No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

Petitioner

v.

AMY KOEHLER,

Respondent

On Writ of Certiorari
From the United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR PETITIONER

Team No. 37

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STATEMENT OF THE ISSUES

I. Did the warrantless search of the laptop by the border patrol agents violate the Fourth Amendment?

II. Was the PNR-1 drone flight or Doppler radar scan of Macklin Manor an unreasonable search under the Fourth Amendment?

STATEMENT OF THE FACTS

On August 17, 2016, U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate began the night shift. R. at 24. Assigned to the Eagle City border, their nightly responsibilities included stopping cars at the border and monitoring for illegal activity, as there had been an uptick in criminal activity at that border station in the past two or three years. R. at 25. Traffic subsided during this shift and the agents stopped each car traveling across the border. R. at 24 .

The agents, as a matter of standard practice, stopped Scott Wyatt when he approached the border at 3:00 AM on August 17th. R. at 2. Agent Ludgate asked him the agency's routine questions. R. at 26. Mr. Wyatt appeared pale and would not make eye contact with the agents, fidgeted with his hands, and gave short answers in response. *Id*. Based on his behavior, the agents followed regular protocol. Agent Ludgate told him they had a right to search his vehicle and asked him to step out of his vehicle for safety. R. at 26.

The agents opened the trunk and found $10,000 in cash. The agents also discovered a laptop. Mr. Wyatt said he shared the laptop with his fiancé, Amanda Koehler. The agents ran Koehler's name in a border watch database. They discovered Ms. Koehler was a violent felon and a person of interest in a kidnapping case. R. at 26-27. Aware of the high-profile kidnapping case, Agent Ludgate proceeded to open the laptop per the Border Search Exception. R. at 28. Mr. Wyatt did not protest this search and the laptop did not have password protection. *Id.* Several documents appeared open on the screen. *Id.* All related to the kidnapping of three children--including where they went to school, details about their father, and information about their pattern of life. *Id.* The agents then placed Mr. Wyatt under arrest for failing to declare an excess of $10,000 and forwarded the laptop information to the Eagle City Police lead investigator, Detective Raymond. R. at 3.

Detective Raymond capitalized on a lease agreement discovered among the documents in the laptop. R. at 3. The Manor had been abandoned months prior, after the death of its owner. *Id.*

The agreement, however, leased the property to a Cayman Island based shell company R.A.S. *Id.* More research revealed that R.A.S. belonged to one Laura Pope, an alias of Ms. Koehler. *Id.*

Lacking information about the property, Detective Raymond decided to conduct preliminary surveillance. R. at 3. Located on the top of Mount Partridge, fog surrounded the Manor and planes rarely flew overhead but Detective Raymond thought aerial surveillance would be helpful to understand the layout of the grounds. Enlisting technology specialist Officer Lowe, the police flew a PNR-1 drone over the property within the height limit mandated by the State of Pawndale. The height limitation was pre-programmed into the drone. During the six test flights, the drone stayed below the height requirement of 1640 feet. On the flight over the Manor, Officer Lowe noted they lost track of the drone's altitude for four to five minutes, but that there was no way to confirm whether the drone actually exceeded 1640 feet.

The drone hovered over Macklin manor for 15 minutes. It took 22 photographs and three minutes of video with its digital single-lens reflex camera ("DSLR"). R. at 4. The images returned layout information and showed a woman crossing the premises. *Id*. Using the pictures, Detective Raymond identified the woman as Ms. Koehler. R. at 33.

Mindful of officer safety, Detective Raymond scanned the premises from the outside to see if she was alone. R. at 4. He used Doppler radar, a frequency-based technology that detects movement as shown by modulations in radio waves. *Id.* Using this technology, he determined that at least four people were on the premises. R. at 5. The information led to a search warrant for the Manor, including the pool house, and the safe recovery of the kidnapped children. *Id.* Detective Raymond arrested Ms. Koehler attempting to flee the property. *Id.*

SUMMARY OF THE ARGUMENT

The first issue concerns a well-established exception to limits on searches imposed by the Fourth Amendment. The Border Search Exception permits officers to investigate passengers and their vehicles as they cross international lines. The government here argues that the Border Search Exception permitted border agents to conduct a search of a laptop located in the trunk of a stopped vehicle. The Supreme Court upholds searches of electronic devices at the border when agents act reasonably. The agent's were acting upon Mr. Wyatt's suspicious behavior when opening the laptop in the course of their standard duties. Their job is to maintain territorial integrity, conduct stops at the border, and investigate suspicious activity. They did not violate Respondent's privacy rights by performing their duties competently.

The second issue demands resolution of the difference between permissible observation and an unreasonable search. One commentator explained that "while ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a search [under the Fourth Amendment]." C.J.S. Searches and Seizures § 1 (1952). In keeping pace with technological advances in surveillance, the Supreme Court has balanced the operational prerogatives of law enforcement with individual privacy rights.

