Team 4

No. 4-422

IN THE
SUPREME COURT OF THE UNITED STATES

_____

United States of America,
Petitioner,

v.

Amanda Koehler,
Respondent,

_____

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

_____

BRIEF FOR RESPONDENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under the Fourth Amendment:

    a) Whether Agent Ludgate's search of Ms. Koehler's laptop at the border is a non-routine search that falls outside the scope of the border search exception?

    b) Whether Agent Ludgate was had the requisite reasonable suspicion to conduct a non-routine search of Ms. Koehler's laptop at the border?

2. Similarly, under the Fourth Amendment:

    a) Whether Officer Lowe's use of a PNR-1 Drone and Detective Perkins' use of a handheld Doppler radar device on Macklin Manor constituted searches in violation of Ms. Koehler's Fourth Amendment rights?

STATEMENT OF FACTS

Border Search of Ms. Koehler's Laptop

On August 17, 2016, U.S. Border Patrol Agent Ashley Ludgate was on patrol from midnight until 8 AM at the U.S. Mexico border. R. at 2. There are rarely arrests made during this shift at the border because criminal activity is lower. R. at 25. Around 3:00 A.M Agent Ludgate stopped a car driven by Scott Wyatt. R. at 2. Agent Ludgate asked Mr. Wyatt if he was transporting $10,000 or more, into the United States. R. at 2. Mr. Wyatt replied that he was not. R. at 2. Agent Ludgate then told Mr. Wyatt she had the right to search his vehicle. R. at 2. She asked Mr. Wyatt to step out of his car and to open the trunk. R. at 2. In the trunk there was $10,000, which matched the amount that the kidnappers had asked for in exchange for proof of life. R. at 2. There was also a laptop that Mr. Wyatt shared with his fiancé, Ms. Koehler. R. at 2.

Agent Ludgate ran Amanda Koehler's name in the criminal intelligence and border watch database. R. at 2. Ms. Koehler had felony convictions for violent crimes. R. at 2. Ms. Koehler was also a person of interest in the Ford kidnappings. R. at 2. Aware of the kidnapping investigation, Agent Ludgate searched the shared laptop. R. at 2–3. Scott Wyatt did not consent to this laptop search and Agent Ludgate did not have a warrant. R. at 27. Agent Ludgate did however admit that she had time to obtain a warrant prior to searching the laptop. R. at 27.

When Agent Ludgate searched the laptop, she found several documents containing information about the Ford's. R. at 3. Agent Ludgate continued searching through the laptop and found a lease agreement with an unknown address and the name of an alias for Ms. Koehler on it. R. at 3. At this point, Agent Ludgate placed Mr. Wyatt under arrest for failure to declare in excess of $10,000. R. at 3. Next, Agent Ludgate contacted Detective Perkins, who is the lead detective in the investigation of the Ford kidnappings, to report her findings. R. at 3.

Search of Macklin Manor

The address on the lease agreement was traced to Macklin Manor, an estate atop Mount Partridge on the outskirts of Eagle City. R. at 3. Perpetual fog and clouds cover Macklin Manor year-round causing planes and other aircrafts to avoid flying over it. R. at 3. An hour and half after the stop of Mr. Wyatt, Detective Perkins ordered Officers Lowe and Hoffman to conduct surveillance on Macklin Manor without a warrant. R. at 3, 4.

While Officer Hoffman patrolled the area on foot, Officer Lowe flew a PNR-1 drone over Macklin Manor. R. at 3. Eagle City Police Department is the only police department in Pawndale to use drones. R. at 3. Although the PNR-1 comes with a pre-programmed maximum flight altitude of 1640 feet, the legal maximum altitude allowable in Pawndale, due to recent network connectivity errors PNR-1 drones have been known to exceed 1640 feet about 60% of the time. R. at 4, 41. Once the drone reached Macklin Manor, it hovered for 15 minutes due to low visibility. R. at 4, 40–41. Officer Lowe lost track of the drone's altitude for about 4-5 minutes. R. at 41. She admitted that the drone could have exceeded 1640 feet during that time. R. at 41.

The PNR-1 drone took 22 high definition photographs and recorded 3 minutes of video. R. 4. This footage included images of the large main house, pool and patio area, and a single-room pool house. R. at 4. The large main house is directly adjacent to the patio area, and about 15 feet separate the house from the pool. R. at 4. The pool house is on the other side of the pool, roughly 50 feet from the main house. R. at 4. Additionally, the PNR-1 drone zoom lens camera captured an image of a female subject crossing from the main house to the pool house. R. at 4, 46. Detective Perkins was able to confirm that the female was Ms. Koehler. R. at 4.

Detective Perkins and Officer Hoffman approached Macklin Manor and Perkins scanned the front door area of the main house with a handheld Doppler radar. R. at 4. The Doppler radar

devices have become popular amongst law enforcement agencies and can detect movement up to 50 feet away. R. at 4. The Doppler radar device can reveal how many people are present inside of a building and roughly where they are located. R. at 4. The Doppler radar detected one individual in the front room of the main house of Macklin Manor, a few feet away from the front door. R. at 5. The officers proceeded to scan the pool house and the Doppler radar revealed three individuals, close together, and another individual nearby, pacing. R. at 5. The officers retreated and obtained a search warrant for the entire residence. R. at 5.

