No. 4-442

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

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

Petitioner, United States of America

Attorneys for the
Petitioner, United States of America

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Agent Ludgate's search of the Respondent's laptop falls within the border search exception to the Fourth Amendment.

II. Whether the Eagle City Police Department's employment of modern technology to obtain information at Macklin Manor infringed upon the Respondent's Fourth Amendment rights.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Eagle City is one of the largest and busiest ports of entry into the United States and has always been a major crossing point for criminals entering the United States. (R. at 2). Agents Dwyer and Ludgate were patrolling this border around 3:00 A.M. when they stopped Mr. Wyatt's vehicle. (R. at 2). When questioned on why he was crossing the border, Mr. Wyatt became agitated and uncooperative, avoiding eye contact with the agents. (R. at 2). His answers were brief and he was very pale. (R. at 26). Agent Ludgate explicitly asked Mr. Wyatt if he was transporting $10,000 or more in U.S. currency. (R. at 2). Mr. Wyatt responded that he was not transporting $10,000. (*Id.*) Agent Ludgate calmly informed Mr. Wyatt that routine searches are done on every vehicle crossing the border, including his. (R. at 2). Per officer request, Mr. Wyatt opened his trunk and the agents discovered $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it. (R. at 2). Suspicious of the initials, Agent Ludgate asked Mr. Wyatt if the laptop was his. (R. at 2). Mr. Wyatt voluntarily stated that he shared the laptop with his fiancée, Amanda Koehler (herein "Respondent"). (R. at 2).

The agents ran the Respondent's name in the criminal intelligence and border watch database. (R. at 2). The search revealed the Respondent's extensive felony record of multiple convictions for crimes of violence. (R. at 2). The agents also discovered that the Respondent was named as the main person of interest in the recent kidnappings of John, Ralph, and Lisa Ford, the teenage children of billionaire biotech mogul Timothy Ford. (R. at 2). The Ford children were targeted and kidnapped on their way to school and held for ransom for $100,000. (R. at 2). Recently, the kidnappers agreed to give proof of life in exchange for $10,000 in $20 bills by noon the next day. (R. at 2).

The FBI and the Eagle City Police Department ("ECPD") have been working together and believed the Ford children were held in Eagle City. (R. at 2). Aware of the investigation, Agent Ludgate opened the laptop. (R. at 2). She found several documents already open. (R. at 3). The documents contained Mr. Ford's personal information such as his address, upcoming meetings and appearances, and the names of his staff members. (R. at 3) Additionally, Agent Ludgate viewed a lease agreement with the name "Laura Pope" and an additional address. (R. at 3). Agent Ludgate informed Agent Dwyer and placed Mr. Wyatt under arrest for failure to declare in excess of $10,000. (R. at 3). Agent Ludgate reported their findings to Detective Raymond Perkins, lead detective in the Ford kidnappings. (R. at 3).

The address that Agent Ludgate found was traced to a large estate atop Mount Partridge on the outskirts of Eagle City called Macklin Manor. (R. at 3). The top of Mount Partridge is cloudy, with fog and clouds typically covering Macklin Manor. (R. at 3). Because of visibility concerns, planes and other aircrafts tend to opt to go around the mountain. (R. at 3).

Because the Eagle City Police Department had recently uncovered information that Respondent, the main person of interest in the Ford kidnappings, had used an alias to rent out Macklin Manor, the police decided to go to the Manor. (R. at 3). Detective Perkins was reluctant to approach the estate without knowing about the layout and residents, due to the dangerous nature of Respondent and the sensitive situation concerning the child hostages. (R. at 43). At 4:30 A.M., Detective Perkins assigned Officers Lowe and Hoffman to conduct loose surveillance on the estate. (R. at 3). Officer Hoffman patrolled the area on foot and Officer Lowe, ECPD's technology expert, deployed a PNR-1 drone to fly over the property at dawn. (R. at 3).

Because of its availability and affordability, the PNR-1 has become a favorite amongst drone enthusiasts all over the world. (R. at 3) The PNR-1 has a short battery life of thirty-five

minutes and a camera that captures high-resolution photos and videos. (R. at 3). The memory card in the PNR-1 can only hold around 30 photos and 15 minutes of video at a time. (R. at 3). The PNR-1 has a pre-programmed maximum flight altitude of 1640 feet which is the legal maximum altitude allowed for drones in Pawndale. (R. at 4). While similar models have been known to exceed the altitude limit due to network connectivity errors, this PNR-1 drone has never exceeded the altitude limit. (R. at 41).

Officer Lowe parked her squad car two blocks away from the estate. (R. at 4). The PNR-1 took 7 minutes to get to Macklin Manor, hovered above it for 15 minutes and returned to Officer Lowe's car 7 minutes later. (R. at 4). The PNR-1 took 22 photos and recorded 3 minutes of video. (R. at 4). The surveillance provided the layout of Macklin Manor including the main house, an open area with a pool and patio, and a single-room pool house. (R. at 4). The main house is near a patio area and a full 50 feet from the pool house. (R. at 4). There is no gate or fence surrounding the property. (R. at 41). The drone captured the image of a single young female walking from the main house to the pool house. (R. at 4). Detective Perkins confirmed that the female subject was the Respondent from photographs acquired by ECPD in a separate investigation. (R. at 4).