Here, neither technology used by the Eagle City Police department implicates the Respondent's privacy interests. The drone use fits squarely within the plain view doctrine. The Doppler radar did not invade a home or detect intimate details protected by the Fourth Amendment. These devices merely facilitated officer safety in conducting preliminary investigations. The government urges this Court to respect the flexibility of the present law and to avoid shackling time sensitive investigations to primitive technology. So long as police respect privacy rights, they

should be allowed use technology to inspect potential criminal activity in a safer, effective, and non-intrusive manner.

STANDARD OF REVIEW

The issue of whether the agents' searches in the present case fell under any established exceptions to the Fourth Amendment's warrant requirement is a question of law, which should be reviewed *de novo*. *Ornelas v. United States,* 517 U.S. 690, 699 (1996).

For the issue of if the police conduct at Macklin Manor constituted an unreasonable search, the Fourth Amendment analysis is reviewed *de novo*. *United States v. Breza,* 308 F.3d 430, 433 (4th Cir. 2002) (stating that whether certain conduct by law enforcement officers infringes upon rights guaranteed by the Fourth Amendment is a question of law subject to *de novo* review). The underlying factual findings are reviewed for clear error. *United States v. Rusher,* 966 F.2d 868, 873 (4th Cir. 1992).

ARGUMENT

I. THE WARRANTLESS SEARCH OF THE RESPONDENT'S LAPTOP DID NOT VIOLATE THE RESPONDENT'S FOURTH AMENDMENT RIGHTS GIVEN SETTLED FOURTH AMENDMENT ANALYSIS.

The Fourth Amendment protects individuals against unreasonable searches and seizures, but warrantless searches are not always unreasonable. The Supreme Court has recognized "specifically established and well-delineated exceptions" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967).

The exception controlling the first issue in this case is the Border Search Exception. With a history older than the Fourth Amendment, the border search exception derives from Congress's authority to protect the border and control who or what crosses it, an inherent attribute of national

sovereignty. *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (*citing* U.S. Const., Art. I, § 8, cl. 3).

The Court of Appeals incorrectly held that the border agents' warrantless search of Ms. Koehler's laptop violated her Fourth Amendment rights. The agents performed the search with reasonable suspicion and minimal intrusiveness.

A. Agent Ludgate's routine search of the laptop was not an intrusive search, thereby eliminating the need for a warrant.

Courts have determined that border searches generally fall into two categories—routine and non-routine. While the distinction between "routine" and "non-routine" searches has never been explicitly defined by the courts, it ultimately rests on the level of intrusiveness imposed by the officers or agents conducting the searches. In 2008, the Ninth Circuit determined that a "routine" search crosses the threshold to "non-routine" and requires a warrant if the search is either particularly offensive, including an intrusive search of the body, or physically destructive. *United States v. Arnold*, 533 F.3d 1003, 1007–08 (9th Cir. 2008).

In this case, Respondent argues that Agent Ludgate violated her Fourth Amendment rights when she found the device in Mr. Wyatt's car, opened it, and searched its contents. R. at 26-28. The Court of Appeals held that although a non-routine label is typically reserved for searches of a person and not his or her belongings, the search of the respondent's laptop was non-routine. The appellate court reasoned that Agent Ludgate's level of access to Ms. Koehler's personal information within the laptop intruded upon her privacy interest. R. at 17. Such an analysis is lacking for the following reasons.

1. Agent Ludgate's search of the laptop demonstrated no particularly offensive or intrusive conduct, and it was not physically destructive, preventing the search from crossing the threshold to a "non-routine" classification.

Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. In *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008), the Ninth Circuit examined the issue of warrantless laptop searches at border stations and determined that reasonable suspicion was not necessary in order for government officials to search the electronic contents of the defendant's laptop. *Id.* at 1008. The defendant in *Arnold* did not make any claims related to physical destruction, but he did raise the "particularly offensive manner" claim. To this point, the Ninth Circuit asserted that there was nothing "particularly offensive" about the manner in which the border patrol officers conducted the search when compared with other lawful border searches. According to the defendant, the officers simply had him turn on his computer and looked at what he had inside, and to the court, this implied a routine search. *Id.* at 1009.

Here, the characteristics of Agent Ludgate's search did not stray very far from the search conducted in *Arnold*. Just as Arnold was selected for secondary questioning at the Los Angeles Airport border checkpoint, the driver in the present case was selected for routine questioning as his car arrived at the border station. R. at 25. The officers in *Arnold* then inspected the defendant's luggage, which contained his laptop and other electronic devices, such as a separate hard drive and memory stick. *Id.* at 1005. Here, Mr. Wyatt opened the trunk to his car after the agents asked him to do so, and he never expressly protested to the examination of the respondent's laptop, which was located inside. R. at 26-28.

