Team Number 7

No. 4–422

IN THE

Supreme Court of the United States

NOVEMBER TERM, 2017

UNITED STATES OF AMERICA,

PETITIONER,

v.

AMANDA KOEHLER,

RESPONDENT.

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

BRIEF FOR PETITIONER

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I. Whether the Government's brief search of open documents on Respondent's laptop at a border station violated Respondent's Fourth Amendment rights.

II. Whether the use of the PNR-1 Drone and the handheld Doppler radar device to survey an estate to ensure the safety of kidnapped children violated Respondent's Fourth Amendment rights.

STATEMENT OF THE CASE

Material Facts

Respondent Amanda Koehler ("Respondent"), a known felon with a history of violent crime, was a person of interest in an ongoing kidnapping investigation. R. at 2, 27, 31–32. The kidnapping occurred on July 15, 2016, in San Diego, California, when John, Ralph, and Lisa Ford (collectively, the "Ford Children") disappeared on their way to school. R. at 27, 44. Two days later, their father received a ransom note demanding $300,000. R. at 44. Soon after, the kidnappers agreed to provide proof of life in exchange for $10,000 in $20 bills due at noon on August 18, 2016. R. at 2, 27, 32.

On August 17, 2016, Border Patrol Agents Christopher Dwyer and Ashley Ludgate (collectively, "Border Patrol") were on patrol at the Eagle City border station in the state of Pawndale. R. at 2. Pawndale is on the United States-Mexico border, and the border station is a known crossing point for criminals. R. at 2. The FBI and the Eagle City Police Department ("ECPD") received information that the Ford Children crossed state lines and were being held hostage in Eagle City. R. at 2.

At 3:00 A.M., Border Patrol conducted a routine stop of a car driven by Scott Wyatt, Respondent's fiancé. R. at 2, 24. Border Patrol asked Wyatt standard questions, including why he was crossing the border and if he was transporting $10,000 or more in U.S. currency. R. at 2, 26. In response, Wyatt was extremely agitated, pale, and uncooperative. R. at 2, 26. He would not make eye contact with Border Patrol, and he denied transporting $10,000. R. at 2.

When Border Patrol asked Wyatt to open his trunk as part of the routine search, they discovered $10,000 in $20 bills. R. at 2, 31. Border Patrol also discovered a laptop, which Wyatt admitted he shared with Respondent. R. at 2, 26. Border Patrol then ran Respondent's name in the

criminal intelligence and border watch database, which revealed Respondent's criminal record and connection to the kidnapping. R. at 2, 27.

Border Patrol opened the laptop, believing they had the authority to do so. R. at 2, 28. The device was not password-protected, and several documents containing Mr. Ford's address and a list of his upcoming meetings were already open. R. at 2–3, 28. Also among the open documents was a lease agreement under one of Respondent's aliases. R. at 3, 28. Subsequently, Border Patrol arrested Wyatt for failure to declare an excess of $10,000. R. at 3, 27.

Border Patrol then contacted Detective Raymond Perkins, Officer Kristina Lowe, and Officer Nicholas Hoffman (collectively, the "ECPD Officers") to report their findings. R. at 3, 31. The ECPD Officers traced the address on the lease to Macklin Manor, a large estate atop Mount Partridge in Eagle City. R. at 3, 30. A shell company owned by Respondent purchased the estate six months prior to the kidnapping. R. at 3, 12. Macklin Manor was abandoned after the previous owner died in 2015, and no one had seen any residents at the property to date. R. at 3, 32.

