Fourth Amendment Search Occurred Because the Officers Trespassed Onto Ms. Koehler's Property to Use the Doppler.*

The traditional property-based understanding of the Fourth Amendment still stands when the Government "gains evidence by physically intruding on constitutionally protected areas. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a

manner which will conserve public interest as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). "When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment has "undoubtedly occurred."' *Jardines*, 569 U.S. at 5 (2013) (quoting *United States* v. *Jones*, 565 U.S. 400, 406-407, n. 3 (2012)). The right to be free from unreasonable government intrusion, especially within one's home, "would be of little practical value" if Government agents can stand within the home's curtilage and "trawl for evidence." *Jardines*, 569 U.S. at 6 (reasoning that curtilage is part of the home itself where privacy expectations are heightened).

The Government was only able to obtain information about the interior of Ms. Koehler's home by physically intruding onto her property. Here, Detective Perkins and Officer Hoffman approached the main home and stood within the curtilage to conduct the intrusive Doppler scan. R. at 33. This is undoubtedly a trespass, which constitutes a Fourth Amendment violation in the most traditional sense. While certain portions of curtilage are expected to have visitors, no homeowner expects that these visitors will peer inside of the home unless invited to. *See Jardines*, 569 U.S. 1 (holding that the Government's use of a trained dog to investigate from a home's porch goes beyond the bounds of what one would expect any private citizen to do).

Therefore, the government's use of the Doppler radar constituted a search in violation of the Fourth Amendment.

### C. Without the Proper Safeguards, Technological Advances Will Continue to Erode Fourth Amendment Protections and Diminish an Individual's Privacy Rights.

"It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo*, 533 U.S. at 33. Although new technologies offer new opportunities for law enforcement to catch

criminals, they also create new risks for abuse and new ways to invade constitutional rights. *United States v. Denson*, 775 F.3d 1214, 1218 (10th Cir. 2014). "[T]he government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions. *Id. at* 1218.

In *Kyllo*, this Court made the conscious effort to adopt a rule that would account for the more technology that would arise in the future. 533 U.S. at 36 (finding that the use of thermal imaging device, which was relatively crude technology, constituted an unlawful search of a home). The Court's ruling in *Kyllo* strongly suggests that Fourth Amendment protections should expand as technology advances. The PNR-1 drone and the Doppler radar used here are far more advanced than the technology encountered sixteen years ago in *Kyllo*.

Fourth Amendment inquiries are centered on reasonableness and question whether an individual's expectation of privacy is reasonable under certain circumstances. As technology advances, this Court should be cognizant of what measures individuals are required to take in order to assert an expectation of privacy and whether requiring such measures is reasonable. For an average citizen, it is nearly impossible to battle the capabilities of new technology. "There's no hiding from the all-seeing network of GPS satellites that hover overhead, which never sleep, never blink, never get confused and never lose attention." *United States v. Pinedo-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting).

In order to protect one's privacy from drone surveillance, an individual would be required to stay indoors, with curtains drawn shut on every window. Enjoying curtilage in a manner that avoids aerial surveillance forces an individual to blanket one's entire property with a cover, which is overly burdensome and interferes with the use and enjoyment of property.

There is even less an average citizen can do to counteract the capabilities of a Doppler radar, as it can detect any individual who is breathing within fifty feet. R. at 4. Even the most restrictive movement would not be enough to hide from a Doppler. Thus, the only way for an individual to maintain a reasonable expectation of privacy in one's own home is to remain more than fifty feet away from all perimeters or to cease breathing altogether.

This Court should find that the Government's uses of technology constituted a search in violation of the Fourth Amendment because holding otherwise will leave citizens at the mercy of advancing technology in the hands of the government. Technology will only continue to advance and, without the proper safeguards, Fourth Amendment protections will soon be obsolete.

## CONCLUSION

The touchstone of the Fourth Amendment is reasonableness and the right of each individual to be free from government intrusion upon their "persons, houses, papers, and effects." The Government violated Ms. Koehler's Fourth Amendment rights when it conducted a non-routine search of her laptop without the requisite reasonable suspicion. Furthermore, the Government's use of a drone and Doppler radar constituted a search in violation of the Fourth Amendment when the devices were used to conduct surveillance on Ms. Koehler's home, where there is a heightened expectation of privacy.

As technology continues to advance, the privacy rights of the individual will continue to diminish. Our case allows this Court to protect individuals' privacy in a time where advancements in technology have made it impossible for individuals to protect themselves. Therefore, we respectfully request that this Court find that the search of Ms. Koehler's laptop was invalid pursuant to the border search exception and that the Government's use of the drone and Doppler radar constituted a search in violation of the Fourth Amendment.