Procedural History

On October 1, 2016, Ms. Koehler was indicted on three counts of kidnapping and on one count of being a felon in possession of a handgun. R. at 1. Ms. Koehler filed a motion to suppress the evidence seized from the laptop search and the search of Macklin Manor. R. at 1. On November 25, 2016 the United States District Court for the Southern District of Pawndale denied Ms. Koehler's motion to suppress. Ms. Koehler was then convicted, after a guilty plea, on the charges of kidnapping and possession of a firearm by a felon. R. at 15. Ms. Koehler reserved her right to appeal the district court's ruling on her motion to suppress. R. at 15. On July 10, 2017 the United States Court of Appeals for the Thirteenth Circuit reversed the district court's judgment and remanded the case for further proceedings. R. at 21. This Court granted petitioner's petition for certiorari. R. at 22.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit's decision because: 1) Agent Ludgate conducted a highly intrusive non-routine search of Ms. Koehler's laptop at the border without the requisite reasonable suspicion; 2) Officers Lowe and Perkins conducted unlawful warrantless searches of Macklin Manor with the PNR-1 Drone and handheld Doppler radar device.

STANDARD OF REVIEW

The issues presented in this case are questions of law under the Fourth Amendment. This Court reviews questions of law *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). *De novo* review serves the goal of providing "police with a defined set of rules which, in most instances, will make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 698–99.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT COURT'S DECISION BECAUSE AGENT LUDGATE CONDUCTED A NON-ROUTINE SEARCH OF MS. KOEHLER'S LAPTOP WITHOUT THE REQUISITE REASONABLE SUSPICION

The border search exception is a "narrow exception" to the warrant requirement. *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (quoting *United States v. Seljan*, 547 F.3d 993, 999 (9th Cir. 2008)). As this Court stated in *United States v. Ramsey*, 431 U.S. 606, 618 (1977), "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." This does not mean anything goes at the border. *Seljan*, 547 F.3d at 1000. At the border, "the ultimate touchstone of the Fourth Amendment is [still] reasonableness." *Katz v. United States*, 389 U.S. 347, 357 (1967). The reasonableness of a search is assessed by balancing the intrusion upon an individual's privacy rights against its promotion of legitimate government interests. *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). The requisite level of justification required for a search is determined by the scope and degree of the intrusion. *See United States v. Jacobsen*, 466 U.S. 109, 124 (1984).

Courts have analyzed border searches based on whether they are "routine" or "non-routine." *See Montoya de Hernandez*, 473 U.S. at 541. A routine border search does not pose a serious invasion of privacy nor offend the average traveler. *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). For example, courts have found that searches of an individual's outer clothing, personal effects, purse, and wallet are routine searches. *Id.* at 1291–92. A non-routine border search is determined by the level of intrusiveness of the search. *See United States v. Irving*, 452 F.3d 110, 124 (2d. Cir. 2006); *Johnson*, 991 F.2d at 1291; *United States v. Braks*, 842 F.2d 509, 511–12 (1st Cir. 1988). Non-routine border searches include intrusive body searches such as strip, body cavity, and x-ray searches. *See Montoya de Hernandez*, 473 U.S. at 541 n.4. Non-routine border searches fall outside the scope of the border search exception and therefore require reasonable suspicion. *See id.* at 541. Although, this Court has not yet decided whether digital device searches are routine or non-routine this Court's recent decision in *Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014), recognizes that searches of digital devices are so intrusive that they should be considered non-routine.

Agent Ludgate's search of Ms. Koehler's laptop should be considered non-routine. *See Riley*, 134 S. Ct. at 2489. The laptop search thus falls outside the scope of the border search exception and reasonable suspicion is required. *See Montoya de Hernandez*, 473 U.S. at 538. Agent Ludgate did not have reasonable suspicion prior to conducting the non-routine search of Ms. Koehler's laptop. *See Riley*, 134 S. Ct. at 2495; *Montoya de Hernandez*, 473 U.S. at 541 n.4. Therefore, the laptop search violated Ms. Koehler's Fourth Amendment rights.

A. Agent Ludgate's Search of Ms. Koehler's Laptop Should Be Considered Non-Routine Because it was Highly Intrusive

Agent Ludgate's search of Ms. Ludgate's laptop should be considered non-routine because it was so highly intrusive into Ms. Koehler's privacy. *See Riley*, 134 S. Ct. at 2489;

Montoya de Hernandez, 473 U.S. at 541. This search thus falls outside the scope of the border search exception. *See Montoya de Hernandez*, 473 U.S. at 538. Although, this Court has not yet decided if digital device searches are routine or non-routine, this Court's recent decision in *Riley*, recognizes that all digital device searches, both manual and forensic, should be considered non-routine. *See* 134 S. Ct. at 2480, 85; *see also Irving*, 452 F.3d at 124; *Johnson*, 991 F.2d at 1291; *Braks*, 842 F.2d at 511–12.

In *Riley*, this Court considered two cases presenting a common question of whether to exempt cell phone searches incident to arrest from the warrant requirement. 134 S. Ct. at 2480, 85. In one case the officer manually searched a smartphone and in the other the officer manually searched a flip phone. *See id.* at 2480–82. After weighing the government's minimal interests in these searches against the unique privacy interests at stake, this Court declined to extend the search incident to arrest exception to cell phones. *Id.* at 2485. Instead, this Court held that a warrant was required before conducting searches of cell phones incident to arrest. *Id.* at 2486.