Additionally, when Agent Ludgate opened the laptop, there was no password protection in place, and the documents she found relating to Mr. Ford and his kidnapped children were all sitting

open on the desktop. R. at 28. Similarly, in *Arnold*, the desktop of the defendant's laptop displayed icons and folders that, when opened, contained pornographic images. After further examination of Arnold's computer equipment, the officers discovered numerous images of child pornography, a crime for which the defendant was later charged. *Id.* at 1005. Just as in *Arnold*, a simple surface-level search of the laptop's contents exposed the Respondent's criminal enterprise.

Under the *Arnold* analysis for routine versus non-routine searches, Agent Ludgate's search of Ms. Koehler's laptop was not offensive, nor was it physically destructive or damaging to her personal property. Agent Ludgate did not engage in a deep, probing search of Ms. Koehler's hard drives, nor did she delve into personal bank records other highly confidential documents. The search in *Arnold* was much more extensive and intrusive, as the officers detained the suspect and questioned him for hours about the contents of his laptop in addition to seizing his hard drives and memory sticks without a warrant, yet the Ninth Circuit still held that the search was constitutional. *Id.* at 1010. Here, the invasion was minimal by comparison, and it should be treated as such. Agent Ludgate's conduct amounted to nothing more than a routine search because its the non-invasive nature.

2. The respondent's argument that her privacy rights were breached by the laptop search is without merit, as one's expectation of privacy at the border is significantly less than in the interior.

The key consideration here is that the expectation of privacy for individuals and their belongings is severely diminished at the border versus the interior. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (holding that dignity and privacy interests requiring reasonable suspicion for highly intrusive searches of the person do not apply to vehicles being inspected at the border).

While a laptop might contain an abundance of personal information, the same could be said for a suitcase or other container being carried by someone crossing the border, and numerous cases have held that luggage and other containers are fair game during routine border searches. *United States v. Okafor*, 285 F.3d 846 (9th Cir. 2002) (reasoning that an x-ray examination and subsequent physical probe of a traveler's luggage equates a routine search, because it was not personally intrusive, posed no harm to the object being scrutinized, and did not unduly delay transit). Someone's luggage could contain piles of privileged legal documents, or personal records relating to social security numbers or bank account information. A laptop would merely present such personal "papers" (in the words of the Constitution) in electronic format, rather than hard copy, and such information should be treated in the same regard as physically tangible property.

A search of electronic devices at the border is routine, as long as it does not cross the line from a file review to a forensic examination. *United States v. Cotterman*, 709 F.3d 952, 967 (9th Cir. 2013) (holding that an exhaustive, warrantless "strip search" of computer hard drives constituted a substantial intrusion upon personal privacy and dignity). Arguably, the agents might have violated Ms. Koehler's privacy rights had they engaged in a deep, forensic examination of the contents of her computer, but no such act occurred. Agent Ludgate merely looked at what was already sitting open on the desktop of the computer, which was not password protected, and there was no seizure of hard drives or deleted files. R. at 28. If Ms. Koehler had subjective concerns about her privacy interests and keeping her information out of the wrong hands, then she could have set a password lock on her laptop.

The potential privacy concerns associated with laptops and other electronic devices are outweighed by the policy concerns surrounding sovereign control and security. As the Court of Appeals pointed out, it is true that laptops have a vast storage capacity and they might harbor

"boundless" amounts of information, but this observation also presents a significant challenge when it comes to controlling what enters the nation's borders. R. at 17. The border search exception is grounded in the recognized right of a sovereign nation to control who or what enters its borders. *Ramsey*, 431 U.S. at 611. Keeping that right intact is essential to protect against the smuggling of illegal materials and information that could be related to future crimes and planned terrorist attacks. Here, the exercise of this sovereign power to secure and protect the border is especially significant, since Eagle City saw an uptick in criminal activity at that border station in the past two or three years. R. at 24.

Thus, Agent Ludgate's warrantless search of Ms. Koehler's laptop did not violate the Fourth Amendment. She conducted a reasonable, non-intrusive routine search that falls within the well-recognized Border Search Exception.

B. Even if the Court found Agent Ludgate's search of the laptop to be non-routine, she had the requisite reasonable suspicion to conduct the search.

In justifying a particular intrusion, an officer must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (holding that the detention of a traveler at the border, beyond the scope of a routine customs search, is justified if agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal). Even if the Court disputed a routine characterization of the laptop search, the search was constitutional because the circumstances surrounding the border stop gave the agents enough reasonable suspicion to conduct the search.

In the context of a border search, reasonable suspicion is measured by a totality of the circumstances, including unusual conduct of the defendant, discovery of incriminating matter

during routine searches, computerized information showing a propensity to commit relevant crimes, and a suspicious itinerary. *United States v. Irving*, 452 F.3d 110 (2d. Cir. 2006).

