Brief on the Merits TEAM R6

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 THE ISSUES

1. Whether the government's intrusive border search of Ms. Koehler's laptop violated her Fourth Amendment protections from unreasonable searches and seizures.

2. Whether flying a PNR-1 drone at an unlawful distance above a home isolated at the top of a mountain, and surreptitiously deploying a Doppler radar device to uncover the contents of a home without a warrant constituted a search in violation of Ms. Koehler's Fourth Amendment rights.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The State of Pawndale lies on the American side of the United States' border with Mexico. R. at 2. Pawndale's capital, Eagle City, is a large and busy port of entry into the United States whose border patrol station has more Border Patrol Agents than any other border station in the country. R. at 2. On August 17, 2016, Scott Wyatt approached the Eagle City border crossing around 3:00 A.M. in his black Honda Civic. R. at 4; R. at 27. That night, United States Border Patrol Agents Christopher Dwyer and Ashley Ludgate were on patrol at the Eagle City border station where they stopped the vehicle driven by Mr. Wyatt. R. at 4. Thereafter, Agent Ludgate asked Mr. Wyatt if he was transporting $10,000 or more in U.S. currency. *Id.* Mr. Wyatt indicated he was not transporting more than $10,000. *Id.* Agent Ludgate later testified that Mr. Wyatt seemed "incredibly agitated and uncooperative," noting Mr. Wyatt's lack of eye contact, fidgeting, and brief question responses. R. at 26. Agent Dwyer then asked Mr. Wyatt to exit the vehicle and open the trunk of his car. R. at 4. After opening the trunk, the agents discovered $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it. *Id.* Mr. Wyatt indicated that he shared the laptop with his fiancée, Amanda Koehler. *Id.*

Subsequently, the agents ran Ms. Koehler's name in a criminal database and discovered she had prior felony convictions. *Id.* Ms. Koehler was also a person of interest in the recent kidnappings of the children of billionaire biotech mogul, Timothy H. Ford, which occurred in the State of Pawndale. *Id.* Agent Ludgate, aware of the ongoing kidnapping investigation, decided to open the laptop and subsequently searched through the documents on the desktop. *Id.* Agent Ludgate found several documents already open, including documents containing Mr. Ford's personal information. R. at 5. Agent Ludgate continued searching through the documents which led to the discovery of a lease agreement under the name "Laura Pope." R. at 5. Mr. Wyatt was

placed under arrest for failure to disclose the $10,000 which is a violation of 31 U.S.C. § 5316.

Next, Agent Ludgate contacted Detective Raymond Perkins, an Eagle City law enforcement officer investigating the Ford kidnappings. R. at 3. Agent Ludgate mentioned the lease agreement she found and indicated that the home was located just outside of Eagle City at Macklin Manor – a place known for being perpetually foggy, so much so that planes and other aircraft avoid flying over that part of the mountain. *Id.* Upon further investigation, the detectives discovered that Macklin Manor is owned by Ms. Koehler. *Id.* Detective Perkins then assigned two officers to conduct surveillance on the property. *Id.* The surveillance included the use of a PNR-1 drone[1] to capture footage of the property, as well as the use of a Doppler radar device[2] which allowed the officers to gain insight into the contents of the home without entering. R. at 3-4. This surveillance was conducted prior to any warrant being issued.

While conducting the warrantless surveillance, the officers used the PNR-1 drone to collect twenty-two high-definition photographs and three minutes of video of Ms. Koehler's property. R. at 4. These photographs were used to capture the layout of the property, and included a photo of a female near the pool area, later identified as Koehler.[3] Notably, the drone used for this surveillance has been known to fly above the legal altitude for drones roughly 60% of the time due to connectivity errors, and during this deployment specifically, the drone was unable to be tracked for 4-5 minutes. R. at 41.

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[1] PNR-1 drones are designed for use by law enforcement. *See* R. at 46. Moreover, the drones cost $4,000, can only be ordered directly from the manufacturer, and a limited amount of the drones are available every year. *Id.*

[2] Doppler radar devices are built for law enforcement purposes. *See* R. at 35. The Doppler device allows officers to detect individuals located inside a residence within 50 feet of the device from something as subtle as their breath. *Id.*

[3] The layout of the property included the main residence and a pool house, nearly 50 feet apart and separated by a pool. R. at 4. The pool was located only 15 feet from the main house. *Id.*

The officers then "surreptitiously" approached the front of the home and deployed the Doppler radar device. R. at 4. The first Doppler scan revealed one individual in the main house. R. at 5. The officers then walked around the main house, to the pool house, and scanned the pool house for activity inside. *Id.* This second Doppler scan revealed four individuals inside the pool house. *Id.* The officers then retreated to obtain a search warrant of the house.[4]

Next, the officers executed the no-knock warrant and searched the home at gunpoint. *Id.* Despite the Doppler reading showing only one individual being in the main house, two individuals were therein discovered and another, Ms. Koehler, was detained before leaving the estate and found to be in possession of a Glock 29 handgun. *Id.* Subsequently, the officers entered the pool house and found one individual standing guard, and three more in chairs. *Id.*

B. PROCEDURAL HISTORY

Koehler was subsequently charged with three counts of kidnapping under 18 U.S.C. § 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1). Ms. Koehler filed a motion to suppress the evidence both seized during the border search and the search conducted via the PNR-1 drone and Doppler radar device. The United States District Court for the Southern District of Pawndale denied that motion. Koehler subsequently pleaded guilty to the foregoing charges and filed an appeal challenging the District Court's order denying her motion to suppress. The Thirteenth Circuit Court of Appeals reversed the decision of the District Court and remanded for further proceedings. Thereafter, the United States of America, as Petitioner, filed a petition for writ of certiorari, which was granted by the United States Supreme Court and is the subject of this brief for Amanda Koehler, as Respondent.