Given Respondent's violent history, the ECPD Officers were reluctant to approach the estate without knowing more about its layout and possible occupants. R. at 3, 32. At around 4:30 A.M. on August 17, 2016, the ECPD Officers deployed a PNR-1 drone (the "Drone") at a pre-programmed attitude of 1640 feet, the legal maximum allowed for drones in Pawndale. R. at 4. The Drone is popular and affordable, and is used by police departments in thirty-five states. R. at 46. It is equipped with a high-definition camera, but only has a battery life of about thirty-five minutes and minimal storage capabilities. R. at 3, 40, 46. The Drone hovered above Macklin Manor for fifteen minutes, taking photos of a large main house, an open pool and patio area, and a single-room pool house roughly fifty feet away from the main house. R. at 4. There were no gates or fences marking the boundaries of the estate. R. at 4, 32–33. The Drone only identified

one person, a woman crossing from the main house to the pool house. R. at 4. The ECPD Officers ran the photograph through their database, identifying the woman as Respondent. R. at 33.

The ECPD Officers then approached Macklin Manor on foot. Fearful that they might endanger the lives of the Ford Children, the ECPD Officers used a handheld Doppler radar device (the "Doppler") to determine how many other people were on the premises. R. at 4, 33. The Doppler uses radar technology to detect the breath of individuals within fifty feet, but it cannot reveal specific details about the interior of a building. R. at 4. The ECPD Officers used the Doppler in the area around the front door to detect one individual in the main house. R. at 4–5, 34. They then conducted a second scan on the pool house, which revealed three individuals close together and unmoving. R. at 5, 34. A fourth individual appeared to be standing guard. R. at 5, 34.

The ECPD Officers retreated and obtained a search warrant for Macklin Manor. R. at 5, 34. At around 8:00 A.M., the ECPD Officers stormed the estate and apprehended Respondent—who was armed with a handgun—as she attempted to flee. R. at 5, 34. They then rescued the Ford Children, who were restrained to chairs in the pool house. R. at 5, 34.

Procedural History

On October 1, 2016, Respondent was 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). R. at 5. Respondent filed a motion to suppress the evidence seized on the date of her arrest. R. at 5. The United States District Court for the Southern District of Pawndale properly denied Respondent's motion to suppress. R. at 13. The court found that there was reasonable suspicion to support the search of Respondent's laptop at the border, and that the use of the Drone and the Doppler was permissible. R. at 8, 11. The court also found that there was probable cause

for a search warrant even without the information from the Drone and the Doppler. R. at 12. Respondent appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 15.

The Thirteenth Circuit improperly reversed the District Court's order and remanded the case. R. at 15, 21. The court found that the search of Respondent's laptop was non-routine and lacked reasonable suspicion. R. at 18. Additionally, the court held that the uses of the Drone and the Doppler constituted impermissible searches. R. at 19–20. The court also determined that any evidence obtained after the border stop was fruit of the poisonous tree. R. at 21. The United States of America (the "Government") appealed, and this Court granted certiorari. R. at 22.

SUMMARY OF THE ARGUMENT

I.

Border Patrol's brief search of open documents on Respondent's laptop did not violate Respondent's Fourth Amendment rights. Holding otherwise would allow external digital threats to sneak through our first line of defense undetected.

This Court should find that brief searches of digital devices at the border are routine because they are non-intrusive. Since Border Patrol does not thoroughly review a laptop's contents, these types of searches are limited and similar to permissible container searches.

Furthermore, searches of digital devices are not unreasonable because the Government's interests outweigh those of the individual. The only way to stop the entry of digital contraband is to allow the Government to search laptops as it searches any other luggage at the border. Laptop searches at the border minimally implicate the interests of the individual because they are limited in scope.

Even if this Court finds that border searches of laptops are non-routine and unreasonable, the search of Respondent's laptop was permissible because Border Patrol had reasonable

suspicion, there were exigent circumstances, and they conducted the search in good faith pursuant to the prevailing law.

II.

The use of the Drone and the Doppler to survey Macklin Manor did not violate Respondent's Fourth Amendment rights. Without the use of technology, law enforcement's arcane observation methods would be rendered obsolete by technologically superior criminals.

Under the test in *California v. Ciraolo*, the aerial observations from the Drone did not constitute a search because the Drone was within navigable airspace and was not physically intrusive. Additionally, the Thirteenth Circuit erred by failing to consider the prevalence of drones, and by mistakenly applying the concurrence from *Florida v. Riley*, which added a third prong to the *Ciraolo* test.