After identifying the Respondent at Macklin Manor, Detective Perkins was worried that alerting the occupants would endanger the lives and safety of the hostages. (R. at 4). In order to protect their safety, Detective Perkins scanned the front door area of the main house with a handheld Doppler radar. (R. at 4). Handheld Doppler radar devices have become popular with many law enforcement agencies in recent years. (R. at 4). The Doppler radar device emits a radio wave to get a rough estimate of where individuals are inside the home. (R. at 4). The Doppler

radar device cannot reveal an image of the inside of a building, nor can it indicate the layout of the inside of a building. (R. at 4).

The Doppler radar detected one individual in the front room of the house, inches from the front door, although officers later learned there were three individuals in the house. (R. at 35). The officer cautiously walked around the main house and proactively conducted a Doppler scan on the pool house. (R. at 5). The second scan revealed three individuals, breathing but unmoving and another individual nearby pacing around and presumably standing guard (R. at 5).

The officers immediately retreated and obtained a search warrant for the entire property. (R. at 5). At 8:00 A.M., Detective Perkins, Officer Lowe, Officer Hoffman returned to the property with a SWAT team. (R. at 5). The team entered the estate as permitted by the warrant. (R. at 8). Officers detained the Respondent before she was able to escape. (R. at 5). The officers found a handgun on the Respondent's person. (R. at 5). Subsequently, the officers entered the pool house, detained the individual standing guard, and rescued John, Ralph and Lisa Ford. (R. at 5). When the officers found the Ford children, they were all restrained to chairs. (R. at 5).

II. SUMMARY OF THE PROCEEDINGS

On October 1, 2016, a federal grand jury indicted the Respondent on three counts of kidnapping under 18 U.S.C. § 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1). (R. at 16). The Respondent filed a motion to suppress the evidence found on the day of her arrest. (R. at 18). The district court rejected the Respondent's argument stating that Agent Ludgate had the reasonable suspicion necessary to conduct a search on the Respondent's laptop and that Detective Perkins possessed the probable cause necessary to secure a search warrant. (R. at 12). The Respondent's motion to suppress was denied in its entirety. (R. at 3). The Fifteenth Circuit Court of Appeals reversed the District Court and suppressed the

evidence. (R. at 11). The Supreme Court granted a writ of certiorari on whether 1) the government's search of Respondent's laptop at a border station a valid search pursuant to the border search exception to the warrant requirement and 2) the use of a PNR-1 drone and handheld Doppler radar device constitute a search in violation of the Respondent's Fourth Amendment rights.

SUMMARY OF THE ARGUMENT

This case concerns law enforcement's ability to find the truth. The evidence gathered as a result of the border search of Respondent's laptop and the employment of technology at Macklin Manor should not be suppressed because the officers conducted reasonable searched.

First, under the border search exception, the search of the Respondent's laptop was routine. Furthermore, the search does not qualify as a forensic search thus not requiring reasonable suspicion. If this Court declares reasonable suspicion was needed, due to the totality circumstances, Agent Ludgate demonstrated reasonable suspicion.

Second, none of the preliminary searches at Macklin Manor were unreasonable. The use of the PNR-1 drone fits squarely within this court's precedent concerning permissible aerial surveillance. Further, the use of the handheld Doppler radar did not infringe on an objectively reasonable expectation of privacy.

All of the evidence gathered in this case was the result of a reasonable search. Excluding it would have little deterrent effect on police misconduct. This Court has carved out exceptions warrant requirement that will apply no matter how much technology advances. The Thirteenth Circuit Court of Appeals' decision has ignored these exceptions and should thus be reversed.

STANDARD OF REVIEW

Motions to suppress evidence are reviewed *de novo*. *United States v. Thomas*, 863 F.2d

622, 625 (9th Cir. 1988). Questions of law and fact are reviewed *de novo*. *United States v. McConney*, 728 U.S. 1195, 1202-03 (9th Cir. 1984). Whether the searches here are prohibited by the Fourth Amendment are questions of law and fact, so *de novo* review is appropriate.

ARGUMENT

I. THE THIRTEENTH CIRCUIT COURT OF APPEALS' DECISION SHOULD BE REVERSED BECAUSE THE SEARCH OF RESPONDENT'S CAR AND LAPTOP DID NOT VIOLATE HER FOURTH AMENDMENT RIGHTS.

The Fourth Amendment safeguards against unreasonable searches and seizures. U.S. Const. amend. IV. § 1. Warrantless searches and seizures are deemed per se unreasonable unless they follow one of a few exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). In an effort to preserve the country's fundamental right to protect its citizens, this Court created an exception for searches conducted at international borders. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). The border search doctrine permits law enforcement to conduct routine searches and seizures at the border without probable cause, a warrant, or reasonable suspicion. *Id.*

While this Court has ruled in *Riley v. California* that the search of digital information requires a warrant, the holding excludes border searches. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014). The search in *Riley* occurred on American soil whereas the present case occurs at an international border requiring a higher standard of domestic security. *Id.* at 2480. Since "the expectation of privacy is less at the border then it is in the interior", all incoming vehicles and people may be searched, including the laptop at issue. *Montoya De Hernandez*, 473 U.S. at 540.

