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

RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Were Respondent's Fourth Amendment rights violated when law enforcement officers searched several documents on a laptop under the border search exception without a warrant?
2. Were Respondent's Fourth Amendment rights violated when law enforcement officers searched Respondent's home and the curtilage using drone and handheld scanner technology without a warrant?

STATEMENT OF FACTS

A. Scott Wyatt was stopped at the border and a warrantless search was conducted on Amanda Koehler's laptop without consent.

Agent Dwyer and Agent Ludgate stopped Scott Wyatt at 3:00 A.M. on the United States-Mexico border in the town of Eagle City. R. at 2. Agents rarely make any arrests around this time. R. at 25. While the border town itself is a major thoroughfare of criminal activity, the most common time for arrests is during rush-hour. R. at 2; R. at 25. During the stop, officers stated that Wyatt appeared nervous and, based on this, the officers requested Wyatt exit his vehicle and open the trunk, which he did. R. at 2.

During the search, border patrol agents discovered a laptop marked with the initials "AK" and $10,000 in $20 bills. *Id.* Wyatt told Agent Ludgate that the initials belonged to his fiancé, Amanda Koehler, who was not present when Wyatt was stopped. *Id.* After consulting a database, the agents learned that Koehler had previous felony convictions and was a person of interest in the recent kidnapping of the Ford children. *Id.* The border patrol officers learned during a briefing that the kidnappers recently requested the same amount of currency in similar denominations as was found in Wyatt's possession. *Id.* The agents placed Wyatt under arrest for failing to declare the $10,000 that was found in his vehicle. R. at 3.

After arresting Wyatt, agents conducted a warrantless search of Koehler's laptop without obtaining consent. R. at 2; R. at 25. Ludgate stated she had ample time to procure a warrant, but chose not to do so. R. at 28. Agents found several documents pertaining to Mr. Ford, such as his upcoming meetings. R. at 2. The computer also contained a lease of Macklin Manor, which used one of Koehler's aliases—Laura Pope. *Id.* Ludgate alerted Detective Perkins, lead investigator on the Ford case, of the findings. *Id.*

B. Warrantless searches were conducted of Macklin Manor using advanced drone and Doppler technology.

Macklin Manor is an isolated, sprawling estate on top of Mount Partridge, and is constantly covered with fog and clouds, such that aircraft regularly avoid the area. R. at 2. Detective Perkins assigned Officer Lowe, the technology expert, to deploy a PNR-1 drone over the estate. *Id.* While the PNR-1 drone is preprogramed with a maximum flight altitude of the local legal limit of 1640 feet, network connectivity errors have caused the devices to fly as high as 2000 feet. R. at 4. Lowe deployed the drone for approximately twenty-nine minutes to learn the layout of the estate, which has no fence. *Id.* The drone took a photo of Koehler walking alongside the pool, on her way from the main home to the pool house about fifty feet away. *Id.*

Without first obtaining a warrant, Detective Perkins scanned both the main home and the pool house with a Doppler radar. *Id.* Doppler radars require special ordering direct from the manufacturer. R. at 35. These handheld devices are capable of detecting movements through walls from up to fifty feet away, and can pinpoint people's location through their breathing. R. at 4. While the radar cannot show the layout of a building, it can determine how many people are inside the home, in addition to their approximate location. *Id*.

The scan of the main house revealed one individual; the scan of the pool house revealed one person pacing and an additional three people who were not moving. R. at 34. After conducting both the drone and Doppler searches, the officers then obtained a search warrant for inside the residence. R. at 5. The officers conducted a search pursuant to the warrant, where they found the three unharmed Ford children, and subsequently detained Koehler, two individuals located in the living room, and an individual located in the pool house. *Id.*

SUMMARY OF THE ARGUMENT

This Court must affirm the Thirteenth Circuit because (1) the warrantless, non-routine search of Amanda Koehler's laptop was conducted without reasonable suspicion; and (2) the warrantless use of drone and Doppler technology was unreasonable. Generally, warrantless searches are presumptively invalid as unreasonable unless conducted under an exception.

First, the border search exception exists as a narrow deviation from the general rule. The crux of whether a warrantless border search is reasonable rests on an inquiry into whether the search was routine or non-routine. A non-routine search requires reasonable suspicion, but a routine search does not. A search is non-routine when it constitutes an extreme invasion of privacy. A serious intrusion into an individual's privacy occurs when a personal laptop containing a lifetime's worth of intimate records and documents is searched without a warrant.