The use of the Doppler also did not constitute a search under the Fourth Amendment. The ECPD Officers did not use the Doppler in constitutionally protected areas. Therefore, the use of the Doppler around the pool house was permissible under *United States v. Ishmael* because the pool house was within an open field. Further, under *Kyllo v. United States*, the use of the Doppler in the area around the front door was permissible because the Doppler's radar technology is in general public use. However, even if this Court finds that the technology is not in general public use, the ECPD Officers could have otherwise obtained the same information without physical intrusion.

Even if this Court finds the use of the Drone and the Doppler was prohibited by the Fourth Amendment, the ECPD Officers had probable cause, so any resulting evidence was not fruit of the

poisonous tree. Further, even if they did not have probable cause, the peril of the kidnapped children created sufficient exigent circumstances to justify a warrantless search.

STANDARD OF REVIEW

When there is a motion to suppress evidence based on a constitutional challenge, this Court reviews legal conclusions *de novo*, and reviews factual findings for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THE BRIEF SEARCH OF OPEN DOCUMENTS ON RESPONDENT'S LAPTOP AT THE BORDER DID NOT VIOLATE THE FOURTH AMENDMENT.

This Court should not hinder the Government's ability to protect the Nation in the face of digital contraband permeating the border. Searches at the border are an exception to the Fourth Amendment and are considered reasonable simply by the fact that they occur at the border. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Customs officials may conduct "routine" searches of individuals, their vehicles, and their effects at the border without any level of suspicion. *See United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). This Court has only found searches to be non-routine where there is a substantial intrusion in an individual's privacy interests. *See United States v. Montoya de Hernández*, 473 U.S. 531, 541 n.4 (1985) (noting that strip, body cavity, or involuntary x-ray searches are non-routine). The government's broad power to patrol the border stems from the necessity to guard citizens from encroaching threats, such as terrorism. Limiting the search of laptops at the border undermines the ability to deter and detect digital contraband, and thus jeopardizes national security.

This Court should reverse the holding of the Thirteenth Circuit and find that brief laptop searches at the border are routine. Laptop searches like the one in this case should fall under the border search exception because they are non-intrusive. Furthermore, conducting searches of

digital devices at the border is not unreasonable because the Government's need to protect the Nation outweighs an individual's privacy interest. Even if this Court finds brief laptop searches to be non-routine and unreasonable, Border Patrol properly searched Respondent's laptop because they had reasonable suspicion, there were exigent circumstances, and they acted in good faith.

A. Brief laptop searches at the border are routine.

The search of Respondent's laptop did not violate her Fourth Amendment rights because it was routine under the border search exception. First, Border Patrol had the authority to stop and question Wyatt at the international border. Second, Border Patrol had the authority to search Wyatt's vehicle. Finally, the search of Respondent's laptop was non-intrusive and brief. Therefore, the search of Respondent's laptop fell well within the border search exception.

1. Crossing an international border subjected Wyatt to a routine border search.

Border Patrol had the authority to stop and question Wyatt. Searches that take place at an international border crossing fall under the border search exception to the Fourth Amendment. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). At a border checkpoint, travelers may be required to identify themselves and their belongings. *Carroll v. United States*, 267 U.S. 132, 154 (1925); *see United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991) (holding that travelers may be required to declare the amount of currency they are carrying). Border Patrol conducted a routine stop at the international border station and asked Wyatt to identify his purpose for entry and declare the amount of cash he was carrying. R. at 2, 24. Thus, Border Patrol had every right to stop and question Wyatt at the international border.