In *Irving*, customs agents found computer diskettes and undeveloped film containing child pornography only after they obtained the following information: the defendant was a convicted pedophile, a subject in a criminal investigation, he had been to Mexico where he claimed that he visited an orphanage, and his luggage contained children's books and drawings. *Id.* at 124.

Here, the agents first encountered the driver's suspicious behavior (lack of eye contact, agitation, lack of cooperation, fidgeting), which fits the bill for "unusual conduct" under the *Irving* test. Then, during a routine search of his vehicle they uncovered an undeclared $10,000 in cash (a crime in itself, and an example of "incriminating matter" under *Irving* because it was the exact amount demanded for proof of life in the kidnapping). R. at 26. After finding and opening the laptop, the agents discovered incriminating computerized information on its desktop, fitting yet another facet of the *Irving* test. Finally, after asking Mr. Wyatt questions about Ms. Koehler and running her name through their database, the agents learned of her felonious history and her status as a person of interest in the kidnapping crime, further hinting at her propensity to commit crimes. R. at 26-28. Just as the series of facts in *Irving* gave the agents reasonable suspicion to conduct a deeper search of the defendant's belongings, the specific facts here served the same function and gave the agents reasonable suspicion to search the contents of the laptop.

C. The *Riley* analysis applied by the Court of Appeals is improper under the border search exception, because an individual's expectation of privacy is severely diminished at the border, and the search of the laptop did not constitute an exhaustive exploratory search.

The Court of Appeals asserted that the immense storage capacity of a digital device changes a person's reasonable expectation of privacy. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (holding that an arresting officer can seize, but not search, a smartphone absent a warrant

unless there are exigent circumstances). The appellate court used this reasoning as a basis for why the content of devices such as the laptop in this case cannot be searched without a warrant. R. at 17. One of the most significant issues with the appellate court's reliance on *Riley* is the fact that the search in *Riley* did not occur at the border, where a person's expectation of privacy is significantly diminished. *See Flores-Montano,* 541 U.S. at 152. As stated previously, protecting public welfare and national security are the main reasons for the border exception's creation, and the diminished expectation of privacy is necessary in order to maintain territorial integrity and curb criminal activity at a place where it is known to occur.

Additionally, a search performed in an otherwise ordinary manner cannot be considered unreasonable simply due to the storage capacity of the object being searched. *California v. Acevedo*, 500 U.S. 565, 576 (1991) (explaining that "looking inside a closed container" when already properly searching a car cannot be held unreasonable when the Court previously found "destroying the interior of an automobile" to be reasonable in *Carroll v. United States*, 267 U.S. 132 (1925).

Although the court in *Acevedo* was referring to the search of closed containers within a vehicle, the laptop in this case could arguably be considered a "container." The Supreme Court has refused to distinguish between "worthy" and "unworthy" containers in Fourth Amendment searches, noting that the central purpose of the Fourth Amendment prohibits such a distinction. *California v. Carney*, 471 U.S. 386, 393–94 (1985). If the Court held that police may search containers within a vehicle, without a warrant, on the belief that the containers hold contraband or evidence, then the search of the laptop in this case was reasonable. The Respondent's initials, "AK," and Mr. Wyatt's admission of her joint ownership of the laptop gave the agents enough

suspicion to look at its contents, with the belief that they might locate evidence of a crime. R. at 26.

The defendant in *Arnold* had attempted to make a similar privacy comparison regarding storage capacity, except he used the protections of a home as his basis for comparison. The defendant argued that a laptop allows for the storage of personal documents in an amount equivalent to that stored in one's home. *See Arnold*, 533 F.3d at 1006. The Ninth Circuit expressly rejected this argument, holding that the defendant's analogy to a search of a home based on a laptop's storage capacity is without merit, because a laptop goes with a person, as the defendant himself stated, and it is not capable of functioning as a home. *Id.* at 1009. In fact, if a container is "readily mobile" and is capable of being carried, then it cannot be afforded the same Fourth Amendment protections as a home. *See Carney*, 471 U.S. at 391. The common theme here is that the privacy argument under *Riley* cannot be properly applied to a laptop search at the border.

In 2006, the Ninth Circuit addressed the issue of warrantless laptop searches under the border search exception. *United States v. Romm*, 455 F.3d 990 (9th Cir. 2006) (holding that a forensic analysis used by customs agents to recover deleted child pornography fell under the border search exception). While the 2013 *Cotterman* decision severely limited the legality of warrantless forensic laptop searches at the border, *Romm* still drives home the point that if a deep, probing (forensic) examination of a laptop's contents can be permissible at the border, then Agent Ludgate's search of Ms. Koehler's laptop should not even be placed on the same spectrum. Her search consisted of looking at documents that were already open on the desktop, as opposed to a more exhaustive, exploratory search of hard drives or caches. R. at 28. There was nothing remotely "forensic" about Agent Ludgate's examination of the laptop's contents.