What this Court in *Riley* found about the unique privacy interests in cell phones applies to all digital device searches. *See id.* In *Riley*, this Court characterized cell phones as "minicomputers" that "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, television, maps, or newspapers." *Id.* at 2489. Therefore, what this Court in *Riley* found about the significant differences for cell phone searches includes, not only cell phones, but all digital devices - including Ms. Koehler's laptop. *See* 134 S. Ct. at 2489.

Specifically, *Riley* provides insight into the intrusiveness of digital device searches. *See id.* at 2489. First, this Court in *Riley* found that a digital device search is more intrusive than a search of a home. *See id.* Second, this Court in *Riley* found that digital devices cannot be treated

like containers. *See id.* Third, this Court in *Riley* found that digital devices are categorically distinct from property because of quantitative and qualitative differences. *See id.*

First, this Court in *Riley* found that searching a phone is even more intrusive than searching a home, reasoning that "a cell phone search would typically expose to the government far more than the most exhaustive search of a house" because "[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *Id.* at 2491. Homes are afforded the greatest Fourth Amendment protection, and therefore this finding alone would support the conclusion that digital device searches should be considered non-routine and beyond the scope of the traditional border search exception because they are so highly intrusive. *See* 134 S. Ct. at 2491; *Ramsey*, 431 U.S. at 618 n.13 (citing *Kremen v. United States*, 353 U.S. 346, 347 (1957) (finding that it is particularly offensive for a search to reveal the entire contents of a cabin). In *Cotterman*, the Ninth Circuit Court of Appeals also found that "digital devices allow us to carry the very papers we once stored at home" and that digital device searches are just as intrusive as a strip search of a person. *See* 709 F.3d at 965–66 (finding that the search was "essentially an electronic strip search").

Second, this Court in *Riley* found that digital devices cannot be treated like containers. *See* 134 S. Ct. at 2491. Unlike other containers, the possible intrusion on privacy is not physically limited in the same way for digital devices. *See id.* at 2491. Digital devices allow access to unlimited amounts of personal information stored in the "cloud." *See id.* (finding that the container analogy fails entirely when a cell phone is used to access data located elsewhere). This directly undermines the Ninth Circuit Court of Appeals' logic in *United States v. Arnold*,

523 F.3d 941, 947 (9th Cir. 2008), where it treated digital devices like a closed container and held that manual digital device searches are routine.

Third, digital devices form a category that is both quantitatively and qualitatively different from luggage and other property that might be searched at the border. *See Riley*, 134 S. Ct. at 2488–89; *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). Quantitatively, digital devices are wholly unlike other property because of their "immense storage capacity" that changes a person's reasonable expectation of privacy. *See Riley*, 134 S. Ct. at 2489. This Court in *Riley* found that the immense storage capacity has several interrelated consequences: 1) digital devices collect many distinct types of information that reveal much more in combination than any isolated record, 2) the sum of an individual's life can be reconstructed, 3) the data on a phone can date back to the purchase of the phone or even earlier, and 4) there is an element of pervasiveness because people can now carry around a cache of personal information with them. *See id.* at 2489–90. In *Riley*, this Court found that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *See id.* at 2488–89.

Qualitatively, digital devices collect many distinct types of information that together reveal a lot more about a person than any physical item could. *Id.* at 2490. Uniquely, digital devices can reveal an individual's private thoughts, interests, and concerns. *See id.* Digital data can also recreate the entirety of an individual's private life, including their specific movements of everyday down to the minute. *See id.* at 2490 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."). In *Cotterman*, the Ninth Circuit

Court of Appeals also found that "the uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy" and that this '"expectation is one that society is prepared to recognize as reasonable.'" 709 F.3d at 965–66 (quoting *Katz*, 389 U.S at 361). This "thus renders an exhaustive exploratory search [of digital devices] more intrusive than with other forms of property." *Id.*

Agent Ludgate searched Ms. Koehler's laptop without consent. R. at 27. She opened the laptop and looked through the documents open on the desktop. R. at 3. After looking through those she continued searching and found additional information before finally arresting Mr. Wyatt. R. at 3. This search was therefore even more intrusive than the search of the flip phone in *Riley*, where the officer just looked at the phone wallpaper and pressed two buttons. *See* 134 S. Ct. at 2481. The level of intrusiveness into Ms. Koehler's entire private life was just as intrusive as a strip search of her person or a search of her whole house. Ms. Koehler's laptop contained thousands of personal files and information that Agent Ludgate should not have had access to at the border. To find that this was a routine search would cut against the logic in *Riley* and would not protect the immense privacy interests of individuals crossing the border with digital devices.

B. Agent Ludgate Did Not Have Reasonable Suspicion to Search Ms. Koehler's Laptop

Agent Ludgate did not have reasonable suspicion to conduct a non-routine search of Ms. Koehler's laptop. When a border search becomes non-routine, a customs official needs reasonable suspicion. *See Montoya de Hernandez*, 473 U.S. at 541 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Reasonable suspicion is defined as a particularized and objective basis for suspecting the particular person of smuggling contraband. *See Johnson*, 991 F.2d at 1291; *see also United States v. Roberts*, 274 F.3d 1007, 1014 (5th Cir. 2001). Agent Ludgate did not have reasonable suspicion for two main reasons. First, she did not have

reasonable suspicion that evidence of contraband would be found on the laptop. *See Cotterman*, 709 F.3d at 968–69 (finding there was reasonable suspicion). Second, applying the four *Irving* factors to this case does not give rise to reasonable suspicion. *See Irving*, 452 F.3d at 124.