This Court has already afforded electronic devices a heightened expectation of privacy, which Petitioner would ask this Court to ignore. Petitioner also requests that this Court ignore sweeping technological advancements in favor of an out dated bright-line rule that is no longer applicable in an ever-changing world.

Further, reasonable suspicion did not exist to conduct a non-routine search. Reasonable suspicion exists when the defendant has acted in a manner to create skepticism. The defendant was not present at the scene of the search for reasonable suspicion to exist. Moreover, the purpose of warrantless searches is twofold: to protect officers and to protect evidence. Neither of those concerns exist in the case of personal laptops.

Second, a warrantless search of a home and its curtilage with Doppler and drone technology is an impermissible, unreasonable search. Thus, the fruit of the poisonous tree doctrine requires the suppression of the evidence collected from this search. Curtilage includes land outside of the

house that is intimately connected to the home and, therefore, requires protection under the Fourth Amendment. This curtilage is protected from warrantless, unreasonable searches if the expectation of privacy is (1) a reasonable expectation; and (2) an expectation that society is prepared to recognize. Aerial searches are unreasonable when aircraft routinely avoid the area, break the law during their flight, or closely observe intimate areas—such as a backyard pool. Furthermore, protecting an individual's backyard pool from close observation is not only reasonable, but necessary. Petitioner requests that this Court hold that a backyard pool is not protected from warrantless drone searches, and this Court must reject that request. The protection is heightened because the estate in question was isolated and perched upon a cloudy mount, which aircraft regularly avoided. Moreover, it is possible that during its search, the government's drone broke the law.

A search of a home takes place when there is an intrusion into a constitutionally protected area, and physical entry is not required to constitute such an intrusion. Using technology that public citizens do not have access to leans in favor of a Fourth Amendment violation. The public does not use technology that spies the exact location of people inside the home. Thus, using Doppler technology constitutes an impermissible search under the Fourth Amendment.

All evidence collected from the unconstitutional search of Respondent's home is inadmissible. Evidence is suppressed when it is the result of an illegal search. The fruit of the poisonous tree doctrine requires the suppression of all evidence discovered through the Doppler radar and PNR-1 Drone.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). In reviewing a motion to suppress on appeal, "determinations of reasonable suspicion and probable cause" are reviewed *de novo*. *Id.* Findings of fact are reviewed for clear error. *Id.* Thus, the standard of review for both issues presented is *de novo.*

ARGUMENT

Reasonableness is the benchmark of any Fourth Amendment inquiry. *See Katz v. United States*, 389 U.S. 347, 360 (1967). A reasonable search is executed with a warrant and based on probable cause. Benjamin J. Rankin, *Restoring Privacy at the Border: Extending the Reasonable Suspicion Standard for Laptop Border Searches*, 43 Colum. Hum. Rts. L. Rev. 301 (2011). Searches conducted without a warrant are presumptively invalid unless based on exigent circumstances or conducted under one of the Fourth Amendment exceptions. *See United States v. Place*, 462 U.S. 696, 701 (1983); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE SEARCH OF AMANDA KOEHLER'S LAPTOP WAS A NON-ROUTINE BORDER SEARCH, AND REASONABLE SUSPICION DID NOT EXIST.

The decision regarding the case at bar will affect the outcome of Fourth Amendment cases about electronic devices for decades to come. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The foundation of the Fourth Amendment is reasonableness. *See Katz*, 389 U.S. 347 at 360.

A. The search of Koehler's laptop was non-routine because of the extreme invasion of privacy and the expansive advancement of technology.

Distinguishing between a routine and a non-routine border search is paramount. The border search exception is meant to serve as a "*narrow exception* to the Fourth Amendment prohibition against warrantless searches." *United States v. Seljan,* 547 F.3d 993,999 (9th Cir. 2008) (emphasis added). The distinction between a routine and non-routine search is pivotal because routine border searches do not require reasonable suspicion, but non-routine border searches do. *United States v. Montoya de Hernandez,* 473 U.S. 531, 538-41 (1985). The more invasive a search, the less routine it is. *United States v. Irving,* 452 F.3d 110, 123 (2d Cir. 2006). This Court must consider the totality of circumstances, including the scope of the intrusion, to decide if a search was reasonable. *United States v. Jacobsen,* 466 U.S. 109, 124 (1984).

i. The search of a laptop constitutes an extreme invasion of privacy.