SUMMARY OF ARGUMENT

This Court should find that border searches should require a warrant due to the intrusive

[4] A copy of the search warrant and affidavit have not been included in the record.

nature of such searches. In the alternative, this Court should find that border searches of electronic devices at the border are non-routine and require reasonable suspicion. The border agents did not possess the requisite reasonable suspicion to search Ms. Koehler's laptop and thus the search was unconstitutional under the Fourth Amendment.

Also, this Court should affirm the Thirteenth Circuit's holding that the PNR-1 drone search was unconstitutional because (1) the photographs and videos were taken of an area considered to be within the curtilage of Ms. Koehler's home, (2) Ms. Koehler subjectively manifested an expectation of privacy, and (3) Ms. Koehler's expectation is objectively reasonable and one the society is ready to recognize as such. In addition, the Doppler radar search was unconstitutional because (1) the information obtained by the Doppler device would not have been knowable without physical intrusion and (2) the Doppler radar device is not in general public use.

Moreover, the information known to law enforcement prior to these unconstitutional searches did not amount to probable cause for a search warrant. Therefore, the fruits of these unlawful searches must be suppressed, and the Thirteenth Circuit's decision must be affirmed.

STANDARD OF REVIEW

This Court reviews de novo the denial of a motion to suppress evidence and the application of the exclusionary rule. *See United States v. Krupa*, 633 F.3d 1148, 1151 (9th Cir. 2011); *United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007). The factual findings underlying the district court's determination that probable cause existed and that investigators acted in good faith in relying upon a warrant are reviewed only for clear error, however, and are provided great deference. *See Krupa*, 633 F.3d at 1151.

ARGUMENT

I. MS. KOEHLER'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE PETITIONER OBTAINED THE EVIDENCE IN QUESTION THROUGH AN UNCONSTITUTIONAL WARRANTLESS SEARCH OF A LAPTOP NOT JUSTIFIED BY THE FOURTH AMENDMENT'S "BORDER SEARCH" EXCEPTION.

This Court should affirm the ruling of the Court of Appeals and hold that the search in question violated Ms. Koehler's Fourth Amendment rights. The District Court ruled that the border agents' search of Ms. Koehler's laptop was proper under the "border search exception" because the agents had reasonable suspicion to conduct their search. R. at 7-8. The Court of Appeals reversed, holding that the agents' search of the laptop was; 1) a non-routine border search requiring reasonable suspicion; 2) the agents did not possess the requisite reasonable suspicion; and 3) regardless of the nature or reasonableness of the search it was unconstitutional under this Court's holding in *Riley v. California*. R. at 17-18.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. This Court has stated that searches "conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). It is clear that "the ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

The border search doctrine "is a narrow exception to the Fourth Amendment prohibition against warrantless searches without probable cause." *United States v. Seljan*, 547 F.3d 993, 999 (9th Cir. 2008) (quoting *United States v. Sutter*, 340 F.3d 1022, 1025 (9th Cir. 2003)). The Government possesses an extremely high interest "in preventing unwanted persons and effects" from crossing the border. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). The

border search exception does not mean that at the border "anything goes." *Seljan*, 547 F.3d at 1000. Individuals do not lose their privacy rights at the border, rather their rights are "balanced against the sovereign's interest." *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). At the border, there is a distinction between routine and non-routine searches. *Id*. at 541 n. 4. The Court in *Montoya de Hernandez* states that, "routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion…." *Id*. at 538. The court reasoned that non-routine searches, require reasonable suspicion, and the "critical factor in determining whether a search is 'routine' is the 'degree of intrusiveness.'" *Flores-Montano,* 541 U.S. at 152 (quoting *United States v. Molina-Tarazon*, 279 F.3d 709, 712-13 (9th Cir. 2002).

A. The Circuit Court of Appeals properly extended this Court's reasoning from *Riley v. California* to searches of electronic devices at the border, and this Court should resolve the circuit split in favor of the Thirteenth Circuit by requiring a warrant for searches of phones or laptops at the border.

The Circuit Court of Appeals properly extended this Court's reasoning in *Riley v. California* to searches of electronic devices at the border due to the highly intrusive nature of searching an individual's electronics. Cell phones "differ in both quantitative and a qualitative sense" from other objects usually searched at the border; electronic devices are categorically different. *Riley*, 134 S. Ct. at 2489 (Modern 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 also United States v. Wanjiku*, 2017 WL 1304087 (N.D. Ill. 2017) ("[t]he Court's decision in *Riley* rejects the government's claim that searches of cell phones or other electronic devices are analytically equivalent to searches of physical items…."). Laptop computers contain "the most intimate details of our lives," such as financial records, confidential documents, and medical records. *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013).