At the center of the debate regarding the Fourth Amendment lies the definition of "reasonable". If a search is deemed unreasonable, reasonable suspicion must be proven. In order to evaluate the validity of the search, the Court should apply two standards 1) whether the border search was routine and 2) the classification of the electronic border search. In the present case,

the border search of the laptop does not require reasonable suspicion because it was routine and was not a "forensic digital search." Even if this Court declares the border search non-routine, the evidence should be admissible because the agents had reasonable suspicion.

A. The Border Search of the Laptop Did Not Require Reasonable Suspicion Because It Was Routine.

The evidence obtained from the search of the laptop is admissible because it was a routine search. Under the Border Search exception to the Fourth Amendment, law enforcement officials can conduct routine searches and seizures at the border without a warrant, probable cause, or reasonable suspicion. *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985). Since a person's expectation of privacy is diminished at the border, many warrantless "searches and seizures . . . are reasonable simply by virtue of the fact that they occur at the border." *Ramsey,* 431 U.S. at 616. The circuit courts have evaluated whether a search is routine by its degree of intrusiveness. *See United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006); *United States v. Tsai*, 282 F.3d 690, 694 (9th Cir. 2002). Some examples of routine searches are pat-downs, pocket-dumps, searches requiring moving or adjusting clothing, scanning, and opening and going through the contents of closed containers. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 549 (D. Md. 2014).

A border search is non-routine "when it reaches the degree of intrusiveness present in a strip search or body cavity search" or is conducted in a particularly offensive manner. *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994). Courts have considered two types of border searches non-routine: invasive bodily searches and extensive damage to property. *United States v. Braks*, 842 F.2d 509, 512 (1st Cir. 1988); *Flores-Montano*, 541 U.S. at 154; *United States v. Seljan*, 547 F.3d 993, 1010 (9th Cir. 2008). Neither of these two non-routine searches occurred in the case at hand.

Courts across the country have deemed a vast majority of computer searches at the border routine. *United States v. Ickes*, 393 F.3d 501, 505 (4th Cir. 2005); *United States v. McAuley*, 563 F. Supp. 2d 672 (W.D. Tex. 2008); *United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008). The facts in the present case strongly resemble the facts in *United States v. Arnold*. 533 F.3d at 1005. Like the present case, the agents in *Arnold* browsed the desktop of the computer. *Id.* at 1005. However, unlike *Arnold* where agents opened folders and browsed documents for several hours, Agents Ludgate and Dwyer held the laptop for less than two hours and the files were already open. *Id.* (R. at 3). *Arnold* found the particularly offensive standard to be irrelevant to electronic searches and compared searches of laptops to suspicionless border searches of a traveler's luggage. *Arnold*, 533 F.3d at 1009.When applying the logic developed in *Arnold* to the present case, the names of staff members and addresses found on Mr. Wyatt's laptop could have easily been found in a non-digital format within Mr. Wyatt's luggage in the form of a planner or folder which would be declared routine. *Id.* (R. at 3). Therefore, this Court should take the Ninth Circuit's approach and find the search of Mr. Wyatt's laptop routine.

B. The Border Search of Mr. Wyatt's Laptop Did Not Require Reasonable Suspicion Because It was Not a Forensic Digital Search.

Since the search of the laptop is not a forensic digital search, reasonable suspicion is not required. Electronic searches are defined as searches of "any device that may contain information, such as computers, disks, drives, tapes, mobile phones . . . cameras, music and . . . any other electronic or digital devices." CBP Directive No. 3340-049 at 5.1.2 (Aug. 20, 2009). When analyzing electronic border searches, courts have distinguished three forms: 1) a physical device search, 2) a "manual digital search", and 3) a "forensic digital search." Thomas M. Miller, *Digital Border Searches After* Riley v. California, 90 WASH. L. REV. 1943, 1944-96 (2015).

During a physical device search, an officer examines physical aspects of the electronic device. A physical device search may involve opening the device to confirm legitimacy without examining data stored. *United States v. Molina-Gomez*, 781 F.3d 13, 17 (1st Cir. 2015) (examining search where border search required disassembling a laptop and discovering heroin).

A "manual digital search" requires an officer to search digital information encompassed in the device. The intrusiveness of a digital search is determined by the amount of time the officer takes to search the device. *United States v. Kim*, 103 F. Supp. 3d 32, (D.C. Cir. 2015). However, courts have found that "a manual review of electronic files contained on a computer is no different than a manual review of papers contained in luggage [which is] a classic example of a routine border search." *United States v. Kolsuz*, 185 F. Supp. 3d 843, 854 (E.D. Va. 2016).