Agent Ludgate did not have reasonable suspicion that evidence of contraband would be found on Ms. Koehler's laptop. This Court in *Ramsey*, differentiated between the "plenary customs power" and the typical government power to search and seize. *See* 431 U.S. at 616. Additionally, in *Montoya de Hernandez*, this Court stated that the detention of the balloon swallower is justified if border agents "reasonably suspect that the traveler is smuggling contraband in her alimentary canal." 473 U.S. at 541. Therefore, the border search exception cannot be used to conduct general investigatory searches in the hopes of finding evidence of criminal wrongdoing. *See id.* Rather, there needs to be reasonable suspicion that the traveler is smuggling contraband into the country in order to conduct a non-routine search. *See Montoya de Hernandez*, 473 U.S. at 541; *Ramsey*, 431 U.S. at 616. Specifically, for digital devices there needs to be reasonable suspicion that the digital device contains digital contraband. *See e.g., Cotterman*, 709 F.3d at 968–69.

Agent Ludgate's search is distinguishable from the searches where the border agent had reasonable suspicion that digital contraband would be discovered on the laptop. *See id.* The Ninth Circuit of Appeals in *Cotterman*, found that there was reasonable suspicion that digital contraband, specifically child pornography, would be found on the laptop and therefore a forensic digital search was justified. *Id.* Additionally, in *Roberts* the Fifth Circuit Court of Appeals found that there needs to be "reasonable suspicion that a particular traveler will imminently engage in the felonious transportation of specific contraband in foreign commerce." 274 F.3d at 1014. The court found that there was probable cause to search the laptop and

diskettes after the defendant admitted that they contained child pornography. *Id.* Here, unlike the searches in *Cotterman* and in *Roberts*, the laptop was not being searched to determine if it contained digital contraband but was rather being searched to find evidence of general criminal wrongdoing. *Cotterman*, 709 F.3d at 968–69; *Roberts*, 274 F.3d at 1014. Agent Ludgate searched Ms. Koehler's laptop specifically in the hopes of finding evidence that might implicate her or Mr. Wyatt in the Ford kidnappings.

Additionally, applying the *Irving* factors to this case shows that there was not reasonable suspicion to search Ms. Koehler's laptop. *See Irving*, 452 F.3d at 124. The Second Circuit Court of Appeals has listed four non-dispositive factors to consider when looking at the totality of the circumstances to determine if there is reasonable suspicion: 1) unusual conduct of the defendant, 2) discovery of incriminating matter during routine searches, 3) computerized information showing propensity to commit relevant crimes, or 4) a suspicious itinerary. *Id.*

Despite what the United States District Court for the Southern District of Pawndale found, these four factors do not rise to the level of reasonable suspicion. R. at 8. According to the district court, the first *Irving* factor, unusual conduct of the defendant, was met because Mr. Wyatt was agitated and uncooperative. R. at 8. However, Mr. Wyatt's behavior can be explained given the context. His short answers were in response to the yes or no questions he was asked and his nervousness seems only natural in this setting where he is outnumbered by two authoritative police figures. Additionally, Mr. Wyatt was driving his car across the border at 3 AM, which according to Agent Ludgate is a time where the least amount of criminal activity occurs and is therefore not consistent with someone acting unusual because they would drive across the border right before rush hour. R. at 25. This factor alone does not rise to the level of reasonable suspicion.

According to the district court, the second *Irving* factor, discovery of incriminating matter during routine searches, was met because Agent Ludgate discovered Mr. Wyatt had a close and personal relationship with Ms. Koehler who was a known felon and person of interest. R. at 8. This close relationship should not be, in and of itself, incriminating. This factor significantly erodes privacy rights and is highly problematic. It allows border agents to use a traveler's innocuous relationship with someone else who was convicted of a crime to support a highly intrusive search of that traveler's belongings.

The district court could not provide a reason for why the third *Irving* factor, computerized information showing propensity to commit relevant crimes, is met in this case. R. at 8. The reason they could not do this is because it is not met. Although, Agent Ludgate looked up Ms. Koehler's name on the criminal intelligence and border watch database and found that she had convictions for violent felonies, this information does not show a propensity for kidnapping. *See Cotterman*, 709 F.3d at 968 (finding that a criminal conviction on its own does not establish reasonable suspicion). In *Irving*, the court found that the defendant was a convicted pedophile and that he was under investigation. *See Irving*, 452 F.3d at 124. This is directly related to the border agents subsequent search for child pornography on the laptop, whereas the search by Agent Ludgate here is far more indirect. *See id.* Additionally, the usefulness of such evidence is especially dubious where, as here, Ms. Koehler was only a person of interest in the kidnappings, "which is an even more tentative, potentially innocuous step towards determining criminal activity" than even being a person under investigation or convicted of the exact same crime. *See United States v. Foster*, 634 F.3d 243, 247 (4th Cir. 2011). Overall, although there is computerized information known by Agent Ludgate about Ms. Koehler's felony convictions, this

is weak evidence to support reasonable suspicion to search the laptop. *See Irving*, 452 F.3d at 124.