In *Riley*, this Court held that police must obtain a search warrant prior to searching the

digital information on a person's cell phone incident to arrest. 134 S. Ct. at 2489-91. The issue arose in two consolidated cases after police searched two phones, a "smart phone" and a "flip phone," incident to arrest. *Id.* The exception for searches incident to arrest is one of the few exceptions to the warrant requirement of the Fourth Amendment. *Id.* This Court in *Riley* noted that the "immense storage capacity" of modern cellphones demonstrates a quantitative difference from "other physical items people typically carry." *Id.* at 2489; *see also* Thomas Mann Miller, *Digital Border Searches After Riley v. California*, 90 WASH. L. REV. 1943, 1978-79 (2015). This Court explicitly rejected the government's argument that cell phones are "materially indistinguishable" from searches of other physical items. *Riley*, 134 S. Ct. at 2488. This Court dismissed the government's argument through use of an analogy; "[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. *Id.*

The qualitative and quantitative aspects of digital information "stored on or accessed by a cell phone" result in the search of a phone potentially being more intrusive than the search of one's home. *Riley*, 134 S. Ct. at 2491; Miller, *supra* at 1978. This Court relied upon the unique aspects of digital information when analogizing the search of a phone to the search of a house; "[i]ndeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house… [a phone] also contains a broad array of private information never found in a home of any form…." *Riley*, 134 S. Ct. at 2491. Such a statement alone justifies the "conclusion that a digital border search is beyond the scope of the traditional border search of a document." Miller, *supra* at 1988.

This Court should extend *Riley*'s holding to border searches which would require a warrant to search and individual's electronic devices. *See United States v. Molina-Isidoro*, 2016

WL 8138926, *8 (W.D. Tex. 2016) ("Were this Court free to decide this mater in the first instance, it might prefer that a warrant be required to search an individual's cell phone at the border."). The Court in *Molina-Isidoro* felt constrained by their Fifth Circuit precedent holding that "particularized reasonable suspicion is the highest standard required for border searches…" *Id*. Moreover, this Court's decision in *Riley* which rejected the argument that electronic devices are analytically equivalent to searches of physical items "suggest[s] the Court's willingness to reevaluate, in the age of modern cell phones, whether the balance of interests should continue to be 'struck much more favorably to the Government at the border' where digital searches are concerned." *United States v. Wanjiku*, 2017 WL 1304087, *5 (E.D. Ill. 2017).

B. In the alternative, the search of Ms. Koehler's laptop constitutes a non-routine search due to the highly invasive nature of laptop searches and the Border Agents did not possess the requisite reasonable suspicion to conduct the search.

If this Court determines that the warrant requirement does not extend to border searches of electronic devices, the Court should still hold that searches of electronics at the border are non-routine because the government's interest in conducting warrantless searches of electronics at the border is outweighed by privacy interests of citizens in being free from such searches due to their highly invasive nature. Furthermore, Petitioner's desire to protect the interests of the sovereign at the border can still be effectuated through a warrant requirement or required reasonable suspicion standard.

The "intrusiveness" of a border search is what distinguishes a routine from a non-routine search. *See United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) ("[T]he level of intrusion into a person's privacy is what determines whether a border search is routine."). This Court has specifically determined the distinction between routine and non-routine searches, but "reasonableness remains the touchstone for a warrantless search." *United States v. Kim*, 103 F. Supp. 3d 32, 50 (D.D.C. 2015) (citing *Cotterman*, 709 F.3d at 957).

1. Searches of electronic devices are substantially different than those of other physical objects which may be searched at the border, and thus this Court's precedent in the area of the border search exception is not applicable.

This Court has outlined the parameters of the border search exception in three main cases. Beginning with *United States v. Ramsey*, where this Court established that border searches of people or their property do not require a warrant or probable cause. 431 U.S. 606, 619 (1977) (upholding a customs official's search of envelopes mailed from Thailand to the United States). Then, in *United States v. Montoya de Hernandez,* this Court distinguished between routine and non-routine border searches and seizures. 473 U.S. 531, 541 (1985) (holding that a search of an individual's alimentary canal required reasonable suspicion). Finally, in *Flores-Montano,* this Court held that searching and disassembling an automobile gas tank did not require reasonable suspicion due to the defendant's lack of privacy interest in his gas tank. 541 U.S. at 155-56.

In *United States v. Kim*, the D.C. District Court dealt with the search of a man's laptop as he departed the country through Los Angeles International Airport. 103 F. Supp. 3d at 34. The Court rejected the government's argument that a "laptop is the functional equivalent of the inspection of a piece of luggage or a cargo container, and … it was presumptively reasonable and subject to no limitation under the border search doctrine." *Id*. at 50. Relying upon the precedents set by this Court in *Montoya de Hernandez* and *Flores-Montano* the District Court opined that "neither of those precedents can be easily compared to this case." *Id*. The Court distinguished prior Supreme Court precedent through acknowledging the "vast storage capacity of even the most basic laptops," which supports the conclusion that "one cannot treat an electronic device like a handbag simply because you can put things in it and carry it onto a plane." *Id*; *see also United States v. Payton,* 573 F.3d 859, 862-63 (9th Cir. 2009) ("Searches of computers therefore often involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers."). In *Cotterman*, however, the Ninth Circuit

held that a forensic search of an individual's laptop at the border constituted a non-routine search while manual or cursory searches remained routine searches under the border search exception. 709 F.3d at 960.