The most significant factor in evaluating whether a border search is routine or non-routine is the extent of intrusion. *United States v. Ramos-Saenz,* 36 F.3d 59, 61 (9th Cir. 1994), *as amended* (Oct. 14, 1994). This Court has previously considered a strip search, body cavity search, and an x-ray search non-routine searches because of the invasion of privacy involved. *See Montoya de Hernandez,* 473 U.S. 531 at 541. On the other hand, this Court has differentiated a vehicle or gas tank search as routine and not requiring reasonable suspicion. *See United States v. Flores-Montano*, 541 U.S. 149, 156 (2004). The level of invasion that comes from the search of a personal laptop falls somewhere between these two extremes along a spectrum. A laptop is capable of holding an almost limitless amount of personal information; it has a capacity far beyond the inside of a gas tank, or even a vehicle. Indeed, searching a laptop has more similarities to an x-ray search:

instead of peering into the physical human body, law enforcement is performing an autopsy of a person's entire digital persona.

Hence, the question turns on the extent to which searching a personal laptop invades an individual's privacy. Even during a search pursuant to the border search exception, an individual's privacy interests are compared to, and balanced against, governmental interests. *Montoya de Hernandez,* 541 U.S. 149 at 155-56. This Court in *Riley v. California* held that cell phones require a heightened expectation of privacy because of the level of intrusion that comes from the search. 134 S. Ct. 2473, 2489 (2014). This Court reasoned that "many of these devices are in fact minicomputers. . ." *Id. Riley* points out that "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.*

The reasoning of *Riley* applies to the case at bar. The discussion here regards a literal computer rather than the minicomputer analogy this Court relied on in deciding that case. A personal laptop contains an immense quantity of personal information about its owner, including "a lifetime of saved email, private photos, passwords, financial and medical records, and evidence of almost any other intimate part of life." *Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel: Hearing Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary,* 110th Cong. 1 (2008) (statement of Peter Swire, C. William O'Neill Professor of Law, Moritz Coll. of Law, The Ohio State Univ.).

The routine search of a vehicle, as discussed in *Flores-Montano,* would not turn up all of the private information that a search of a laptop would. The intrusion that comes from having access to such a vast amount of information is far greater than the intrusion that comes from opening a suitcase containing clothes and, perhaps, even a few personal photographs. Accordingly, it is imperative that personal laptop computers are afforded the same heightened

expectations of privacy as a cell phone, pursuant to *Riley*. A laptop computer is the equivalent of hundreds of filled personal file cabinets: a veritable treasure trove of private information that the government should not have free reign to search.

Therefore, the search of a laptop constitutes so extreme an intrusion of privacy that this Court must hold that such devices are afforded heightened expectations of privacy and the Constitutional safeguard of judicial review.

ii. The advancement of technology forces this Court to hold that laptop searches are non-routine.

This Court must address the technological advances that have dimmed the once bright-line rules. In 1967, this Court held that a person who enters a telephone booth, shuts the door behind him, and pays the toll is entitled to assume that his conversation is private. *Katz,* 389 U.S. 347 at 352-54. This Court reasoned that "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.* at 352.

The case at bar fifty years later is no different. In *Katz,* the agents could see the defendant inside the glass phone booth and speculate about the contents of his conversation, but were not permitted to actually listen in. *Id.* Here, Amanda Koehler effectively did the same thing as the Defendant in *Katz*—she "paid the toll" in purchasing a laptop and "shut the glass door." Like the agents in *Katz* could only see the defendant inside the booth, Ludgate only knew to *whom* the closed laptop belonged, not its contents. R. at 2. Accordingly, Koehler was justified in assuming that the information stored on her laptop was safe from being "broadcast to the world." *Katz,* 389 U.S. 347 at 352.

Seventy-three percent of Americans own a personal computer, second only to cell phones as the most owned electronic devices.[1] Laptop computers have pervasively taken over the way the nation communicates—from email to the President's daily use of Twitter. Such dramatic technological changes demand that this Court follow its reasoning in *Katz*. To do otherwise would ignore the essential part laptops play in the lives of most citizens.