The district court could also not provide a reason for why the fourth *Irving* factor, a suspicious itinerary, is present. R. at 8. Again this is because it is not present. Mr. Wyatt did not have a suspicious itinerary when he crossed the border, unlike the defendant in *Irving* who did have a suspicious itinerary because he had traveled to Mexico and visited an orphanage. *See id.* Overall, the second and fourth *Irving* factors are not present and the first and third factors are weak. *See id.* Thus, the *Irving* factors do not rise to the level of reasonable suspicion needed to justify a non-routine search of Ms. Koehler's laptop. *See id.*

Finally, Agent Ludgate admitted that she had time to get a warrant prior to searching the laptop. R. at. 27. Agent Ludgate could have seized the laptop without a warrant incident to lawful arrest, since she did place Mr. Wyatt under arrest for failing to declare in excess of $10,000. R. at 3. She then could have obtained a warrant to search the contents of the laptop from a neutral and detached magistrate. In fact, Agent Ludgate could have even quickly obtained a telephonic warrant. *See, e.g., Montoya de Hernandez*, 473 U.S. at 557 (Brennan, J., dissenting). Bypassing the warrant requirement for such highly intrusive non-routine searches leaves all of the discretion in the hands of border agents. *See Katz*, 389 U.S. at 358–59. As the Ninth Circuit Court of Appeals stated in *Cotterman*, "[a] person's digital life ought not be hijacked simply by crossing a border." 709 F.3d at 965.

Ms. Koehler was not even crossing the border, only her laptop that she shared with her fiancé was. Nevertheless, Agent Ludgate conducted a non-routine search of Ms. Koehler's laptop at the border and therefore needed the requisite reasonable suspicion. However, Agent Ludgate did not have an objective basis, based on specific and articulable facts, to support searching Ms.

Koehler's laptop in order to find digital contraband. Therefore, Agent Ludgate did not have the requisite reasonable suspicion prior to conducting a non-routine search of Ms. Koehler's laptop and thus violated Ms. Koehler's Fourth Amendment rights.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT COURT'S DECISION BECAUSE OFFICER LOWE AND DETECTIVE PERKINS CONDUCTED WARRANTLESS SEARCHES OF MACKLIN MANOR WITH A PNR-1 DRONE AND HANDHELD DOPPLER RADAR DEVICE IN VIOLATION OF MS. KOEHLER'S FOURTH AMENDMENT RIGHTS

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…and no Warrants shall issue, but upon probable cause…" U.S. CONST. AMEND. IV. The home lies at the very core of Fourth Amendment protection and this Court has repeatedly acknowledged the sanctity of the home and an individual's right to retreat thereto and to be free from unreasonable government intrusion. *See Payton v. New York*, 445 U.S. 573, 601 (1980); *Silverman v. United States*, 365 U.S. 505, 511 (1961).

At the outset of Fourth Amendment analysis, one must first determine whether a "search" implicating the Fourth Amendment has occurred. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001). For, a search does not occur, even when the explicitly protected location of a home is concerned, unless a reasonable expectation of privacy exists. *See Kyllo*, 533 U.S. at 34 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). Justice Harlan's Concurrence in *Katz* establishes a two prong test for determining whether a search implicating the Fourth Amendment occurred: 1) the individual exhibited an actual (subjective) expectation of privacy, and 2) that the expectation of privacy is one that society is prepared to recognize as reasonable. 389 U.S. at 361 (Harlan, J., concurring).

In the instant case, Ms. Koehler manifested an actual (subjective) expectation of privacy in the information obtained from both the use of the PNR-1 drone on Macklin Manor by Officer

Lowe and the use of the handheld Doppler radar device on Macklin Manor by Detective Perkins. *See id.* Further, society is prepared to recognize both of these expectations of privacy as reasonable. *See id.* The government's use of these technologies is therefore a search under the Fourth Amendment. *Id.*

Additionally, these searches violated Ms. Koehler's Fourth Amendment rights. *See id.* This Court has historically found warrantless searches to be unreasonable. *See id.* No warrant was issued prior to the government's PNR-1 drone search nor handheld Doppler radar device search and no exceptions to the warrant requirement apply. R. at 4. Therefore, this search was unlawful and the fruits must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

A. Officer Lowe's Use of a PNR-1 Drone on Macklin Manor Is a Search Under the Fourth Amendment because the Government Intruded on Ms. Koehler's Reasonable Expectation of Privacy

Ms. Koehler had a subjective expectation of privacy in the information obtained via the use of a PNR-1 drone on Macklin Manor that society is prepared to recognize as reasonable. *See Katz*, 389 U.S. at 361. As this Court will recall, the Fourth Amendment protects people, not places. *See id*. at 351. For, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection … [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *See id.*

Ms. Koehler manifested her subjective expectation of privacy through her choice of Macklin Manor as her residence due to its remote location, significant distance from any major airport, and low visibility from overhead – visibility that was so limiting in fact, that flights often re-routed in an effort to avoid the airspace above Macklin Manor because it was dangerous. *See*

United States v. Breza, 308 F.3d 430, 436 (4th Cir. 2002) (noting court's consideration of choice of home because of remote location as militating in favor of a subjective expectation of privacy).