Finally, a "forensic search," involves in an exhaustive search that results in discovering information on the device. *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013). According to *United States v. Cotterman*, forensic searches require: 1) creating an exact copy of the device's hard drive, 2) using software that provides access to all the current and deleted files on the device, and 3) using software that provides access to location information and metadata. *Id.* at 958. Forensic searches have been deemed highly intrusive and therefore requiring reasonable suspicion prior to the search. *Id.* at 957.

Here, officers performed a physical device search and a brief manual digital search, neither of which require reasonable suspicion. Agent Dwyer and Ludgate performed a physical device search when they examined the exterior of the laptop noticing the initials "AK". (R. at 2). Agent Ludgate proceeded to ask Mr. Wyatt about the initials and discovered that he shared the laptop with Amanda Koehler, the main person of interest in the recent kidnappings of John, Ralph and Lisa Ford. (R. at 2). Upon learning about the Respondent's propensity for violent

crime through the database search as well as the presence of the proof of life demand in Mr. Wyatt's trunk, Agent Ludgate proceeded to perform a short manual digital search by opening the laptop and looking through the desktop. (R. at 3). Agent Ludgate reported that several documents were already open on the computer. (R. at 3). The manual digital search was completed in less than an hour and a half due to the subsequent deployment of Officers Kristina Lowe and Nicholas Hoffman to Macklin Manor. (R. at 3).

The search of the laptop does not qualify as a forensic digital search. Neither of the agents made a copy of the device's hard drive and forensic software was not used to unearth current or deleted files on Mr. Wyatt's computer.

By contrast, in *United States v. Cotterman*, the defendant's laptop was driven 170 miles away and was subjected to a comprehensive forensic search unearthing every inch of data stored. *Cotterman*, 709 F.3d at 958. Agent Ludgate did not "mine every last piece of data on [Mr. Wyatt's] device or deprive [him] of [his] most personal property for days." *Id.* at 967. Alternatively, Agent Ludgate conducted a brief, cursory search of Mr. Wyatt's laptop of several files that were not password protected and already opened. (R. at 2) Therefore, the search of the laptop qualifies as a physical device search and a manual digital search, but not a forensic digital search requiring reasonable suspicion.

C. Even If This Court Declares the Border Search Non-Routine, The Evidence Is Admissible Because the Agents Had Reasonable Suspicion.

The search of the laptop is admissible because Agents Ludgate and Dwyer demonstrated reasonable suspicion. Non-routine border searches require reasonable suspicion to be admissible. *Flores-Montano,* 541 U.S. at 155. Looking at the totality of the circumstances, reasonable suspicion is defined as a particularized and objective basis for suspecting criminal activity. *United States v. Cortez*, 449 U.S. 411, 417 (1981). *Navarette v. California*, 134 S. Ct. 1683, 1687

(2014). To determine the presence of reasonable suspicion in the case at hand, the Court should analyze four factors: 1) unusual conduct of the defendant, 2) discovery of incriminating matter during the search, 3) computerized information showing propensity to commit relevant crimes and/or 4) a suspicious itinerary. *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006).

In the case at bar, the search satisfies three of the four factors. First, when the Respondent's fiancée was pulled over, he refused to make eye contact with Agent Ludgate and was very pale. (R. at 26) When Agent Ludgate asked why he was crossing the border, Mr. Wyatt appeared extremely agitated and uncooperative, fulfilling the first prong of the reasonable suspicion test. (R. at 2). Second, when asked if he was transporting $10,000 or more, Mr. Wyatt responded no. (R. at 2). Noting Mr. Wyatt's behavior and suspecting that he may be hiding something, Agent Dwyer proceeded to calmly ask him to step out of the car and open the trunk. (R. at 26). When he did so, Agent Dwyer discovered $10,000 in $20 bills and a laptop with the initials "AK" inscribed. (R. at 2). The evidence found in the trunk satisfies the second factor of the reasonable suspicion test because Mr. Wyatt lied to the agents about the presence of $10,000.

Additionally, Mr. Wyatt fulfilled the third factor of the reasonable suspicion test when computerized information revealed his personal connection to the Respondent. When asked if the laptop belonged to him, Mr. Wyatt stated that he shared the laptop with his fianceé Amanda Kohler .(R. at 2). Agent Dwyer and Ludgate ran the Respondent's name through the criminal intelligence and border watch database and revealed the Respondent's multiple convictions for crimes of violence and her status as a person of interest in the kidnappings of Mr. Ford's children. (R. at 2). After learning of Mr. Wyatt's personal connection to the Respondent and noting the presence of $10,000 in $20 bills, Agent Ludgate believed Mr. Wyatt could be connected to the kidnappings. (R. at 32). The money in the trunk matched the exact

specifications of a proof of life demand made by the Ford children kidnappers. (R. at 2) Moreover, the demand was due at noon on August 18, the same day that Mr. Wyatt attempted to cross the border. (R. at 2). Through the combination of the circumstances present in Mr. Wyatt's search, this Court should find that Officer Dwyer and Ludgate had reasonable suspicion to conduct search of Mr. Wyatt's laptop.