The *Riley* analysis does not apply here, because the respondent's expectation of privacy is diminished at the border as a matter of law second and her privacy was not breached by the search, because the search included only the documents already open on the computer's desktop.

II. THE EAGLE CITY POLICE MAY LAWFULLY USE ASSISTIVE TECHNOLOGY WITHOUT A WARRANT SO LONG AS THEY DO NOT VIOLATE PRIVACY EXPECTATIONS.

While the Fourth Amendment prohibits unreasonable searches, it does not immunize criminals from surveillance. The limits on police observation are determined by societal and actual privacy expectations. *Katz v. United States*, 389 U.S 347, 361 (1967). In this case, police used a drone and Doppler radar to gather preliminary information. The drone availed police to the sky, a public vantage point, for layout information of Macklin Manor. The Doppler scan returned intelligence about movement within the criminal compound. Neither technique amounts to an unreasonable search because police honored traditional privacy limitations by using technologies with a non-invasive character.

A. The PNR-1 flight did not violate any privacy expectations because Ms. Koehler acted in the plain view of the officers.

The drone flight did not violate Ms. Koehler's expectation of privacy or a societally recognized privacy right for two reasons. First, Ms. Koehler exposed her activities to overhead observation. Second, the drone flew through public navigable airspace. Respondent cannot reasonably expect a sky free of observation and society does not hold law enforcement to such an expectation.

1. *Ms. Koehler's outside activities reveal her limited subjective expectation of privacy.*

The law frustrates actual expectations of privacy in cases where the subject exposes their activities to law enforcement. *United States v. White*, 401 U.S. 745, 752 (1971) (holding

expectations of privacy founded on assumptions of privacy or the discretion of co-conspirators as unsustainable). Here, the Respondent walked across Macklin Manor at 4:30 AM. R. at 4. The drone imaged the respondent when it took pictures of the grounds, allowing police to identify her as their kidnapping suspect. R. at 33.

While the drone facilitated this identification, the coincidental timing does not render the entire drone flight an unconstitutional search. *Katz,* 389 U.S. at 361 (reasoning that individuals may not claim subjective privacy when they act in the plain view of outsiders). Ms. Koehler undercut her claim to any actual expectation of privacy when she walked across the premises and stood guard by the pool house in the middle of a live kidnapping. R. at 33. The police did not violate the constitution because they observed her from a lawful vantage point.

Directly analogous with drones, police may use helicopters to view activities from the sky without violating privacy expectations. *See California v. Ciraolo*, 467 U.S 207, 213 (1986); *United States v. Breza,* 308 F.3d 430, 435 (4th Cir. 2002) (determining that a police helicopter flown 200 feet over the defendant's property did not violate the Fourth Amendment because his activities were in plain view).

Respondent maintains that she manifested an expectation of privacy by selecting Macklin Manor for its natural buffers, specifically the perpetual fog keeping planes away. R. at 3. Prevailing weather conditions cannot confer a heightened subjective expectation of privacy any more than criminals using remote locations for privacy. In *United States v. McIver,* the Ninth Circuit dismissed an argument that two defendants were immune from surveillance because they had chosed a remote area of a forest to cultivate marijuana. 186 F.3d 1119, 1125 (9th Cir. 1999).

Likewise, foggy skies cannot legally render Ms. Koehler free from observation. Her belief that no planes would fly overhead is not a sufficient basis to establish an actual expectation of

privacy. *Ciraolo*, 476 U.S. at 213-14 (rejecting an argument that defendant's 10-foot high fences enclosing his marijuana fields protected him from aerial surveillance). By crossing the outdoor grounds, Ms. Koehler exposed herself to any potential observer. R. at 4. The drone did not see any more than what another person flying over Macklin Manor in public airspace could have seen.

Moreover, the public thoroughfare remains over Macklin Manor even with infrequent flights overhead. R. at 42. It is "the possibility that a member of the public may observe activity from a public vantage point—not the actual practicability of law enforcement's doing so without technology—that is relevant for Fourth Amendment purposes." *United States v. Houston*, 813 F.3d 282, 289 (6th Cir. 2016). The possibility of planes, helicopters, and overhead flights is not diminished by the business practices of the Eagle City Airport and its flight providers. As evidenced by the drone flight, the airspace above the Manor is perfectly navigable.

Even when using sense-enhancing technology to look down upon properties and activities, police do not need a warrant to see what is in plain view from the sky. In *Dow Chemical Co. v. United States*, 467 U.S. 227, 243 (1986), the Supreme Court held that a $22,000 precision aerial camera capable of taking several photographs in precise and rapid succession from 1,200 feet did not constitute invasive technology. The DSLR camera in the drone manages only a zoom feature and an ability to snap action shots in high definition. R. at 46.