2. Border Patrol properly inspected Wyatt's vehicle.

Border Patrol was authorized to inspect Wyatt's entire vehicle, including the trunk. Border patrol may thoroughly comb through vehicles during routine inspections. *See Flores-Montano*, 541 U.S. at 155 (holding that routine border searches include the authority to remove, disassemble,

and reassemble a vehicle's fuel tank). Here, Border Patrol merely opened the trunk to discover Respondent's laptop and $10,000 in $20 bills. R. at 2. Therefore, this relatively shallow search was well within its power.

3. The search of Respondent's laptop was routine under the border search exception.

Brief searches of digital devices at the border need not heavily intrude on an individual's privacy. Routineness turns on the degree of intrusiveness the search poses. *See United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2014).

Law enforcement can conduct three types of digital searches, each varying in scope and the level of intrusiveness. First, law enforcement might conduct a "physical" search, examining the physical aspects of the device, but not the information stored on it. *See, e.g.*, *United States v. Molina–Gómez*, 781 F.3d 13, 17 (1st Cir. 2015) (deeming border patrol's disassembly of a laptop and Playstation hiding bags of heroin inside permissible). Second, law enforcement might conduct a "forensic" search. This is the most intrusive type of search because it involves using sophisticated software to access data that would not be available otherwise. *See, e.g.*, *United States v. Saboonchi*, 990 F. Supp. 2d 536, 564–69 (D. Md. 2014) (finding that using software to copy a device's hard drive or access deleted files and metadata is a forensic search). Alternatively, law enforcement might conduct a "manual" search by accessing content on a digital device in the same manner as a typical user. *See, e.g.*, *United States v. Kolsuz*, 185 F. Supp. 3d 843, 855 (E.D. Va. 2016) (holding that using the touch screen to navigate only readily available content on an iPhone was a manual search).

This Court should allow Border Patrol to continue to conduct manual searches of digital devices. Manual searches are non-intrusive because they are limited in scope. The brief review of Respondent's laptop was a manual search. Additionally, searches of laptops are container searches, which do not require reasonable suspicion.

a. Manual searches of digital devices are non-intrusive because they are limited in scope.

This Court has only found that extensive searches, like strip, body cavity, or involuntary x-ray searches, are highly intrusive, and therefore non-routine. *See Flores-Montano*, 541 U.S. at 152. However, a manual search of a digital device at the border is limited by the sheer fact that it occurs at the border. *See United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005) ("Customs agents have neither the time nor the resources to search the contents of every computer."). Indeed, courts have already found that manual searches fall under the border search exception. *See, e.g.*, *Kolsuz*, 185 F. Supp. 3d at 855 (finding that the suspicionless manual search of defendant's iPhone at the airport was a routine border search); *Cotterman*, 709 F.3d at 967 (affirming suspicionless manual laptop searches at the border, but limiting forensic examinations). Thus, manual searches of digital devices at the border are routine because they are inherently brief and limited.

b. Border Patrol's brief inspection of Respondent's laptop was a manual search.

Border Patrol opened Respondent's laptop and only reviewed files already open on the homepage. R. at 3; *cf. United States v. Arnold*, 523 F.3d 941, 943 (9th Cir. 2008) (approving a manual search when border patrol clicked on folders and opened files on defendant's computer), *cert. denied*, 555 U.S. 1176 (2009). Border Patrol did not open any files or search through the device's hard drive. See R. at 3. Thus, the search was manual because Border Patrol reviewed respondent's laptop in the manner that a typical user would.

c. The manual search of Respondent's laptop was a container search.

The government does not need reasonable suspicion to search closed containers at the border. *See Ramsey*, 431 U. S. at 619. This authority to search containers at the border stems from the reality that contraband will not be laid out neatly for law enforcement to review. *United States*

v. Ross, 456 U.S. 798, 820 (1982). Under this principle, Border Patrol has the authority to conduct suspicionless manual searches of laptops.