II. THE OFFICERS' USE OF TECHNOLOGY DID NOT VIOLATE RESPONDENT'S FOURTH AMENDMENT RIGHTS.

The Fourth Amendment is not understood to restrict the police to the use of their unaided senses. Devices that enhance police senses can aid in surveillance without violating the Fourth Amendment.

Respondent has not met her burden of proving the officers' use of technology in this case violated her Fourth Amendment rights. First, the use of the PNR-1 Drone was on a public airway, did not create an undue nuisance to Respondent's property, and utilized technology that is in general public use. Second, Respondent has not shown that the use of the handheld Doppler radar was a "device that is not in general public use" that was used "to explore details of the home that would have previously been unknowable without physical intrusion. *Kyllo v. United States*, 533 U.S. at 40. Third, Respondent has not proven that any of the evidence obtained through the surveillance of Macklin Manor was a direct or derivative result of an illegal search—the "so-called fruit of the poisonous tree." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

A. Officer Lowe's Use Of The PNR-1 Drone Did Not Implicate The Fourth Amendment, Because It Was On A Public Airway, Did Not Create An Undue Nuisance To Respondent's Property, And Utilized Technology That Is In General Public Use.

Officer Lowe's use of the drone in this case does not constitute a "search" under the meaning of the Fourth Amendment. The detective's use of the drone did not trespass on Ms. Respondent's property, nor did it infringe upon a "reasonable expectation of privacy."

i. *The PNR-1 drone was deployed in public navigable airspace.*

This Court clarified in *United States v. Jones* that when "the Government obtains information by physically intruding" on a constitutionally protected area, "a 'search' within the meaning of the Fourth Amendment" has "undoubtedly occurred." 565 U.S. 400, 407 (2012). Thus, when officers trespass upon a defendant's property to conduct a search, thereby violating her property rights, "what they learned only by physically intruding on [the] property to gather evidence is enough to establish that a search occurred." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). However, no physical intrusion of the sort occurred here.

Navigable airspace has long been held a public space. *United States v. Causby*, 328 U.S. 256 (1946). Therefore, an aircraft traveling over someone's property thus does not amount to trespass. *Id.* at 261. If it did, "every transcontinental flight would subject the operator to countless trespass suits." *Id.* Moreover, observations made from public thoroughfares are not covered by the Fourth Amendment. *Jardines*, 560 U.S. at 7. As navigable airspace is a "public thoroughfare," observations made from there do not violate the Fourth Amendment as a trespass.

Here, the PNR-1 drone was flown in a public thoroughfare. Although the estate rests on Mount Partridge, where planes "*often* steer clear" due to reduced visibility, the airspace above it is no less a public thoroughfare. (R. at 3, 12) (emphasis added). The idea that a space is not a public thoroughfare because people use it less is untenable. *See Florida v. Riley*, 488 U.S. 445, 453 (1989) (O'Connor, J., concurring) ("Public roads, even those less traveled by, are clearly demarked public thoroughfares.").

Absent an actual physical trespass into the home or its curtilage, a Fourth Amendment violation only occurs when a person has a "constitutionally protected reasonable expectation of privacy." *California v. Ciraolo*, 476 U.S. 207 (1986) (citing *Katz v. United States*, 389 U.S. 347

(1967)). This involves a two-part inquiry: First, she must exhibit "an actual (subjective) expectation of privacy"; and, second, that expectation must "be one that society is prepared to recognize as [objectively] reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In applying this test, "it is important to begin by specifying precisely the nature of the state activity that is challenged." *Smith v. Maryland*, 442 U.S. 732, 741 (1979). Here, neither prong is met.

Under *Katz*, a person does not have a subjective expectation of privacy in "objects, activities, or statements that [a person] exposes to the 'plain view' of outsiders" because "no intention to keep them to [herself] has been exhibited." *389 U.S.* at 361 (Harlan, J., concurring).

Here, Respondent took no precautions to ensure the layout of Macklin Manor and her presence there would be kept private. No fence, gate, or wall surrounded Macklin Manor. (R. at 4, 12.) Moreover, she was openly "crossing from the main house to the pool house." (R. at 4, 13). She was easily identified through a standard photo comparison. (R. at 33, 4.) She did not wear a hat or attempt to cover her face to avoid detection.

Thus, the Respondent did not have a subjective expectation of privacy in the layout of Macklin Manor nor her presence at the estate.

An expectation of privacy of the outdoor areas of the home viewed from public navigable airspace is not one that "society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). It is settled law that a "physically nonintrusive," observation from "public navigable airspace"—like the observation here—does not violate "an expectation of privacy that is [objectively] reasonable." *Ciraolo*, 476 U.S. at 213. Furthermore, when someone takes no precautions to ensure private enjoyment of the home, "they cannot reasonably expect privacy from public observation." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring). The PNR-1 drone flying in public navigable airspace cannot violate an objective expectation of privacy.