Binocular-enhanced views from police helicopters are not considered searches either. *United States v. Van Damme*, 48 F.3d 461 (9th Cir. 1995) (finding no search when an officer in a helicopter looked through a 600mm telephoto lens to see through open doors of a greenhouses); *United States v. Lace*, 669 F.2d 46 (2nd Cir. 1982) (stressing that a view from a helicopter with binocular assistance is not a search). Compared to a 600mm telephoto lens and a precision aerial camera, a DSLR camera does not invasively enhance what is already in plain view below.

Finally, the Respondent insists that the drone interfered with her privacy because it spotted her in the "curtilage" of Macklin Manor. R. at 9. In *Ciraolo,* the Supreme Court rejected this exact argument, holding that police do not need a warrant to see what is in plain view even if an activity occurs within the curtilage of a home. 476 U.S. at 213; *see also United States v. Warford*, 439 F.3d 836, 843 (8th Cir. 2006) (resolving the parties' dispute on whether police saw marijuana plants during aerial surveillance in the curtilage by dismissing the entire distinction as legally irrelevant). Thus, whether the space between the pool house and main house is curtilage does not matter in this analysis. If the police saw activity during aerial surveillance in plain view, then it is not a search.

Consequently, the dispositive assessment returns to the foundational principle that the Fourth Amendment does not protect what a person knowingly exposes. Ms. Koehler crossed the grounds of Macklin Manor in plain view. Police did not encroach on Ms. Koehler's subjective privacy—they lawfully utilized the sky as a public vantage point with non-invasive technology.

2. Society recognizes the sky is a public thoroughfare with legal vantage points; therefore, Respondent's hopes for protections from aerial observation cannot be honored.

The Supreme Court has long considered the sky a public highway. *United States v. Causby*, 328 U.S. 256, 266 (1946). As a result, societal expectations of complete vertical privacy necessarily faded away in the age of routine and commercial flight. *Ciraolo*, 476 U.S. at 213. The Supreme Court affirmed this view in *Florida v. Riley*, 488 U.S. 445, 450-51 (1989), finding that surveillance within navigable airspace is not a search under the Fourth Amendment. Quoting *Ciraolo*, the Court reemphasized that "the Fourth Amendment simply does not require the police traveling in the public airways…to obtain a warrant in order to observe what is visible to the naked eye." *Riley*, 488 U.S. at 451.

Here, the Eagle City Police technology specialist operated the drone within navigable airspace. R. at 41. The PNR-1 drone is pre-programmed to operate within the maximum height set by the State of Pawndale. R. at 41. Respondent pointed to a programming issue among the PNR-1 model as evidence that police flew the drone above the height requirement. R. at 19. But respondent has no evidence that the drone actually flew outside of navigable airspace in the course of its flight. R. at 41. The technology specialist testified that the police lost track of the drone's altitude for four to five minutes, but could not say if it went above the altitude. *Id.* All six test flights stayed within the mandated height, tending to show compliance with the Pawndale regulation. *Id.*

The Court of Appeals dismissed the drone's regulatory compliance altogether and narrowly considered the context of Macklin Manor. Agreeing with Ms. Koehler, they held that because aircraft did not routinely fly over Macklin Manor, the drone had no justifiable reason to be there. R. at 19. This language misuses the standard contemplated in the *Riley* concurrence while sanctioning a case-by-case analysis of societal justifications for defendants. 488 U.S. at 455. This approach is flawed for two reasons.

First, the *Riley* plurality focused on air travel generally and regulatory compliance, not whether flight is sufficiently rare over one property or another. *Id.* at 450-51. Justice O'Connor noted she would narrow the plurality standard to consider whether the public rarely, if ever, travels overhead at such altitudes. *Id.* at 455. However, this emphasis is on the altitude of flight as part of the analysis, not flight generally.

Second, the overall issue to resolve is whether society is prepared to honor Ms. Koehler's expectation that Macklin Manor's isolated location entitles her to complete immunity from overhead observation. *Oliver v. United States*, 466 U.S. 170 (1984) (stressing that societal

expectations of privacy must be broadly analyzed and not made on a case-by-case basis). Ms. Koehler operated within a city, and by extension a society, accepting of air travel. The idea she would be insulated from an overhead view is untenable considering that the State of Pawndale implemented drone flight legislation, suggesting that there was enough drone flying to regulate. R. at 39. Additionally, the airport in Eagle City suggests consumer demand for an air travel hub that supplies private and commercial flights in and out of the city. R. at 3. Eagle City also hosts an international border as one of the busiest port cities in the country. R. at 2. Taken together, the residents of Eagle City most likely accept the general proposition that someone (police, public, or otherwise) might see activity around their houses from the sky.