The particular of facts surrounding the search in this case is a matter of first impression for this Court relating to the border search exception. This Court's precedent involving the border search exception is limited to gas tanks, personal belongings (envelopes), and cavity searches. Agent Ludgate opened Ms. Koehler's laptop after discovering that Ms. Koehler is a "felon with multiple convictions of violence" and was a person of interest in an ongoing investigation. R. at 2. Agent Ludgate's search of Ms. Koehler's laptop revealed highly sensitive information. R. at 28. Agent Ludgate discovered bank statements, a personal schedule, and employee schedules belonging to Mr. Ford. R. at 28. Agent Ludgate also found a lease agreement belonging to Ms. Koehler. R. at 28. The large quantity and the qualitative type of sensitive information found during the search is not normally carried on an individual's person. *Riley*, 134 S. Ct. at 2489-91. This Court in *Riley* stated that "[b]efore cell phones a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy." *Id*. at 2489 (citing Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36, HARV. J.L. & PUB. POL'Y 403, 404-05 (2013)). The Agent's ability to search files and folders on Ms. Koehler's desktop gives the agent far more access to highly personal and sensitive information than is otherwise accessible with no electronics present. The difference between a forensic search and a cursory search of a laptop is minor when comparing both searches to searching physical objects, such as a purse or glove box.

2. The government's interest in protecting the sovereign by stopping and examining people and property crossing the border can still be furthered while requiring reasonable suspicion to search electronics at the border.

The broad scope of searches at the international border stem from the "long-standing

right of the sovereign to protect itself by stopping and examining persons and property crossing into this country." *Ramsey*, 431 U.S. at 616. However, this does not mean that "anything goes" at the border. *Seljan*, 547 F.3d at 1000. The border search exception finds its roots in the government's desire to "prevent unwanted people and contraband from entering the country to protect national security, regulate immigration, and enforce customs restrictions." Miller, *supra* at 1989 (citing *Ramsey*, 431 U.S. at 619).

Ultimately, reasonable suspicion for the searches of electronic devices prevents the government from unduly burdening the privacy interests of citizens through unreasonable searches of the electronics. As Agent Ludgate stated, she had time to obtain a warrant to search Ms. Koehler's laptop prior to performing the search. R. at 28. Under this framework, however, border agents would only need reasonable suspicion and not a warrant to search the device. The citizens' privacy interests are extremely high when dealing with the sensitive information stored on electronic devices. *Riley*, 134 S. Ct. at 2489. Through the adoption of the Thirteenth Circuit's reasoning and establishing a requisite reasonable suspicion standard for all electronic devices at the border, the government is protecting the individual privacy interests of its citizens while maintaining the ability to conduct searches in furtherance of their goals of protecting the borders. As the Ninth Circuit opined in *Cotterman*, the reasonable suspicion standard is a "modest, workable standard" that is employed in other Fourth Amendment exceptions to the warrant requirement. 709 F.3d at 966. Thus, this Court should hold that searches of electronics are non-routine and require reasonable suspicion in light of the immense privacy interests in play and the incredibly intrusive nature of such searches.

3. The border agents did not possess the required reasonable suspicion to search Ms. Koehler's laptop at the border.

This Court defined reasonable suspicion as "a particularized and objective basis for

suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). "The standard is met when a law enforcement officer can point to 'specific and articulable facts,' which, when considered together with the rational inferences that can be drawn from those facts, indicate that criminal activity 'may be afoot.' " *Kim*, 103 F. Supp. 3d at 43 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Ultimately, the issue is whether a "reasonably prudent man in the circumstances would be warranted in his belief that the suspect is breaking, or is about to break, the law." *United States v. Edmonds*, 240 F.3d 55, 59 (D.C. Cir. 2001).

Merely because an individual is "under investigation" or has prior convictions is "inadequate to furnish reasonable suspicion." *United States v. Foster*, 634 F.3d 243, 247 (4th Cir. 2011). Moreover, "nervousness is of 'limited significance' in determining whether reasonable suspicion exists." *United States v. Simpson*, 609 F.3d 1140, 1147 (10th Cir. 2010) (quoting *United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000)). Knowledge that a defendant "has a criminal history is not enough to create reasonable suspicion, even when combined with weaker indicators such as nervousness and illogical travel plans." *United States v. Stepp*, 680 F.3d 651, 667 (6th Cir. 2012) (citing *Joshua v. DeWitt*, 341 F.3d 430, 446 (6th Cir. 2003)).

A reasonably prudent individual in the circumstances would not deduce that Ms. Koehler was breaking, or was about to break, the law at the time Mr. Wyatt was stopped. Agent Ludgate based her conclusion solely off of Ms. Koehler's prior convictions and the fact that Ms. Koehler was a person of interest in the Ford kidnappings. R. at 2. Agent Ludgate testified about Mr. Wyatt's failure to cooperate and nervous tendencies, but that is not why she opened the laptop. R. at 26. "Aware of the ongoing investigation, Agent Ludgate opened the laptop…." R. at 2. If being a person of interest in a criminal investigation and having felony convictions is enough for reasonable suspicion, then the privacy interest of individuals at the border is no more. Agent

Ludgate did not view Ms. Koehler, she did not speak with Ms. Koehler, and had no reason to suspect Ms. Koehler was involved in criminal activity aside from unfairly using prior convictions and being involved in an investigation as reason for searching Ms. Koehler's belongings, which is inadequate to support reasonable suspicion. *See Id*. ("Just as an officer's knowledge of a suspect's past arrests or convictions is inadequate to furnish reasonable suspicion; so too is knowledge that a suspect is merely under investigation, which is an even more tentative, potentially innocuous step towards determining criminal activity.").