In addition to the sheer amount of people who own a laptop, the storage capacity of the device further blurs the once bright-line rules. The purpose of the Fourth Amendment is to protect reasonable and justifiable privacy expectations. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). The present rule implies that a non-routine search pertains only to people rather than property. *See Flores-Montano*, 541 U.S. at 152. This Court has recognized warrantless searches of a gas tank, a cigarette pack, and a pat-down of a person. *See Flores-Montano*, 541 U.S. 149 at 156; *United States v. Robinson*, 414 U.S. 218, 227 (1973); *Terry v. Ohio*, 392 U.S. 1, 20 (1968). However, this Court has also recognized that "some searches of property are so destructive as to require" particularized suspicion. *Flores-Montano*, 541 U.S. 149 at 153.

At its core, a laptop computer is fundamentally different from property that could fit in a pocket. As such, laptops are deserving of heightened privacy expectations. The tremendous volume and sensitive nature of the information on a laptop is distinguishable them from other types of property:

> [g]iven their unique nature as multifunctional tools. . . [cell phones] contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.

[1] Monica Anderson, *Technology Device Ownership: 2015*, Pew Research Center, October 2015, *available at* http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015.

State v. Smith, 124 Ohio St. 3d 163, 169 (2009). The observation from the Supreme Court of Ohio is not unlike this Court's analogizing of cell phones to "minicomputers" in *Riley*. *Riley*, 134 S. Ct. 2473 at 2489. Not only does a physical laptop have the capacity to hold thousands of personal files, but the advent of cloud technology creates the ability to store more. Cloud technology even creates the ability to link to an individual's phone, saving hundreds or thousands of personal photos and text messages directly accessible from the laptop. This Court must recognize the differences between a laptop computer and other personal belongings, and affirm the lower court.

Consequently, the general rule regarding non-routine and routine searches is no longer an easy, bright-line standard. For these reasons, this Court must follow its own reasoning and precedent in *Katz*, and affirm the Thirteenth Circuit's holding that the search of Koehler's laptop was a non-routine search.

B. There was no reasonable suspicion to search Koehler's laptop without securing a warrant because the *Irving* factors are not met.

The reasonable suspicion standard depends on the totality of the circumstances surrounding the search. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Reasonable suspicion is defined as an objective, particularized suspicion that a person has committed criminal activity. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable suspicion is a modest standard, used to prevent "unfettered crime-fighting searches . . . on citizen's private information." *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013). An officer must have objective justification to conduct a warrantless search. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The purpose of requiring reasonable suspicion is to allow for a neutral and unbiased decision. *See Johnson*, 333 U.S. 10. The protection in the Fourth Amendment balances a neutral magistrate, who will decide when there is enough evidence to search property, against an officer engaged in the "often competitive enterprise of ferreting out crime." *Johnson*, 333 U.S. 10 at 13. To allow an officer to

make such decisions without the neutral party, and search property without a warrant, "would reduce the Amendment to a nullity." *Id.*

i. The *Irving* factors are not met and reasonable suspicion based on the circumstances did not exist.

The Petitioner and District Court of Pawndale rely on the factors discussed in *Irving,* which are not met in this case. *Irving*, 452 F. 3d 110 at 124. These four factors are (1) strange behavior of the defendant; (2) the discovery of incriminating evidence during a routine search; (3) computerized information showing a tendency to commit related crimes; and (4) a suspicious itinerary. *Id.* Further, prior criminal history is not enough to create reasonable suspicion. *See Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013); *see also Burrell v. McIlroy*, 464 F.3d 853, 858 (9th Cir.2006).

The Ninth Circuit court held in *Cotterman* that reasonable suspicion did exist to search the defendant's laptop. *Cotterman*, 709 F.3d 952 at 968-69. The court considered all of the circumstances that existed in that case, including the prior criminal history. *Id.* at 968-69. The court reasoned that while a prior conviction for sexual molestation of a child alone was not enough to create reasonable suspicion, the defendant often traveled out of the country to sex tourist countries and was returning from a country known for sex trafficking tourism. *Id.* at 968-69.