Moreover, Ms. Koehler's purchase of Macklin Manor through the use of an alias and via a shell corporation militates in favor of Ms. Koehler's subjective expectation of privacy. *See United States v. Broadhurst*, 805 F.2d 849, 854 (9th Cir. 1986) (taking into account this very factor in its analysis and finding a subjective expectation of privacy).

Additionally, the information obtained from the use of a PNR-1 drone on Macklin Manor was not rendered illusory by the extent of public observation of Macklin Manor from navigable airspace. *See Florida v. Riley*, 488 U.S. 445, 464-65 (1989). In light of the prevalence of present-day private and commercial flight within the public airways, this Court has adapted its jurisprudence accordingly, and holds that no reasonable expectation of privacy exists when an aerial search occurs in navigable airspace in a nonintrusive manner and any member of the public flying in that same airspace would have seen the area being searched. *See Florida*, 488 U.S. at 451; *California v. Ciraolo*, 476 U.S. 207, 213 (1986). *Ciraolo* and *Riley* both illustrate that to be lawful, aerial surveillance needs to occur in 1) navigable airspace, 2) in a nonintrusive way, 3) in an area accessible to the public, 4) in an area routinely used by other aircrafts, and 5) without violating any laws. *See Riley*, 488 U.S. at 451 (holding that naked eye inspection of marijuana plants from a helicopter 400-feet over a partially covered greenhouse was not a search); *Ciraolo*, 476 U.S. at 213 (holding warrantless aerial observation via naked eye observation of respondent's marijuana plants in a fenced-in backyard from a private airplane 1,000 feet above was not a search).

As the United States Court of Appeals for the Thirteenth Circuit properly indicated, the facts of this case are entirely distinguishable from those of *Riley* and *Ciraolo*. R. at 19, 20. First,

the PNR-1 drone has been experiencing network connectivity problems that allow it to fly a full sixty feet higher than what is considered navigable airspace in violation of the state law of Pawndale. R. at 41. In fact, Officer Lowe admitted that she lost track of the drone for about 4-5 minutes during the aerial surveillance of Macklin Manor, and that there was a possibility that the drone exceeded the maximum navigable airspace allotted by law during that time – in fact about 60% of the time this happens. R. at 41. For this Court to maintain the warrantless search of Ms. Koehler's curtilage based on a less than 50% chance that the PNR-1 drone did not break the laws of Pawndale would be an error in the highest form. R. at 41 (due to recent network connectivity errors PNR-1 drones have been known to exceed 1640 feet about 60% of the time)

Second, in *Ciraolo* this Court found police observations to be nonintrusive because the officers were readily able to observe the landscape below with the naked eye from a public vantage point. *See* 476 U.S. at 207–08. The conditions surrounding Macklin Manor the day Officer Lowe flew the PNR-1 drone made any observation by the naked eye difficult. R. at 40–41 any member of the public flying (not hovering) over Macklin Manor could not have observed what the PNR-1 Drone observed. *See Riley*, 488 U.S. at 451; *Ciraolo*, 476 U.S. at 207–08. Officer Lowe conceded this point when she admitted that the "visibility was not very clear" that day due to clouds and fog and required her to hover "for a little bit" over the estate – actually fifteen minutes – before taking pictures. R. at 41, 43. This cannot be what a nonintrusive warrantless search looks like – the use of a zoom lens camera attached to a drone that may or may not fly above the maximum allowable altitude which hovers waiting for the briefest parting of the perpetual cloud cover to take invasive high definition photographs of one's home. R. at 46.

Finally, unlike in *Ciraolo* and *Riley* where there was nothing in the record to suggest aircrafts flying within navigable airspace would be sufficiently rare to lend to the claim of a

reasonable expectation of privacy, here the record is flush with details that aircrafts "often steer clear of flying over Mount Partridge… due to the extremely limited visibility." *See Riley*, 488 U.S. at 451–52; *Ciraolo*, 476 U.S. at 207–08. Justice O'Connor's Concurrence in *Riley*, pointed to the importance of the routine and regularity of public travel within the airspace in question when she asserted that mere compliance with aviation regulations should not determine whether a Fourth Amendment violation occurred, but rather "whether the [aircraft] was in the public airways at an altitude at which members of the public travel with sufficient regularity that [the defendant's] expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable." *See* 448 U.S. at 444–45 (O'Connor, J., concurring).

Therefore, Ms. Koehler had a subjective expectation of privacy in the information obtained via the use of the PNR-1 drone on Macklin Manor that society is prepared to recognize as reasonable. *See Katz*, 389 U.S. at 361.

B. Detective Perkins' Use of a Handheld Doppler Radar Device to Scan Macklin Manor Is a Search Under the Fourth Amendment Because the Government Intruded on Ms. Koehler's Reasonable Expectation of Privacy

While the *Katz* test is difficult to apply in some cases, in the search of the interior of the home, the prototypical area of protected privacy, "there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable." *See Kyllo*, 533 U.S. at 34. This court has explicitly held that "obtaining by sense-enhancing technology [not in general public use] any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area'" constitutes a search. *See id.* (quoting *Silverman,* 365 U.S. at 512). This Court stated this concept emphatically in *Silverman* where any physical invasion of the home, "by even [a] fraction of an inch, was too much." *See* 365 U.S. at 512. In the home, all details are intimate details, because the entire area is held safe from prying government eyes. *See*

Kyllo, 533 U.S. at 34. Therefore, although the United States District Court for the Southern District of Pawndale attempted to diminish the information obtained via Detective Perkins' handheld Doppler radar search as "merely that people were present inside the home," these were intimate details because they were details of the home that are protected by the Fourth Amendment. R. at 11.