II. THE OFFICERS' USE OF TECHNOLOGY TO UNCOVER DETAILS ABOUT MS. KOEHLER'S HOME WAS AN UNCONSITUTIONAL SEARCH IN VIOLATION OF MS. KOEHLER'S FOURTH AMENDMENT RIGHTS.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals with respect to the use of technology at the home of Ms. Koehler because Officer Lowe's use of the PNR-1 drone and Detective Perkins's use of the handheld Doppler radar device was a violation of Ms. Koehler's Fourth Amendment rights to be "free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359 (1967). Moreover, the evidence existing prior to these unconstitutional searches did not amount to probable cause and no warrant to search the home of Ms. Koehler should have been issued. Accordingly, this Court should affirm the Thirteenth Circuit's decision to suppress the "fruits" of those unconstitutional searches.

A. Officer Lowe's use of the PNR-1 drone violated Ms. Koehler's Fourth Amendment rights because it constituted a search of her home for which she had a reasonable expectation of privacy.

The Fourth Amendment guarantees "the 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 strongest of these protections are extended to the home, and the curtilage of the home, as the curtilage is considered part of home itself for Fourth Amendment purposes. *Oliver v. United States*, 466 U.S. 170, 180 (1984). On the other hand, the same protections are not afforded when

an area falls within the "open fields" exception, as they are neither "houses," nor "effects" within the meaning of the Fourth Amendment. *Id.* at 176. Here, however, the area surveyed by Officer Lowe's drone was not an "open field," but instead it was within the curtilage of the home and therefore, shall be afforded Fourth Amendment protections. Moreover, Ms. Koehler (1) manifested a subjective expectation of privacy and (2) that expectation is one that society is prepared to objectively view as reasonable. Accordingly, Ms. Koehler's Fourth Amendment rights were violated when this search was conducted.

1. Officer Lowe's drone search was conducted within the curtilage of Ms. Koehler's home.

This Court has defined the curtilage of a home as an area "intimately linked to the home, both physically and psychologically." *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *see also United States v. Dunn*, 480 U.S. 294 (1987) (defining curtilage as an area "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of protection."). This Court set forth four factors in *Dunn* which are used to determine whether an area is considered curtilage and protected under the Fourth Amendment.

First: "the proximity of the area to the home." *Dunn*, 480 U.S. at 301. In *Dunn*, 180 feet between a barn and a main house contributed to a finding of the barn being transformed from being within the curtilage to being in an open field. *Id.* at 302. Here, however, all of the landmarks surveyed on the property were located within a fifty-foot range. Moreover, the main house was located only fifteen feet from the patio where the pool was located. While "[t]here is no magic distance (e.g., 20, 50, or 100 yards) upon which curtilage is automatically transformed into an open field," many courts have found distances of more than fifty feet to lend inference to the area being an intimate part of the home. *United States v. Garrott*, 745 F. Supp. 2d 1206, 1209 (M.D. Ala. 2010); *see also United States v. Biles*, 100 F. App'x 484, 493 (6th Cir. 2004) (150-

foot separation found to be within the curtilage); *United States v. Seidel*, 794 F. Supp. 1098, 1103 (S.D. Fla. 1992) ("In comparison, a few hundred yards (to the end of Mr. Seidel's property) constitutes 'in close proximity' to the house"). In fact, pool houses specifically have been found to be clearly within the curtilage of a home. *King v. Louisiana Tax Comm'n*, No. CV 14-549, 2015 WL 13118963, at *2 (W.D. La. June 19, 2015) ("The structure at issue in this case is a pool house which this court finds to be clearly within the curtilage of Plaintiffs' home."). Accordingly, the fifty-foot gap between the main house and the pool house separated by nothing more than the pool lends inference to this area being within the curtilage of the home.

Second: "whether the area is within an enclosure surrounding the home." *Dunn*, 480 U.S. at 301. Generally, an enclosure around a home is made up of some sort of fencing. However, "obviously not all houses have fences, nor are they required for a house to have curtilage." *Com. v. Ousley*, 393 S.W.3d 15, 27 (Ky. 2013). *Dunn* and its progeny make clear that the reason enclosures are included in this analysis is because they "serve[] to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house." *Dunn*, 480 U.S. at 302. Courts have also held that when the area is partially obstructed by a house or structure, this *Dunn* factor falls in favor of the defendant. *See United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997). Here, the pool area was between two structures on the property, and thus, an enclosure was not needed to determine the boundaries of the curtilage.