The four *Irving* factors are not met in this case. While Wyatt acted suspiciously and failed to declare the currency found in his trunk, Koehler—the defendant in this case—did not act unusually because she was not present. R. at 2. Even if Wyatt's conduct could be held against Koehler, his failure to declare currency is in no way related to Koehler's laptop. There was no evidence that Koehler's laptop contained more information regarding Wyatt's failure to declare $10,000.00 or more in U.S. currency. *Id.* Koehler did not have a suspicious itinerary because she

was not traveling. *Id.* The only factor met is that Koehler had prior criminal history, which is not dispositive of the issue. *Id*. Further, the case before this Court is distinguishable from *Cotterman* because Koehler had a prior criminal history and nothing else. Koehler was not even present at the time the laptop was searched. *Id.* Unlike the defendant in that case, she was not returning from a suspicious country, and there was no indication that she frequently traveled out of the country. *Id.* Therefore, this Court must hold that there was no reasonable suspicion to search Koehler's laptop without a warrant.

ii. Ludgate could have seized the laptop and waited to conduct a search until a warrant was secured, but chose not to do so.

During a lawful arrest, police may seize a laptop without searching its contents. *Riley,* 134 S. Ct. 2473 at 2488-92. In the face of advanced technology, this is especially potent. Justice Scalia penned, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-4 (2001). The recognized exceptions to the warrant requirement of the Fourth Amendment exist when evidentiary or officer safety concerns exist. *See Arizona v. Gant*, 556 U.S. 332, 346 (2009).

Laptops do not meet the reasons for an officer needing to conduct a warrantless search. In *Gant,* the Court held that absent one of these safety or evidentiary concerns, a warrantless search was prohibited. *Id.* These concerns include when the arrestee is dangerous, may have access to a weapon, or when destruction of evidence is possible. *Id.* at 346-47. In that case, this Court refused to follow the doctrine of *stare decisis* regarding the exception of warrantless search incident to arrest, stating that the Court would be ". . . particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it. The safety and evidentiary interests. . .simply are not present in this case." *Id.* at 348.

Here, the Court need not go so far as to reject *stare decisis.* Instead, this Court may follow its own reasoning set forth in both *Gant* and *Riley* and hold that a laptop may be seized but not searched under a Fourth Amendment exception. Koehler's laptop presented no officer safety concern. Ludgate was neither injured when she opened the device, nor when she searched it. R. at 2. Just as in *Gant*, the evidentiary concerns that present themselves under other circumstances are not present here. The laptop posed no evidentiary concern because the device was not self-destructing and Koehler was not present at the time the laptop was seized. R. at 2. In fact, Ludgate admitted that she had sufficient time to secure a warrant, but chose not to do so. R. at 28.

This Court must hold that the search of Koehler's laptop was non-routine and that reasonable suspicion did not exist. Alternatively, this Court may hold that its reasoning in *Riley* and *Gant* are applicable. This Court must affirm the Thirteenth Circuit and hold that Koehler's motion to suppress is granted.

II. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT WARRANTLESS USE OF THE PNR-1 DRONE AND HANDHELD DOPPLER RADAR WERE IMPERMISSIBLE SEARCHES, THE RESULTS OF WHICH CONSTITUTE FRUIT OF THE POISONOUS TREE.

Today's decision regarding law enforcement's use of drone and Doppler technology is one that will dictate legitimate privacy expectations in this age of rapid technological advancement for years to come. The Ninth Circuit, in evaluating far less sophisticated beeper trackers in *United States v. Pineda-Moreno*, quite presciently observed that those simple trackers were just "the advance ripples to a tidal wave of technological assaults on our privacy." 617 F.3d 1120,1125 (9th Cir 2010). Once thought of as science fiction, waves of electronic devices that hover in backyards and see through the walls of homes now threaten to drown Fourth Amendment protections. The cornerstone of the Fourth Amendment is reasonableness. *See Katz,* 389 U.S. 347 at 360. The Court

today is tasked with establishing a bulwark of reasonable expectation, behind which citizens may safely shelter from the ever-widening grip of high-tech developments.

A. The use of the PNR-1 Drone in Koehler's backyard was an impermissible search because Koehler had a reasonable expectation of privacy, which society is prepared to recognize.

This Court must hold that the Eagle City Police Department's use of the PNR-1 Drone was an impermissible search under the Fourth Amendment. The crux of any inquiry into the appropriateness of a government search is two-fold: (1) an individual must have a subjective expectation of privacy; and (2) society recognizes that expectation as objectively reasonable. *Katz*, 389 U.S. 347 at 361.

i. Koehler had a subjective expectation of privacy by her pool because it necessarily constitutes part of the curtilage of her home.