The Fourth Amendment draws a firm line at the entrance to the house. *See Payton*, 445 U.S. at 601. Ms. Koehler has a subjective expectation of privacy in the information obtained via the use of a Doppler radar device on Macklin Manor because it was her home. *See Katz*, 389 U.S. at 361. This expectation of privacy is one that society is prepared to recognize as reasonable. *See id.*

As the United States District Court for the Southern District of Pawndale properly noted, *United States v. Denson*, 775 F.3d 1214 (10th Cir. 2014), was the first court to address the use of handheld radar devices in the context of the Fourth Amendment. R. at 10. While, the Tenth Circuit Court of Appeals in *Denson* did not reach the issue of whether the government violated Mr. Denson's Fourth Amendment rights via a warrantless search of his home via Doppler radar device, the court deemed "obvious… that the government's warrantless use of such a powerful tool to search inside homes poses *grave* Fourth Amendment questions." *See* 775 F.3d at 1218 (emphasis added).

Both the United States District Court for the Southern District of Pawndale and the United States Court of Appeals for the Thirteenth Circuit acknowledge that the Court's decision in *Kyllo* provides a two prong framework with which to determine whether the handheld Doppler radar device used by Detective Perkins constituted a search under the Fourth Amendment. *See* 533 U.S. at 34. In *Kyllo*, the police used a thermal-imaging device to detect levels of heat

emanating through a garage wall conducting an unlawful search. *See id.* The Court highlighted two factors in its decision: (1) whether the information that the Doppler device gained would previously have been unknowable [or not otherwise unobtainable] without physical intrusion and 2) "whether the device is in general public use." *See Kyllo*, 533 U.S. at 34–35. With *Kyllo* as guidance, Ms. Koehler clearly had a reasonable expectation of privacy in the information obtained via use of a handheld Doppler radar device on Macklin Manor that society is prepared to recognize as reasonable. *See* 533 U.S. at 34–35*; see also Katz*, 389 U.S. at 361.

The information the handheld Doppler radar device gathered would not have been obtainable without entering the house. *See* 533 U.S. at 35 (finding that a thermal imager captures only heat emanating from a house). Specifically, the information Detective Perkins obtained by using the handheld Doppler radar device included: (1) that an individual was in the front room of the house, approximately 10-15 feet away from the front door; (2) that three unmoving persons were close together, approximately 10 feet from the front of the pool house entrance; (3) and that another individual appeared to be pacing near the front of the pool house, a few feet from the front door. R. at 5, 34. As the United States Court of Appeals for the Thirteenth Circuit indicated, it is pure common sense that there would be no conceivable way for a person to have known 1) how many people are inside a home and 2) exactly where those people are positioned inside the home without the observer actually entering the residence. R. at 20. The United States District Court for the Southern District of Pawndale tries to perverse this common sense notion by citing the possibility that if Detective Perkins had been surveying on foot – a Fourth Amendment violation in and of itself since that is trespassing because Macklin Manor is not an open field – surely, eventually one or more of the individuals would have walked outside. R. at 11. This obfuscates the point altogether, and requires that those inside the residence reveal themselves to

those outside the residence. *See id.* It is not at all clear whether an individual would have walked outside – for all we know, they could have had a stock pile of supplies and maintained concealed for months.

Handheld Doppler radar devices are not in general public use. *See Kyllo*, 533 U.S. at 34–35. This Court has yet to substantially define what it means for a device to be in "general *public* use." *See S.D.* Thuesen*, Fourth Amendment Search—Fuzzy Shades of Gray: the New "Bright-Line" Rule in Determining When the Use of Technology Constitutes a Search*, 2 Wyo. L. Rev. 169 (2002). *Merriam-Webster Dictionary* defines the general public as "all the people of an area, country, etc." *General Public*, MERRIAM-WEBSTER DICTIONARY (2017). Further, *Macmillan Dictionary* defines the general public as "ordinary people in society." *General Public*, MACMILLAN DICTIONARY (2017). With these definitions as guidance as well as acknowledgment from this Court that drug sniffing dogs are considered devices not in common use, where the Doppler radar device is "popular amongst…law enforcement agencies" and "built for law enforcement purposes" this Court cannot construe this type of usage to constitute general public use. *See Florida v. Jardines*, 569 U.S. 1, 11 (2013). The handheld Doppler radar device is being used by a very particular subset of the populace for a particular purpose. R. at 46. Keeping in mind one's reasonable expectation of privacy, it cannot be that a reasonable person would expect the general public to be using these devices – at least in the way that the device was implemented by Detective Perkins: to scan a home from tens of feet away. *See Katz*, 389 U.S. at 361.

Therefore, Ms. Koehler had a subjective expectation of privacy in the information obtained via the use of a Doppler radar device on Macklin Manor that society is prepared to recognize as reasonable. *See Katz*, 389 U.S. at 361.