Take *Dow Chemical Company v. United States*, for example. There, the EPA took aerial photographs of a Dow Chemical Company power plant "from altitudes of 12,000, 3,000, and 1,200 feet." *Dow Chem. Co.*, 467 U.S. at 229. Noting that "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant," this Court found the EPA's aerial photography did not violate a reasonable expectation of privacy. *Id.* at 239.

Similarly, in *Florida v. Riley*, the warrantless, naked-eye aerial observation of a partially-open greenhouse from a helicopter did not violate the Fourth Amendment: "the home . . . [is] not necessarily protected from inspection that involves no physical intrusion." 448 U.S. 445, 449 (1989). This court emphasized that "[a]ny member of the public could legally have been flying over [the] property in a helicopter at the altitude of 400 feet and could have observed [the] greenhouse." *Id.* at 451. Moreover, private and commercial flight in a public airway is routine, and there was "no indication that such flights [were] unheard of in" that county in Florida. Thus, no objectively reasonable expectation of privacy had occurred, when the helicopter did not interfere with any "normal use of the greenhouse," and "no intimate details connected with the use of the home . . . were observed." *Id.* at 452.

Under *Florida v. Riley*, if Respondent had proven that the drone was outside of "public navigable airspace" and did not comply with applicable laws and regulations, a different complexity may arise. *See* 488 U.S. at 451 ("it is of obvious importance that the helicopter in this case was *not* violating the law."). However, nothing in the record indicates that the PNR-1 drone employed here was flying above the 1,640-feet limit for drones in Pawndale. Although the PNR-1 developer warned that the drone *could* go higher than the pre-programmed height of 1,640 feet, a highly-qualified technology specialist testified that this specific PNR-1 drone has *never*

exceeded that limit in all of its test runs. Moreover, the Thirteenth Circuit's determination that connectivity problems that *allow* the PNR-1 drone to fly above navigable airspace render it unconstitutional is misguided. Certainly, helicopters and airplanes *can* fly outside of navigable air—that doesn't make their use unconstitutional. (R. at 41, 9). Since Respondent did not prove that the PNR-1 drone in this case flew outside of navigable airspace, the drone can't have violated a reasonable expectation of privacy.

Respondent is asking this court to reopen the book on aerial surveillance that has long been shelved—the PNR-1 drone is no different from the airplane in *Dow Chemical Company* or the helicopter in *Riley*.

ii. *The PNR-1 did not create an undue nuisance.*

Officer Lowe employed a nonintrusive device in order to obtain information concerning the layout of Macklin Manor. As in *Dow Chemical*, "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces in between structures . . ." *Dow Chem. Co.*, 467 U.S. at 239. And even if Respondent claims the layout of Macklin Manor is somehow the home itself or its curtilage, she cannot get around the facts: (1) there was absolutely no physical intrusion and (2) Officer Lowe saw nothing more than "any member of the public . . . legally flying over" Macklin Manor would have seen: the layout of the estate and a "single, young female near the pool house" (later identified as the Respondent). (R. at 32-33.)

The perpetual fogginess of Macklin Manor does not change this result. Although planes may opt to go around the mountain due to limited visibility, the air above it is still navigable. The record does not indicate that "such flights are unheard of," even if infrequent. *Riley*, 448 U.S. at 450.

Even if the drone went outside of navigable airspace, the search is not contrary to the Fourth Amendment under this Court's holding in *Riley*. There, the majority was concerned that the helicopter flew *lower* than the legal limit: "as far as this record reveals . . . there was no undue noise, and no wind, dust, or threat of injury." *Riley*, 488 U.S. at 451. As was the case in *Riley*, the PNR-1 drone was nonintrusive—even if it went above the limit allowed by law.

iii. *The PNR-1 drone and DSLR camera are in general public use.*

The use of the PNR-1 drone's DSLR camera does not complicate this result. Under *Kyllo v. United States*, a 'search' under the Fourth Amendment occurs when officers use "a [sense-enhancing] device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." 533 U.S. 27, 40 (2001). There are two parts to this analysis: (1) whether the device is in general public use, and (2) whether the details would have been unknowable without its use. *Id.* Accordingly, the use of a thermal imaging device that was not in general public use and showed intimate activities within the home violated the Fourth Amendment. *Id.* The camera and drone, however, do not fit the definition of an unconstitutional sense-enhancing device set forth in *Kyllo*.

Dow Chemical is once again illustrative. Using a "standard floor-mounted, precision aerial mapping camera" that cost $22,000 in the 1980s, the EPA took aerial photos of the exterior of the Dow Chemical Company. *Dow Chem. Co.*, 467 U.S. at 229. This Court held that "highly sophisticated surveillance equipment not generally available to the public" might be contrary to the Fourth Amendment—although that $22,000 specialty mapmaking camera did not qualify as such "sophistical surveillance equipment." *Id.* at 239.