Third: "the nature and uses to which the area is put." *Dunn*, 480 U.S. at 301. Since *Dunn*, courts have found things such as mowed lawns, barbeque grills, gardening, and drying clothes to indicate that an area is within the curtilage of a home. *Jenkins*, 124 F.3d at 773; *Garrott*, 745 F. Supp. 2d at 1212. Here, there is a pool and patio which indicates that this is an area commonly used for intimate activities of the home such as sunbathing and swimming. It is

hard to conceive a definition of intimate family activities which would exclude such activities. This is clearly not an "unoccupied or undeveloped" area as described in *Oliver*. 466 U.S. at 180. Moreover, on both sides of the patio there was a "house," which lends inference to the extension of intimate activities of the home. Thus, this factor clearly falls in favor of Ms. Koehler.

Fourth: "the steps taken by the resident to protect the area from observation by passersby." *Dunn*, 480 U.S. at 301. In applying the fourth *Dunn* factor, courts have looked at location of the area in relation to areas of public access. For example, when analyzing this factor and concluding that the factors militate in favor of the defendant, the Sixth Circuit expressly considered the following:

> Defendants' backyard is a good distance from the road and is located, quite obviously, behind the house. The yard is therefore well shielded from the view of people passing by on the only public thoroughfare near defendants' property. Moreover, the wooded field behind defendants' house helps protect against undesired public viewing of the backyard. It is also important to remember that defendants live in a remote and sparsely populated rural area where they would have had no particular reason to believe that they needed to construct a high impenetrable fence around the backyard in order to ensure their privacy.

Jenkins, 124 F.3d at 773.

In the present case, the home was at the top of a mountain on the outskirts of Eagle City and was known as a "[p]retty isolated place" given its location. R. at 32. In fact, it is well known that the fog in this area creates a visual barrier which deters aircraft from flying over the home R. at 42. In addition, the pool area is directly between two structures within close proximity, which creates a barrier around that area. Thus, the pool area was hidden from passersby via ground and air and by simply purchasing the land in this location, with the barriers described above, it can be said that Ms. Koehler took steps to protect her home from observation by passersby.

Moreover, notwithstanding consideration of these factors, the Court has often stated that "the conception defining the curtilage—as the area around the home to which the activity of

home life extends—is a familiar one easily understood from our daily experience." *Oliver*, 466 U.S. at 182 n.12. This Court in *Dunn* did "not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." 480 U.S. at 301. The ultimate conclusion boils down to whether "an individual reasonably may expect that the area in question should be treated as the home itself." *Id.* at 300. Common sense leads to the conclusion that an individual likely considers their pool patio, located between their main home and their pool house, to be part of their home. Common sense also indicates that this pool patio is not an "open field." Accordingly, this Court should find that the area surveyed was within the curtilage of Ms. Koehler's home and therefore is entitled to Fourth Amendment protections.

2. Officer Lowe's drone search violated Ms. Koehler's Fourth Amendment rights.

Upon attachment of Fourth Amendment protections, the focal point of Fourth Amendment analysis is defined as whether a person's reasonable expectation of privacy has been intruded upon by the government. *Katz*, 389 U.S. 347. Thus, in considering whether the use of the PNR-1 drone violated Ms. Koehler's constitutional rights, this Court should apply the two-pronged analysis set forth in Justice Harlan's oft-quoted concurrence in *Katz* – (1) whether Ms. Koehler manifested a subjective expectation of privacy and (2) whether that expectation is one that society is prepared to objectively view as reasonable. Moreover, *Florida v. Riley* makes clear that this analysis is to be a case-by-case inquiry.

a. Ms. Koehler manifested a subjective expectation of privacy by choosing to isolate herself on the top of a mountain, covered by a perpetual fog.

The first prong of the *Katz* analysis looks at the subjective manifestations of Ms. Koehler. The facts of this case are clear. Ms. Koehler moved to the top of a mountain, bought property in a different name, in an area she knew was covered by a perpetual fog and which she would have

no air traffic overhead. Moreover, the property itself was known as isolated. Simply because there was no fence or "no trespassing" sign is irrelevant to this inquiry because they would not have prevented the aerial surveillance that occurred. Common sense indicates that moving far away from the city, to an area that is cloaked in fog year-round, and is known as being isolated, will have the effect of giving the resident privacy in her daily activities. Thus, the locational factors of the estate alone are a sufficient manifestation of an expectation of privacy.

b. Ms. Koehler's expectation of privacy is one that is objectively reasonable, and one society is prepared to accept as such because the search occurred within the curtilage of her home, while using advanced technology in a manner contrary to state law.

When determining whether the expectation of privacy is reasonable, "the Court has recognized that no single factor invariably will be determinative." *Rakas v. Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring). This Court "must keep in mind that [t]he test of legitimacy is not whether the individual chooses to conceal assertedly private activity, but instead whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (internal quotations omitted). In *Katz,* this Court found an individual entering a phone booth in public and closing the door behind them manifests a subjective expectation of privacy in their phone conversation which society was prepared to observe as reasonable. *Katz*, 389 U.S. 347. Similarly, Ms. Koehler desired protection from visual observation, evidenced by her moving to an isolated and visually protected mountain top in order to escape the eyesight of any passersby.