Respondent's laptop is a closed container. This Court has defined the term "container" expansively, providing that a container is "any object capable of holding another object." *See New York v. Belton*, 453 U.S. 454, 460 n.4 (1981) (finding that a jacket with pockets is a container). Here, Respondent's laptop held files such as Mr. Ford's bank statements, personal schedule, employees' schedule, and a lease agreement under one of Respondent's aliases. R. at 3; *see Arnold*, 523 F.3d at 947 (holding that laptops are no different than other containers). Therefore, Respondent's laptop is a closed container because it is an object capable of holding files.

This Court held in *Riley v. California* that a cellphone is not a container because data in "many modern cell phones may not in fact be stored on the device itself." 134 S. Ct. 2473, 2491 (2014). However, the search of Respondent's laptop was different from the search of a cellphone; manual searches are analogous to searches of luggage since they only consist of reviewing information physically stored on the device. *See House v. Napolitano*, No. CIV.A. 11-10852-DJC, 2012 WL 1038816, at *7 (D. Mass. Mar. 28, 2012) (finding the search of digital devices is "more akin to the search of a suitcase and other closed containers"). Border Patrol's policy is to not access the cloud or internet during their search of digital devices. *See June 20, 2017 Due Diligence Questions for Kevin McAleenan, Nominee for Commissioner of U.S. Customs and Border Protection (CBP)*, http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/170712-cpb-wyden-letter.pdf. Just as border patrol would open a suitcase and view the items on top, here, Border Patrol simply opened Respondent's laptop and viewed the documents already left open on the home screen. R. at 3. Border Patrol examined Respondent's laptop like other containers at the border because they only reviewed files readily present.

This Court should not afford more protection to digital files than paper files. Courts have recognized that a distinction between digital files and paper files would be arbitrary. *See, e.g.*, *United States v. Giberson*, 527 F.3d 882, 888 (9th Cir. 2008); *Napolitano*, 2012 WL 1038816, at *8 ("Carving out an exception for information contained on electronic devices would provide travelers carrying such devices with greater privacy protection than others who choose to carry the same type of personal information in hard copy form."). Wyatt and Respondent left their files open on a laptop that was not password protected. R. at 2–3. Had Wyatt and Respondent instead left paper copies of their kidnapping plans in a manila folder, there would be no restriction on Border Patrol's authority to review them. Criminals like Respondent should not receive greater privacy protection because they choose to keep their files in digital rather than paper form.

B. Manual searches of digital devices at the border are not unreasonable where the Government's interests outweigh those of the individual.

A search is not unreasonable when the interests of the government outweigh the privacy interests of the individual. *See Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999). At the border, the Government has a prevailing interest in preventing the entry of unwanted contraband. Additionally, a manual search is a minimal invasion on an individual's interests. Therefore, manual searches of digital devices at the border are not unreasonable because the Government's interests outweigh those of the individual.

1. The Government has a prevalent interest in protecting the border.

The Government's strong interest in national protection subjects border searches to a different reasonableness analysis than a typical search. Even before the Fourth Amendment was adopted, border searches were considered reasonable "by the single fact that the person or item in question had entered into our country from outside." *Ramsey*, 431 U. S. at 619; *see also Flores-Montano*, 541 U.S. at 152 ("The Government's interest in preventing the entry of unwanted

persons and effects is at its zenith at the international border."). The search of Respondent's laptop occurred where the Government's interests are at their peak. R. at 2–3. Therefore, the Government's interests at the border are compelling.

a. The Government cannot adequately protect the border by ignoring illicit materials that may be found on digital devices.

In the face of new threats, this Court has consistently stretched the limits of what would be considered reasonable for the sake of national security interests. *See Montoya De Hernández*, 473 U.S. at 541 (allowing the detention of a traveler at the border for sixteen hours given reasonable suspicion that she was carrying drugs inside her body); *see also Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating that blanket suspicionless searches at airports are reasonable given the risk posed to safety). Laptops have been used to transport contraband like child pornography. *See, e.g.*, *Arnold*, 523 F.3d at 943; *Ickes*, 393 F.3d at 503. Manual searches of laptops are the only method of detecting digital contraband before it crosses the border. Thus, the Government has a strong interest in conducting manual searches of digital devices at the border to prevent the entry of new types of illicit contraband.

b. The Government's interests at the border are distinct from those in the interior.