Like the aerial surveillance employed in *Dow Chemical*, the PNR-1 drone was equipped with a camera that allowed officers to take photos of the *exterior* of the estate. Unlike in *Kyllo*,

officers here did *not* use the drone to view anything inside the home. *See Dow Chem. Co.*, 467 U.S. at 237 ("Any actual physical entry . . . into any enclosed area would raise significantly different questions."). Moreover, although the drone here takes high definition photos, it is not nearly as precise as the constitutional $22,000 mapmaking camera used in *Dow Chemical*, which could identify objects as small as wires one-half inch in diameter. *Id.* at 238.

Furthermore, both drones and HD cameras are in "general public use." The PNR-1 drone is used in police departments in thirty-five states. (R. at 46). Moreover, the Federal Aviation Administration predicts that increased availability, lower cost, and ease of use will result in hobbyists operating over 3.5 million drones by 2021. FEDERAL AVIATION ADMINISTRATION, FAA AEROSPACE FORECAST: FISCAL YEARS 2017-2037, at 31 (2017). Furthermore, every smart phone sold today is equipped with a high-definition camera. Each is at least as, if not more, common as the "conventional, albeit precise, commercial camera commonly used in mapmaking" from *Dow Chemical*. 476 U.S. at 238.

Similarly, the layout of the estate and seeing a woman on the premise could have been obtained without a physical trespass. Since the estate was once owned by the former Eagle City Chief of Police, his relatives may have been contacted for details of the estate. Nonetheless, the use of the drone was reasonable and an efficient way of getting that information in a timely manner.

Officer Lowe's use of the drone in this case does not constitute a "search" under the meaning of the Fourth Amendment, because it was used on a public airway, did not create an undue nuisance to Respondent's property, and utilized technology that is in general public use.

B. The Use Of The Handheld Doppler Radar Did Not Implicate The Fourth Amendment Because Officers Did Not Search A Constitutionally Protected Area.

This Court has not addressed the issue of handheld Doppler radars in its Fourth

Amendment jurisprudence. In fact, no circuit court outside of this case has definitively spoken on the issue either. *See United States v. Denson*, 775 F.3d 1214, 1219 (10th Cir. 2014) (discussing the use of a police Doppler device in dicta, but ultimately deciding the case on other grounds).

Respondent did not show that the use of the handheld Doppler radar infringed on an expectation that society is willing to recognize as reasonable under *Katz*. Sense-enhancing devices are consistently held to be Constitutional. *See United States v. Whaley*, 779 F.2d 585 (11th Cir. 1986) (binoculars); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (cell-cite location information); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (high-magnification mapmaking camera).

Respondent did not prove that the Doppler revealed anything that otherwise would not have been obtained without physical intrusion, nor that pool house was within the home's curtilage and entitled to Fourth Amendment protection to begin with.

Kyllo does not control this case: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion . . . constitutes a search . . ." *Kyllo*, 533 U.S. at 34 (emphasis added).

The Doppler radar used in this case did not reveal information that would have been unknowable without physical intrusion. The Doppler radar revealed simply the amount of people within the walls at any given time. Unlike the thermal imaging device in *Kyllo*, the Doppler radar does not operate "somewhat like a video camera showing heat images." 533 U.S. at 29-30. While a thermal imager that detects infrared radiation reveals "virtually all objects," the Doppler used here only detects how many people are in a structure—it does not reveal the identity of the people in the home, where in the home the people are, or even the layout of the home. Respondent cannot contend that the Doppler radar reveals "at what hour each night the lady of

the house takes her daily sauna and bath" or any other intimate activity in the home. *Id.* at 39.

Moreover, Respondent never proved that the pool house was entitled to protection under the Fourth Amendment. Whether a structure is within the curtilage of a home turns on "whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 300 (1987) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (984)). This Court set out four factors to consider when determining whether a structure is considered "curtilage" (and thus protected by the Fourth Amendment): "(1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby." *Id.* at 295.

Dunn itself illustrates this test. In that case, after aerial photos confirmed the layout of Mr. Dunn's ranch, two officers entered his property, passing through several fences and gates. *Id.* at 299. From a field, they shined a flashlight into a barn on Dunn's property, identifying an illicit drug laboratory. *Id.* Applying the factors set out above, this Court held that the barn was in an open field, rather than within the home's curtilage: First, the barn was a "substantial distance"—sixty yards—from the home; second, the barn was not within a fence surrounding the home, and stood "out as a distinct and separate portion of the ranch"; third, the officers knew that the barn was not being used as part of the Respondent's home; and fourth, Mr. Dunn did "little to protect the barn area from observation by those standing outside." *Id.* Since the area observed was not the curtilage of the home nor the home itself, the officers "lawfully viewed the interior of [Mr. Dunn's] barn[.]" *Id.* at 305.

The facts here are strikingly similar to those in *Dunn*. Officers entered Respondent's property—but, notably, were less intrusive, passing through no fences or gates. (R. at 4.) From

the open pool area, they used a sense-enhancing device (similar to the flashlight in *Dunn*) to determine illicit activity within the pool house (kidnapping). As in *Dunn*, an application of the factors reveals the pool house is not part of the curtilage of Macklin Manor: First, the pool house is a "substantial distance"—fifty yards—from the home; second, neither the pool house nor the house itself were within a fence; third, the pool house had one room, which indicated to the officers that it was not used as part of the main home (particularly where the main home is a large "Manor" with plenty of other rooms to be used for that purpose); and fourth, although the entire estate rests upon Mount Partridge and Respondent purchased Macklin Manor through an alias, she did not take further steps to remove the pool house from the view of passersby, such as a fence or security.