A subjective expectation of privacy is most acute in the area immediately surrounding the home because it has both a physically and mentally close connection. *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986). This curtilage "extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). In determining the outer limits of the curtilage of a home, this Court has traditionally looked at four factors: (1) proximity to the house; (2) whether the area is enclosed; (3) how the area is used; and (4) the steps taken to protect the area from observance. *United States v. Dunn*, 480 U.S. 294, 301 (1987). However, these factors are not dispositive of the fundamental question: "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

In *Oliver*, this Court held that a defendant growing marijuana in the woods did not have a subjective expectation of privacy. *Oliver,* 466 U.S. 170 at 174. In that case, the defendant was cultivating marijuana near a path in an open field close to his home. *Id.* This Court reasoned that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Id.* at 178. This Court has repeatedly held that an open field is not safeguarded under the Fourth Amendment, but an area surrounding a home is afforded such protections. *See Air Pollution Variance Bd. v. Western Alfalfa Corp.,* 416 U.S. 861, 865 (1974); *see also Hester v. United States,* 265 U.S. 57, 59 (1924).

Here, three of the four *Dunn* factors are resolved in favor of Koehler. The only factor against Koehler is that there is not a formal fence or enclosure around the property, but this is easily counterbalanced by the remaining factors. First, the drone flew directly in Koehler's backyard and observed her walking near the pool, a mere fifteen feet away from the main house. R. at 4. Second, Koehler chose a home that was situated in a secluded location, consisted of expansive grounds, and was perched upon an obscured promontory. R. at 3. The mount upon which the home sat was so plagued by visibility issues that aircraft routinely avoided the area, thus giving Koehler, at the very least, a subjective expectation of privacy from aerial observation. R. at 3. Finally, the drone spied an area reserved for swimming and sunbathing: a privileged location normally used while scantily clad or not at all. Not only do the weight of the factors lie in favor of this area belonging to the curtilage of the home, but the use of that area is "so intimately tied to the home itself" that it deserves Fourth Amendment protections.

Furthermore, the case at bar is distinguishable from *Oliver*. Lowe used the drone in Koehler's backyard, which, despite its considerable size, is a far cry from an open field. R. at 4.

To hold that a large estate deserves less protection than a small home would deprive select individuals of the same Fourth Amendment protection afforded to others.

Therefore, this Court must affirm the Thirteenth Circuit and hold that Koehler had a subjective expectation of privacy in her backyard.

ii. Koehler's expectation of privacy near the pool in her own backyard is one that society will recognize as reasonable.

Society is most apt to recognize an expectation of privacy as reasonable when it comports with societal values and cultural norms. *See Katz*, 389 U.S. 347 at 360; *see also Oliver*, 466 U.S. 170. The controlling question is whether an individual is justified in expecting an inference of privacy that his or her peers would also rely on. *United States v. Broadhurst*, 805 F.2d 849, 853 (9th Cir. 1986).

The expectation of privacy by a backyard pool is one that society can—and should—accept. This expectation is a critical protection for all homeowners. In *Ciraolo*, this Court determined that the backyard garden, which was fenced alongside a patio pool, was the home's curtilage, therefore entitling the defendant to a subjective expectation of privacy. *Ciraolo*, 476 U.S. 207 at 211-16. However, this Court held that the defendant in that case lacked a reasonable expectation of privacy from "physically nonintrusive" aerial observations of his curtilage that were made with the naked eye. *Id.* at 213-14. This Court resolved that such privacy expectations were not reasonable because any member of the public make the same observations during a similar routine flight. *Id.* at 213. This Court rationalized that *Katz* was inapplicable due to that decision not contemplating such high-altitude flights as belonging to a "category of future electronic developments that could stealthily intrude upon an individual's privacy." *Id.* at 215.

The drone in this case is such an unforeseen electronic development–one that stealthily and intrusively invades the most intimate areas of life. Unlike *Ciraolo,* where an airplane was flying hundreds of feet above a residence, the drone in this case is more akin to Senator Diane Feinstein's recent encounter with a drone hovering outside the window of her home.[2] Here, the record indicates that the drone could only "zoom in on a target up to 15 feet away" to obtain the picture of Koehler. R. at 46. Thus, the drone was floating only a stone's throw from Koehler while it spied upon her near the pool.