This Court held in *Riley v. California* that cellphones may not be searched incident to arrest without a warrant. 134 S. Ct. at 2495. Searches incident to arrest are only justified to protect police and prevent the destruction of evidence. *See id.* at 2488. Under that policy, this Court did not find that cellphones seized incident to arrest would be at risk of harm or destruction given that the arrestee is already in custody. *See id.* at 2486. However, a border search poses different concerns that warrant the search of a laptop. Once a digital device leaves the border, it is in the hands of the traveler—the manual search at the border is the only way to stop its entry into the nation. Thus,

the reasoning for prohibiting warrantless searches of cellphones in *Riley v. California* does not extend to warrantless searches of digital devices at the border.

2. Manual digital searches minimally implicate individual privacy interests.

Manual digital searches at the border are not unreasonable because they minimally intrude on an individual's interests. First, manual searches are minimally intrusive because they are limited in scope. Second, the circumstances surrounding the search of Respondent's laptop rendered any expectation of privacy objectively unreasonable.

a. Individual interests are minimally implicated during manual searches given their limited scope.

A manual search of a laptop is limited in time and scope, making it minimally intrusive on an individual's interests. A non-forensic search of an electronic device at the border will be innately cursory due to time constraints. *See Ickes*, 393 F.3d at 507. For example, in this case Border Patrol only reviewed the files that were left open on Respondent's laptop. R. at 3. Therefore, an individual's privacy interest is only minimally implicated in a manual search because border searches are limited in scope and duration.

b. Respondent's expectation of privacy over her laptop was objectively unreasonable.

Even if an individual has an expectation of privacy, it is not constitutionally protected unless society is prepared to recognize it as reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Respondent had no reasonable expectation of privacy for the files left open on her laptop's home screen. Border patrol may power a device on and off to ensure it is what it purports to be. *See Cotterman*, 709 F.3d at 960. Border Patrol merely opened Respondent's laptop and saw files on the home screen connecting her to the kidnapping. R. at 3. Border Patrol should not have to shield their eyes from this incriminating evidence because Respondent did not have a legitimate expectation of privacy.

Respondent's expectation of privacy over her laptop was objectively unreasonable. The existence of password-protection factors into the reasonableness of a laptop search. *See, e.g.*, *Cotterman*, 709 F.3d at 969–70. Additionally, turning information over to a third party destroys a person's legitimate expectation of privacy. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979). Respondent did not have a password to unlock her laptop, and she shared her laptop with another person who transported it to another country. R. at 2–3. Respondent's treatment of her laptop rendered any expectation of privacy objectively unreasonable.

Travelers expect to be thoroughly searched at the border and do not have an objectively reasonable expectation of privacy. Historically, a traveler's expectation of privacy is diminished at the international border. *See Montoya de Hernández*, 473 U.S. at 538. In our post-9/11 world, this expectation of privacy has further diminished. *See Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657 (N.D. Tex. 2005) ("[D]elays at the border are inevitable and becoming more frequent in light of heightened security concerns in the post-911 world."). This case is no different—neither Respondent nor Wyatt had any reason to believe Wyatt would not be subject to a border search. Thus, any expectation of privacy at the Eagle City border station was objectively unreasonable because travelers expect to be inspected when crossing international boundaries.

C. Even if a manual search of a digital device is non-routine and unreasonable, Border Patrol was justified in searching Respondent's laptop.

Even if a manual search of a digital device is non-routine and unreasonable, Border Patrol's search of Respondent's laptop did not violate the Fourth Amendment. First, Border Patrol had reasonable suspicion to search Respondent's laptop. Second, the kidnapping of the Ford Children created exigent circumstances that warranted the search of Respondent's laptop. Finally, Border Patrol conducted the search of Respondent's laptop in good faith, pursuant to prevailing law.