The plurality standard of *Riley* accepted both air travel as a general part of modern life and the consequent diminution of privacy from above. 488 U.S. at 450. With this standard, it does not matter that oncoming aircraft frequently avoided Mount Partridge. What matters is that as a society we accept that air travel and subsequent surveillance within navigable airspace can occur without a warrant. *Id.* at 451–52. Whether air travel rarely occurs over the mountain evades the controlling relevant legal analysis. That planes, helicopters, and drones could fly over Macklin Manor is significant and was evidenced by the successful drone flight. Respondent's expectation of privacy is thus not one society is prepared to honor as reasonable and the drone flight should not be considered a search.

B. The Doppler Scan of Macklin Manor is not a search under the Fourth Amendment.

In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court established a "bright line" around the home against futuristic and invasive technology. In this case, Doppler radar should not trigger this analysis for two reasons. First, police understood that Ms. Koehler purchased Macklin Manor with a company and probably used that property to facilitate her illegal business. She

cannot assert the police invaded her home. Second, Doppler radar is distinct from the invasiveness of thermal imaging. It performs a cursory scan for movement, not a detailed analysis of private space. R. at 4. The scan, then, should be analyzed under a traditional *Katz* analysis.

1. The protections of the home announced in Kyllo do not apply to businesses or to manors masquerading as residences.

In *Kyllo*, the Supreme Court makes clear that the Fourth Amendment steadfastly protects the home from intrusive technology. 533 U.S. at 40. Justice Scalia announced that the Fourth Amendment draws "a firm line at the entrance to the house...and that line, we think, must be not only firm but also bright with respect to enhanced methods of surveillance." *Id.* Respondent's argument rests on this notion that she is entitled to the bright line protections of the home. R. at 20. However, there are no facts to suggest Ms. Koehler leased, used, or lived in Macklin Manor as a house.

Ms. Koehler did not lease Macklin Manor using her own identity. Officers uncovered the location from a lease agreement that showed the Manor leased to R.A.S., a shell company. R. at 3. Only by linking Ms. Koehler to the company did they suspect she would be at Macklin Manor. Had she wanted to use Macklin Manor as a home, she would have purchased the property in her own name, with her fiancé, or with any of her private aliases. She also used the Manor as a base to facilitate her kidnapping scheme. R. at 5. She stationed people in her employ there to guard her crime, not her private space. Sebastian Little, Dennis Stein, and another unidentified individual were there standing guard over kidnapped victims. R. at 5. There were not there to protect Ms. Koehler's property or privacy. It is incredibly unlikely that these people resided there with Ms. Koehler as roommates, family, or guests to create a home atmosphere. They were there as part of a business, albeit an illegal one.

Of course, while businesses have reduced expectations of privacy, they remain entitled to the fundamental Fourth Amendment protections. *Kyllo,* 533 U.S. 27, 37 (2001); *Dow Chem. Co.*, 476 U.S. at 238–39. Their protections are significantly reduced in the face of technology compared to the treatment of the home in *Kyllo.* Thus, the "bright line" of *Kyllo* should not apply here and the Doppler scan should instead be viewed under a traditional *Katz* analysis.

2. Even if Macklin Manor were a home, Doppler imaging is distinct from thermal imaging because Doppler is not an invasive technology.

Kyllo limits invasive surveillance techniques capable of imaging or discerning the details of a home. 533 U.S. at 35-6. If information gained from sensory enhanced technology could not have been ascertained without physical entry, then the method goes too far. *Id.* at 34. The second consideration is whether the technology is in common use. *Id.*

a. The Doppler radar does not reveal information that unduly invades privacy and should not be considered a search.

The officers in *Kyllo* targeted a suspected marijuana grow in a house. 533 U.S. at 29. They used thermal imaging to detect hot spots emanating from the home. *Id.* at 30. The Court held that detection revealing the internal temperature of a home was unknowable absent technological assistance or being in the home itself. *Id.* at 34. Thus, the thermal technology constituted an invasion.

Doppler radar use does not trigger this either-or conclusion. Officers could have determined movement about Macklin Manor without either technology or entry into the home. For example, the police could have staked out the Manor and waited for people to move in, out, and about the grounds and into plain view. Ms. Koehler did not take any actions indicating she wished to exclude observation of the Manor on the ground level. There were no fences, gates, "no trespassing signs," or any privacy provisions to prevent people from seeing activity on the grounds. *Oliver,* 466 U.S. at 179 (stating that affirmative actions of exclusion like fences, "no trespassing"

signs, or gates might bar public observation in a remote location). However, the officers elected to enhance their safety and expedite the situation given the violent criminal history of Ms. Koehler and the pressing matter of three missing children.

In *Dow Chemical*, the court distinguished preliminary technological inspection versus specialized devices that might "penetrate" the walls to uncover trade secrets or record confidential discussion. *Dow Chem. Co*., 476 U.S. at 239. Like *Dow,* investigators in this case did not uncover private matters or confidential content. The Doppler scan only revealed that multiple people were moving about the criminal complex. R. at 33-4. This informs nothing more than officer safety considerations and could have been revealed by different means other than radar. So long as the technology is not unduly intrusive, the officers may obtain this kind of observational information without a warrant. The number of people inside, coming, and going from a home is cursory information related to safety considerations. The scan did not reveal criminal activity analogous to trade secrets. Doppler radar was supplemental technology used for safety purposes in this case. The technology itself did not reveal human activity or the intimate details of the property.