Society will not accept an expectation of aerial privacy when flights occur with regularity within the confines of the law. In *Florida v. Riley*, this Court held that the use of a helicopter in regularly navigated airspace to observe marijuana grown in a greenhouse within the curtilage did not violate the Fourth Amendment. 488 U.S. 445 (1989). The decision turned on the fact the police helicopter was flown both in compliance with the law and in the same airspace that other aircraft frequently used. *Id.* at 451. This Court took special notice that the outcome could change if police observed "intimate details connected with the use of the home or curtilage[,]" or if the aircraft violated laws or regulations. *Id.* at 451-52. The majority reasoned that although the defendant had a subjective expectation of privacy, it was not one society was willing to deem reasonable under the circumstances. *Id.* at 450. The concurrence in that opinion stated that flights at lower altitudes could create substantial concerns because of their rarity. *Id.* at 455.

Here, Koehler has a reasonable expectation of privacy because of the frequency of air traffic in the area and the laws governing such flights. Koehler possessed the same subjective expectation of privacy in her backyard as did the defendants in *Ciraolo* and *Riley.* She purposely

[2] Kathryn A. Wolfe, *Dianne Feinstein Spots Drone Inches from Face*, POLITICO (Jan. 15, 2014, 4:15 PM), http://www.politico.com/story/2014/01/senator-dianne-feinstein-encounter-with-drone-technology-privacy-surveillance-102233.

sought out a generous estate, far outside the city and ensconced on a secluded mount. R. at 32. Society is ready to recognize this expectation as reasonable because of the circumstances; the fact that she chose this remote residence further heightens Koehler's expectation of privacy. Officer Lowe described the manor as "constantly cloudy, foggy, stormy, [and] just [had] all kinds of visibility issues all the time." R. at 42. Furthermore, Officer Lowe potentially violated local laws during the deployment of the drone. Pawndale's legal maximum altitude for drones is 1640 feet. R. at 4. However, Officer Lowe stated that she "lost track of the drone's altitude" for a few minutes. R. at 41.

The conclusive question in deciding this case is whether the use of the PNR-1 Drone is one that society is prepared to acknowledge as reasonable. Unlike the unobtrusive use of aircraft at heights of 400 feet by a helicopter in *Riley,* the record has established that the drone was within a few feet of Koehler. R. at 46. In *Ciraolo* and *Riley,* only inanimate objects were observed. Conversely, here, the drone was spying directly on Koehler in close proximity to one of the most intimate and exposing areas immediately outside the modern suburban home—the pool. R. at 4.

Where aerial observation has provided police with information concerning the curtilage of a home, the court's decision has always turned on whether these flights were a regular occurrence in the area. *See Ciraolo,* 476 U.S. 207 (airplane flown at 1,000 feet); *see also Riley,* 488 U.S. 445 (helicopter flown at 400 feet); *see also Broadhurst,* 805 F.2d 849 (airplane flown at 1,000 feet); *see also United States v. Breza,* 308 F.3d 430 (4th Cir. 2002) (helicopter flown at 200 feet). Today, this Court must decide that drone flights conducted at altitudes of 20 feet or less, or in airspace routinely avoided by other aircraft, are distinguishable.

The case at bar eerily resembles the dissent's concerns in *Riley*. In that opinion, written nearly thirty years ago, Justice Brennan prognosticated technological advancements could threaten a dystopian world akin to George Orwell's *1984:*

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said… In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[3]

This Court must affirm the Thirteenth Circuit and hold that the use of the PNR-1 Drone violated the Fourth Amendment. As Justice Brennan opined, "who can read this passage without a shudder…?" *Riley*, 488 U.S. 445 at 466.

B. The use of the handheld doppler to peer inside Koehler's home was an impermissible search and is presumptively invalid without a warrant.

This Court must hold that the Eagle City Police Department's use of the handheld Doppler radar was an impermissible search under the Fourth Amendment. When police use technology unavailable to the public to peer inside homes to gain otherwise inaccessible information, an impermissible search has occurred. *Kyllo*, 533 U.S. 27 at 28. It does not matter if there is a physical intrusion, but rather if the search in question violated a constitutionally protected domain under the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505, 512 (1961). A search takes place whenever there is a violation of privacy that society would consider reasonable. *See Jacobsen*, 466 U.S. 109.

In *United States v. Karo*, federal agents placed a tracking device inside a can of ether that was later stored within a home. 468 U.S. 705, 708 (1984). In that case, this Court reasoned that

[3] *Riley*, 488 U.S. 445 at 466 (quoting George Orwell, *Nineteen Eighty-Four* (1949))

absent the tracking device, entry of the ether into the home could have been observed by agents with the naked eye. *Id.* at 715. However, knowledge of the ether's continued presence could only have been obtained through physical entrance on the premises. *Id*. This Court held that when, "without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house," it has performed an impermissible search. This Court concluded that absent exigent circumstances, a warrant is necessary in such a situation to ensure that these invasive technologies are not abused. *Id*. at 717.