This case involves a single-room structure in an open field. Because the pool house and is not a constitutionally protected area, Respondent cannot contend her constitutional Fourth Amendment rights were violated there.

The handheld Doppler radar was employed in this case in order to protect police safety. By using this device, officers in this case were able to avoid a lethal confrontation with a known violent felon. They were able to quickly and efficiently determine exactly where the kidnapped Ford children were, without alerting Respondent or placing themselves or the children in harm. Like here, the use of handheld Doppler radars across the country allow law enforcement to avoid violent confrontations.

C. The Use Of Technology In This Case Did Not Directly Or Derivatively Result In Evidence Or Evidence That Is Considered "Fruit Of The Poisonous Tree."

The Thirteenth Circuit held that officers in this case did not have probable cause absent the use of the PNR-1 drone and the handheld Doppler radar. This finding is erroneous for two reasons. First, the totality of the circumstances demonstrates highly suspicious activities

indicative of criminal activity, even without the information obtained by the PNR-1 drone and the handheld Doppler radar. Second, even without probable cause, the discovery of the evidence at issue was inevitable.

"Probable cause exists when 'the affidavit upon which a warrant is founded demonstrates in some trustworthy fashion the likelihood that an offense has been committed and that there is sound reason to believe that a particular search will turn up evidence of it" *United States v. Schaefer*, 87 F.3d 562, 565 (1st Cir. 1996). This occurs after an examination of the events that occurred leading up to the search, and the decision whether these events would amount to probable cause in the eyes of an objectively reasonable officer. *Ornelas v. United States*, 517 U.W. 690, 696 (1996). But what matters in this analysis is whether the "totality of the circumstances" demonstrates probable cause. *Ill. v. Gates*, 462 U.S. 213, 238 (1983 ("Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.")

Here, the totality of the circumstances demonstrates a substantial chance of criminal activity. The information obtained from the searches at issue here was minimal: Respondent's presence at Macklin Manor, the layout of Macklin Manor, and the fact that there was one person in the home and four in the pool house. Information obtained prior to the search was enough to establish probable cause. Officers found a laptop with the initials "AK" initialed on it—the initials of the main person of interest in the Ford kidnappings. (R. at 26.) Additionally, the routine border search revealed $10,000 in $20 increments—the exact amount in the exact denomination the kidnappers asked for in exchange for proof of life. (R. at 27.) The search of the laptop revealed a keen interest in Mr. Ford along with the lease for Macklin Manor rented under one of the Respondent's aliases. (R. at 28.) Taken as a whole, all of this indicates a substantial

chance that Respondent was committing crime at Macklin Manor.

The exclusionary rule exists solely to deter police from violating constitutional rights. It requires that both evidence obtained during an illegal search and evidence that is later gathered as an indirect result of the illegal search—"fruit from the poisonous tree"—be excluded as evidence. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

Because the exclusion of evidence severely inhibits officers' ability to find the truth and allows criminals to go unpunished, it is "clearly . . . unwarranted" unless it "yield[s] '*appreciable* deterrence." *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011) (emphasis added). It is only appropriate "where its deterrence benefits outweigh its substantial social costs." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

The inevitable discovery doctrine, which this Court carved out in *Nix v. Williams*, permits evidence to be admitted "if an independent, lawful police investigation inevitably would have discovered it." *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005). In those cases, "the deterrence rationale has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 443 (1984).

In *Nix v. Williams*, this Court allowed evidence concerning the location of a kidnapped girl's body would be admissible, even when the evidence was obtained through an illegal search. 467 U.S. 431 (1984). There, a search party narrowing in on the girl's body would have ultimately discovered it: "The evidence clearly shows that the searches were approaching the actual location of the body, that the search would have been resumed had Respondent not led the police to the body, and that the body inevitably would have been found." *Id.*

Here, law enforcement agents would have found the Ford children and obtained a warrant regardless of the use of the PNR-1 drone or the handheld Doppler radar. A continuing

investigation would have led the officers to Macklin Manor. Before the border search, the Eagle City Police Department had recently obtained information that Respondent had used an alias to rent out Macklin Manor. (R. at 32). This would have led them to Macklin Manor, uncovering all of the evidence and the children. The only difference would be that the police would have been more in danger, not knowing what they would be facing.

CONCLUSION

Advances in technology do not necessarily require new interpretations of the Fourth Amendment. Because the officers' law enforcement techniques are permissible under this Court's precedent, this Court should reverse the Thirteenth Circuit Court of Appeals and allow the evidence gathered to stand in finding Respondent's conviction.

Dated: October 20, 2017

Respectfully submitted,

_/s/_____

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