C. Officer Lowe and Detective Perkins Violated Ms. Koehler's Fourth Amendment Rights by Searching Macklin Manor Without a Warrant Based on Probable Cause

This Court has historically found searches that are conducted outside the warrant process to be presumptively unreasonable. *See Katz*, 389 U.S. at 356. Because no warrant was issued prior to the government's PNR-1 drone search nor handheld Doppler radar device search implicating the Fourth Amendment, these constitute violations of Ms. Koehler's Fourth Amendment rights. R. at 4. Moreover, although, there are constitutionally accepted exceptions to the warrant requirement, none of these exceptions apply here because the officers did not have the requisite probable cause to search. *See Katz*, 389 U.S. at 357.

In assessing whether the government meets the probable cause standard, this Court looks to the "totality of the circumstances." *See Illinois v. Gates*, 462 U.S. 213, 230 (1983). The conception of probable cause is nontechnical and a common sense notion that deals with "the factual and practical considerations of everyday life on which reasonable prudent men…act." *Id.* at 231. Therefore, probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *See Ornelas*, 517 U.S. at 697 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). The known facts and circumstances from Agent Ludgate's search of Mr. Wyatt's car did not give rise to probable cause to search Macklin Manor. *See id.* It was only after the impermissible warrantless searches conducted using the PNR-1 drone and handheld Doppler radar device that the officers were able to establish probable cause and to obtain a no-knock search warrant for Macklin Manor. R. at. 5.

What is important to remember is that Macklin Manor was the object of the search warrant. R at 5. The information obtained from Agent Ludgate's search of Mr. Wyatt's car did not sufficiently link Macklin Manor to the Ford kidnappings. The only evidence obtained from Mr. Wyatt's car pertaining to Macklin Manor was the lease agreement listing the name "Laura

Pope" (one of Ms. Koehler's aliases) and an address that did not match Mr. Ford's. R. at 3. Upon further investigation it was revealed that R.A.S., a company based in the Cayman Islands, purchased Macklin Manor six months ago, that R.A.S. is a shell company owned by Laura Pope, and Laura Pope is one of Ms. Koehler's aliases. R. at 3. Additionally, no one had seen any residents on the Macklin Manor property. R. at 3. These facts surely fall short of probable cause that Macklin Manor was linked to the Ford kidnappings – the officers needed to have reasonable belief that contraband or evidence of a crime would be found; all that they have is information that a shell company (which a person of interest owns) purchased a property. *See Ornelas*, 517 U.S. at 697 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). No additional facts are provided which would allow the police to make the logical jump that any criminal activity was being conducted there, let alone that the Ford children were there. Especially when the search involves the sanctity of the home, it would be grossly inept of this Court to find that probable cause existed to search Macklin Manor based solely on the evidence obtained from Agent Ludgate's search of Mr. Wyatt's car. *See Payton*, 445 U.S. at 601.

D. All Evidence Obtained from the Search of Macklin Manor Are Fruits of an Illegal Search that Must Be Suppressed

Since the government could not establish probable cause for the search warrant of Macklin Manor without the information obtained via the PNR-1 drone and handheld Doppler radar device impermissible searches, all evidence obtained is fruits, and must be suppressed. *See Wong Sun*, 371 U.S. at 488. The secondary evidence of the Macklin Manor warrant search was discovered by exploitation of the initial illegality – that is the impermissible warrantless searches of Macklin Manor via PNR-1 drone and Doppler radar device. R. at 5. Moreover, none of the factors which help in assessing whether the "poison" of a constitutional violation has been purged militate in favor of non-suppression. First, there was no attenuation of the taint. *See Wong*

Sun, 371 U.S. at 488 (finding the taint of the unlawful arrest had dissipated by time and the intervention of free will). Detective Perkins and Officer Lowe conducted the impermissible PNR-1 drone and Doppler radar device searches mere hours prior to the search of Macklin Manor. R. at 2-3. Immediately upon identifying Ms. Koehler on the premises and the number and location of individuals within the Macklin Manor main house and pool house, the officers retreated and obtained a search warrant; there were no intervening events. R. at 5. As discussed, the initial illegality of these searches was particularly egregious as they involved government intrusion on the sanctity of the home and were not unintentional, but divisive. *See Payton*, 445 U.S. at 601. Moreover, there was no independent basis for probable cause to search Macklin Manor despite the officers' assertion to the contrary. *See Murray v. United States*, 487 U.S. 553, 544 (1988) (finding an independent basis for the warrant based on prior information known to the officers). Finally, this was not a case of inevitable discovery. *See Nix v. Williams*, 467 U.S. 431, 448 (1984) (finding the body would have been inevitably discovered by the search party). Therefore, all evidence obtained from these unlawful searches are fruits which must be suppressed.

CONCLUSION

Agent Ludgate conducted a highly intrusive non-routine search of Ms. Koehler's laptop at the border without the requisite reasonable suspicion. Officer Lowe and Detective Perkins conducted warrantless searches of Macklin Manor with the PNR-1 Drone and handheld Doppler radar device in violation of Ms. Koehler's Fourth Amendment rights. Thus, Ms. Koehler respectfully asks that this Court affirm the Thirteenth Circuit Court's decision.