Similarly, in *Kyllo,* federal agents used a thermal imaging scanner to observe the external effects of heat sources emanating from within a home. *Kyllo,* 533 U.S. 27 at 30. This Court rejected the government's contention that making "off-the-wall" observations of heat outside the home was different that full on "through-the-wall surveillance." *Id.* at 35-6. This Court held that the scanner's use still rose to the level of an "intimate detail," making it an impermissible search absent a warrant. *Id.* at 36-7.

The present case provides more damning evidence of an unreasonable and unlawful search than those in either *Karo* or *Kyllo*. In those cases, agents were only given a vague conception regarding the probable presence of inanimate objects within the home. Here, agents were able to pinpoint the exact location of persons in a building and their movements based on breathing. R at 33. The search performed was the type of "through-the-wall surveillance," which permitted agents to peer inside the home in a way no external observation could have allowed. Finally, the Doppler hand scanner used in this instance was one not commonly used by the public as evinced by the fact that the police department special ordered the device direct from the manufacturer. R at 35.

Therefore, this Court must find that the use of the doppler hand scanner device constituted an impermissible search, which was presumptively invalid absent a warrant.

C. The "Fruit of the Poisonous Tree" doctrine requires that this Court exclude the evidence discovered at Macklin Manor.

This Court must affirm the Thirteenth Circuit's decision to exclude the evidence found at Macklin Manor based on the fruit of the poisonous tree doctrine. Evidence is excluded when it is discovered directly from an illegal search or seizure, or when it is discovered based on findings illegally obtained. *Segura v. United States,* 468 U.S. 796, 804 (1984). Probable cause is based on an examination of all the probabilities under the circumstances. *Illinois v. Gates,* 462 U.S. 213, 282 (1983). The exclusion of evidence that is the result of unconstitutionality is important because otherwise the "constitutional guarantee against unlawful searches and seizures could be said to be reduced to a form of words." *Brown v. Illinois,* 422 U.S. 590, 603 (1974).

Probable cause did not exist from Ludgate's search of Koehler's laptop. The search of Koehler's laptop was unconstitutional. The search was non-routine and conducted without reasonable suspicion. All the government based probable cause on was $10,000 and that Wyatt was engaged to Koehler. R. at 35. Probable cause is not met with these two pieces of evidence. Notwithstanding the unconstitutionality, probable cause did not exist even including the laptop search. Petitioner contends that a laptop with Koehler's initials, a lease to Macklin Manor, and the money in Wyatt's car are enough to search the estate. However, none of these facts link Macklin Manor to the Ford kidnappings, let alone give officers enough evidence to search Koehler's home without a warrant. Macklin Manor was connected to the kidnappings only *after* the impermissible searches with the drone and Doppler.

Accordingly, all evidence discovered as a result of the warrantless searches using the drone and the Doppler is considered a "fruit" of an illegal search. Thus, this Court must suppress the evidence.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court affirm the Thirteenth Circuit. Searching a laptop under the border search exception is considered non-routine, which requires reasonable suspicion. Agent Ludgate did not have reasonable suspicion to search Koehler's laptop without a warrant. This Court has previously held that electronic devices are deserving of heightened protections. Officers may seize electronic devices—such as laptops—but not search them until a warrant is procured. The use of a PNR-1 Drone to search an area as intimate as a pool is unreasonable. Moreover, using a handheld Doppler radar to pinpoint the approximate location of people inside a home constitutes an intrusion of a protected space. Thus, using technology such as drones and Dopplers on a home or its curtilage without a warrant is impermissible under the Fourth Amendment.

Therefore, Respondent respectfully asks that this Court affirm the Thirteenth Circuit and hold that the search of a laptop is non-routine under the border search exception, and reasonable suspicion did not exist in this case. Respondent also respectfully asks that this Court affirm the Thirteenth Circuit, and hold that the use of the PNR-1 Drone and Doppler radar without a warrant violates the Fourth Amendment. Accordingly, this Court should affirm the Thirteenth Circuit's decision to suppress all evidence seized as a result of these illegal searches.