Moreover, the three key cases discussing aerial surveillance are all factually distinguishable from the case at bar, but provide guidance to this Court in the form of a permissible rationale. The first landmark case to discuss aerial surveillance in the context of the Fourth Amendment, *California v. Ciraolo,* answered the question of "whether *naked-eye*

observation of the curtilage by police from an aircraft *lawfully* operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." *Ciraolo*, 476 U.S. at 213 (emphasis added). In *Ciraolo*, this Court found that the second prong of the *Katz* test was not satisfied because of the prevalence of air traffic over that area, and the ability of any one of those passengers to be able to look down and see the large plot of ten-foot marijuana trees growing. Here, however, no naked eye observation occurred. In fact, there were high definition cameras and videos taken while an unmanned aircraft hovered over Ms. Koehler's property. Moreover, in order for these photographs to be taken, the drone had to hover over the area for a few minutes in order to allow the cameras to gain focus through all of the fog. Clearly, this is not a process which could have been completed by the "naked eye."

However, while the facts of *Ciraolo* are distinguishable, the Court provided guidance by specifically including that the flight was conducted *lawfully*. Here, the flight was not conducted in a lawful manner and by way of inference, it is clear that the drone exceeded the state's altitude limit for such drone. Specifically, Officer Lowe testified that the drone was known to have a 60% chance of exceeding the altitude limit due to connectivity errors, and that there were connectivity errors for 4-5 minutes of this flight. R. at 39-41.

The second case, *Dow Chem. Co. v. United States*, answered questions regarding aerial surveillance in the context of commercial property. 476 U.S. 227 (1986). In finding that the second prong was not satisfied, this Court reasoned that "the Government has 'greater latitude to conduct warrantless inspections of commercial property' because 'the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home." *Id.* at 237–38, (citing *Donovan v. Dewey*, 452 U.S. 594, 599 (1981)) In contrast, this case involves a home, with a pool, and an adjacent pool house. As

described above, the property survey was within the curtilage of the home and therefore is to be afforded the protections of the home, as the most sacred of places.

Finally, *Florida v. Riley* is also distinguishable. 488 U.S. 445 (1989). In *Riley,* this Court considered the facts surrounding the naked eye observation from a helicopter lawfully hovering in the context of aerial surveillance. However, while the facts again are distinguishable, the Court provided guidance for facts such as those presented in this case. First, while finding that the second prong was not satisfied, the Court emphasized that "[w]e would have a different case if flying at that altitude had been contrary to law or regulation." *Id.* at 451. As discussed above, the flight in this case was not conducted in accordance with law.

The test utilized in *Riley* is a fact intensive inquiry. *Id.* This Court specifically found that even if there was a reasonable expectation of privacy to be free from "*ground-level observation*," there was no such expectation to be free from observation from the air due to the facts of the case. Specifically, in *Riley,* the roof of the greenhouse was open, allowing those in the air to see in, and there was no evidence that flights over the defendant's property were unheard of. *Id.* Here, however, the perpetual fog itself prevented the everyday passerby from visually observing the property, and the record makes clear that aircraft avoid the area due to the low visibility.

In addition, Justice O'Connor's concurrence indicates that the test for whether there was a legitimate expectation of privacy rest not on whether a member of the public "could" view the area from a public vantage point, but instead the inquiry is whether a member of the public *would* generally view this area from a public vantage point. *See Riley,* 488 U.S. at 455 (O' Connor, J., concurring). Specifically, Justice O'Connor provided the following:

> [I]t is not conclusive to observe, as the plurality does, that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." Nor is it conclusive that police helicopters may often fly at 400 feet. If the public rarely, if

> ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

Id. at 454-55 (O'Connor, J., concurring) (internal citations omitted). Moreover, it is proper for this Court to follow Justice O'Connor's concurrence given that it falls within the *Marks* rule. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotations omitted).

Clearly, this aerial search does not fit the test a defined by Justice O'Connor because this is an area where the public rarely, if ever, navigates the airspace above Ms. Koehler's home. Thus, even if the public "could" potentially view what law enforcement did, it is unlikely they *would*. Accordingly, the evidence obtained by the drone was the result of an unconstitutional search, and the evidence obtained was unable to be used in obtaining a search warrant.

B. Detective Perkin's use of the handheld Doppler radar device constituted an unconstitutional search because there was no implied license to scan the house with the radar device, and law enforcement used a device which is not in general public use to obtain information previously unknowable without physical intrusion.

This Court should affirm the Thirteenth Circuit's decision as to the unconstitutional use of a Doppler radar device used to scan the inside of the home for the presence of individuals. The facts of this case clearly indicate that there was an unconstitutional search of Ms. Koehler's home because (1) there was no implied license which allowed law enforcement to use this device to scan the contents of the home, and thus, their actions constituted a trespassory invasion, and (2) law enforcement used a device which is not in general public use to obtain information which was previously unknowable without physical intrusion. Accordingly, the search of Ms. Koehler's

home was unconstitutional and the information obtained therefrom was unable to be used in obtaining a warrant. Thus, the Thirteenth Circuit correctly remanded for further proceedings.

1. There was no implied license which allowed law enforcement to use this device to scan the contents of the home, and thus, their actions constituted a trespassory invasion.