Compared to other technologies limited by *Kyllo*, Doppler is indeed the round peg the Respondent is trying to shove into a square hole. Consider GPS attached to cars, sniff dogs set on porches, or recording devices placed in homes or phone booths. GPS reveals protected pattern of life data. *United States v. Jones*, 565 U.S. 400, 404 (2012). Sniff dogs are highly specialized "tools" able to detect unknowable odors that reveal specific illegal preferences. *United States v. Whitaker*, 820 F.3d 849, 852–53 (7th Cir. 2016); *Florida v. Jardines*, 569 U.S. 1, 12–13 (2013). Recording devices reveal intimate conversations to the uninvited ear. *Katz*, 389 U.S. at 352. The commonality among these is the high level of invasion and the detailed content uncovered by the technologies. Doppler is not like these technologies.

Rather, Doppler is analogous to a Third Circuit sanctioned technology: wireless signal detectors. Also known as "MoocherHunter," these devices detect and track wireless signals inside a home. *United States v. Stanley*, 753 F.3d 114, 116 (3d Cir. 2014). The technology returns only generalized readings of wireless activity to an investigator. Similarly, Doppler does not reveal content; it reveals the impressions from movement.

b. Doppler is a versatile technology with varied common uses and should not be limited to the specific form, handheld Doppler radar, when analyzing this case.

The second prong of *Kyllo* requires that Doppler be in "common use" for police to use it without a warrant. 533 U.S. at 35-6. Doppler radar is an everyday technology. Its colloquial and generic uses include forecasting weather (determining general patterns), detecting speed from a passing car (while not identifying the car itself), and checking blood flow in medical imaging.[1] Doppler is a versatile technology with multiple applications, not a rare one.

As a policy, useful technology aids cannot all instantly trigger the application of *Kyllo* and be rendered unconstitutional. *Kyllo* at its broadest interpretation might allow this, but law enforcement officers must be allowed to take precautions in dangerous situations when the technology is as non-invasive as Doppler radar. Police are entitled to enhance their safety with an application of general technology so long as they observe traditional privacy rights.

Thus, *Kyllo* should not apply here with any force. Doppler is a different technology than thermal imaging because it does not invade the home or provide any information that would otherwise not be available to officers without being physically on the property.

[1] Panesor, Tajinder, *Radar*, The Institute of Physics (2010), available at https://www.iop.org/publications/iop/2011/file_47456.pdf

3. The Doppler scan is not a search under the Katz analysis because it does not violate Respondent's privacy expectations.

Returning to the *Katz* analysis, the antecedent question remains if the Doppler scan constituted a search. Here, Respondent had no actual expectation of privacy in terms of what she sought to keep hidden. *Oliver*, 466 U.S. at 179. She did not take any affirmative actions other than hiding the kidnapped victims at the back of the property in the pool house. Ms. Koehler cannot use her desire to conceal illegal activity as a sufficient basis for a legitimate privacy expectation.

Society is also unprepared to honor an expectation of privacy that shields individuals from all observation. One cannot purchase a property with a shell company on a hill in a busy city and then simultaneously claim an expectation of privacy when officers leveraged an inconvenient observation point. Doppler does no more than emit frequencies, which here estimated the number of occupants which police could have ascertained had they sacrificed time and safety. Other technology might require a warrant before use, such as GPS devices installed on cars, thermal imaging detecting heat, microphones installed within the home, and recording devices. Doppler, however, should not. All of those technologies share an invasive feature that reveals content and life details that should be protected. Doppler is fundamentally non-invasive. It merely allows police to identify potential persons in preparation for searches. It does not in itself constitute a search.

CONCLUSION

The government thus asks the Supreme Court to reverse the Court of Appeals based on this case's facts, the controlling law, and as a matter of policy. To the first issue, the Border Search Exception applies as the agents conducted a routine search in furtherance of Eagle City's border security. Even if the Court finds that the search was non-routine, the agents comported themselves responsibly and reasonably in light of Mr. Wyatt's suspicious conduct. The evidence produced

from this search did not violate the Respondent's Fourth Amendment rights and should not be suppressed.

To the second issue, the police actions did not constitute a search given *Katz* and its narrower doctrinal successors. Aerial surveillance may be conducted without a warrant to see what is in plain view. Officers may also use non-invasive technology, like Doppler, that assesses situations for safety concerns. Police must be allowed to use technology to investigate crimes in the modern world. Respondent demonstrated no actual expectation of privacy and police did not act contrary to the Fourth Amendment. The evidence gathered from these efforts is admissible and should not be suppressed.