Looked at from a property interest standpoint, it is clear that Detective Perkin's use of the Doppler radar device constituted a search. It cannot be disputed that the areas in which the device were deployed was at the very least curtilage of the home. *Florida v. Jardines*, 569 U.S. 1, 7 (2013) ("The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends.") (internal quotations omitted). The Court in *Jardines* walked through the concept of an implied license, recognizing that the implicit front door license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8. Specifically, it raises no concerns when someone engages in activities related to that of a trick-or-treater, or someone hanging door hangers. *Id.* In fact, it raises no concern if an officer simply walks up to a front door, knocks on the door, and begins a conversation with the resident. *Id.* However, the line is crossed when a law enforcement officer brings a police dog to the area around the home in order to uncover information about the contents of the home. *Id.* at 9.

Here, that line was crossed when Detective Perkin's began scanning the inside of Ms. Koehler's home with the Doppler radar device. Clearly this type of behavior is more like that of a drug sniffing dog, and of an entirely different nature than a trick-or-treater requesting candy.

2. The Doppler radar device is not in general public use and was used to obtain information which previously would have been unknowable without physical intrusion, and therefore it constituted an unconstitutional search.

As the Thirteenth Circuit noted, *Kyllo v. United States* is directly in line with the facts of this case. 533 U.S. 27 (2001). In *Kyllo*, the officers used a thermal imaging device to detect heat

emitting from a residence in order to determine if there were drugs being grown inside. *Id.* The Court found that this was in fact an unconstitutional search of the individual's home. In doing so, the Court recognized, among other things, the technological advancements that have made this possible, and the fact that "in the sanctity of the home, *all* details are intimate details." *Id.* at 28 (emphasis in original). The majority opinion disposed of any artificial distinctions being drawn, including the dissent's belief that there should be a distinction between "off the wall" observations and "through the wall surveillance. *Id.* at 35. Notably, even the dissent would agree that the facts of this case fall into the "through the wall surveillance" category and therefore, an unconstitutional search occurred.

Ultimately, *Kyllo*, left the courts with a two-part test for determining when the use of technology constitutes a search. First, this Court must determine whether the information obtained by the Doppler device "would previously have been unknowable without physical intrusion." *Kyllo*, 533 U.S. at 40. Second, this Court must determine whether the device is "in general public use." *Id.* Neither one of these prongs are satisfied in this scenario.

As to the first prong, the actions of the officers themselves make it clear that the information would previously have been unknowable without physical intrusion. If that were not the case, they would not have needed to use an advanced imaging device to determine how many individuals were in the home. Similarly, the second prong fails because the only evidence presented shows that this device is not in general public use. Specifically, Detective Perkins learned of the device from another police agency, has only ever used the device for police activity, has never witnessed an individual using one of these in the general public, had to special order the product directly from the manufacturer because it is not available from other sources, and specifically states that he does not believe they are popular among the public. In addition,

the average citizen likely has no use for this device, as its' only use is to allow the user to get a look behind closed doors.

It is undeniable that "the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Id.* at 31. Accordingly, the scans conducted by the Doppler radar device were unconstitutional and the evidence obtained was unavailable to be considered in obtaining a search warrant.

C. The "fruits of the poisonous tree" must be excluded because prior to the unconstitutional searches, there was no probable cause to support the warrant to search Ms. Koehler's home.

It is fundamental in our Constitution that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This Court has described probable cause as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The test for determining probable cause looks to the totality of the circumstances *Id.* at 238. In order for an affidavit to supply probable cause, it "must provide the magistrate with a *substantial* basis for determining the existence of probable cause." *Id.* at 239 (emphasis added). Ultimately, the task "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

"[T]here is a distinction between probable cause to arrest and probable cause to search." *United States v. Jones*, 994 F.2d 1051, 1055 (3d Cir. 1993). Specifically, "search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found." *Id.* Here, the only clues the officers could rely on prior to the use of the PNR-1 drone and the Doppler radar device was $10,000 in another

individual's car, along with a laptop that contained Ms. Koehler's initials, and paperwork showing Ms. Koehler owned Macklin Manor. Thus, even if the evidence was enough to establish probable cause to arrest Koehler, it does not directly follow that there was probable cause to search the home. The police had not been doing surveillance on the home. They had not seen Koehler, or any other individual at the home. In fact, Detective Perkins testified that he believed the estate had been abandoned for six months prior to the search. Accordingly, the only piece of evidence tying Koehler to the home were the documents found in Mr. Wyatt's vehicle.

In addition, the testimony of Detective Perkins also establishes that the information included in the search warrant was directly reliant upon the unconstitutional search conducted using the PNR-1 drone. Specifically, he gave testimony that "the search warrant encompassed the pool house also." R. at 34. Based on the record, the layout of the land appears to have been unknown to the officers prior to the drone search and therefore, the specific location of "the pool house" could not have been included in the search warrant prior to the drone search.

It is clear that probable cause was not established until the PNR-1 drone captured a picture of Ms. Koehler, and the Doppler radar indicated three unmoving individuals in the pool house. Thus, because the search warrant could not have been issued prior to the unconstitutional searches, the evidence retrieved is "fruit" of an impermissible search and must be suppressed.

CONCLUSION

For the reasons analyzed above, the border search, the PNR-1 drone search, and the Doppler radar search were all unconstitutional searches in violation of Ms. Koehler's Fourth Amendment rights. As such, the information obtained from these searches was unable to be used in obtaining a search warrant and the "fruits" of the searches must be suppressed. Accordingly, this Court should affirm the decision of the Thirteenth Circuit.