1. Border Patrol had reasonable suspicion to search Respondent's laptop.

The Government may conduct non-routine searches where they have reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 541–42, 553. Reasonable suspicion requires the court to consider "the totality of the circumstances" rather than a strict set of factors. *United States v. Cortez*, 449 U.S. 411, 417 (1981). This standard is considerably less than a preponderance of the evidence. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

Here, there was reasonable suspicion in the face of numerous factors. The Eagle City border station is a high crime area and the ECPD Officers suspected the kidnapped children were somewhere in Eagle City. R. at 2; *cf. Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (finding reasonable suspicion after suspect fled a high crime area upon noticing police officers). When Border Patrol questioned Wyatt, he was uncooperative, pale, extremely agitated, and avoided eye contact. R. at 2, 26; *cf. United States v. Shields*, 453 F.2d 1235, 1236 (9th Cir. 1972) (finding nervousness and lack of eye contact contributed to reasonable suspicion for a border search).

Soon after, Wyatt lied to Border Patrol when asked if he was carrying cash in excess of $10,000. R. at 2; *cf. United States v. Flores*, 477 F.2d 608, 609 (1st Cir. 1973) (finding that Defendant attempting to bring in gem stones without declaring them supported reasonable suspicion for a strip search at the border). Additionally, Border Patrol knew that the nearby kidnappers recently asked for $10,000 in $20 bills as proof of life, the exact amount Wyatt lied about carrying. R. at 2; *cf. Sokolow*, 490 U.S. at 8 (finding the fact that "few vacationers carry with them thousands of dollars in $20 bills" is probative in a reasonable suspicion analysis).

Border Patrol's suspicion of Wyatt was solidified when he revealed that he shared the laptop with Respondent. *See* R. at 27. A quick search through the criminal intelligence and border watch database revealed that Respondent is a felon with multiple convictions for crimes of violence and a person of interest in a major kidnapping. R. at 2; *cf. United States v. Irving*, 452

F.3d 110, 124 (2d Cir. 2006) (finding that the defendant being the subject of a criminal investigation was a factor that supported reasonable suspicion). Taken together, these circumstances supported reasonable suspicion for Border Patrol to search Respondent's laptop.

2. There were exigent circumstances to justify the search of Respondent's laptop.

Border Patrol could search Respondent's laptop under the exigent circumstances exception to the Fourth Amendment. This Court has recognized that police can search electronic devices under exigent circumstances, such as "a child abductor who may have information about the child's location on his cell phone." *See Riley v. California*, 134 S. Ct. at 2494. Here, Border Patrol knew that the laptop belonged to a person of interest in a kidnapping, and found the exact amount of money in the exact denominations as the ransom paid to the kidnappers. R. at 2–3. Therefore, exigent circumstances existed for the search because Border Patrol reasonably believed that Wyatt had information about the missing Ford Children on his laptop.

3. The search of Respondent's laptop falls under the good faith exception.

Border Patrol reasonably relied on the long-standing border search exception when they opened Respondent's laptop. This Court has held that evidence obtained from a search should not be suppressed when law enforcement officers, in good faith, conform their conduct to the prevailing statutory or constitutional law. *United States v. Peltier*, 422 U.S. 531, 541–42 (1975) (holding that evidence need not be suppressed even if the respondent's Fourth Amendment rights were violated by border patrol's search of his car). Here, Border Patrol reasonably believed that briefly inspecting Respondent's laptop was part of a routine vehicle search under the border search exception. R. at 28. Thus, the evidence found on Respondent's laptop need not be suppressed because it was obtained pursuant to a good faith reliance on prevailing law.

II. THE USE OF THE DRONE AND THE DOPPLER TO SURVEY MACKLIN MANOR TO ENSURE THE SAFETY OF THE FORD CHILDREN DID NOT VIOLATE RESPONDENT'S FOURTH AMENDMENT RIGHTS.

Restricting law enforcement from using modern technology keeps police officers in the dark and leaves citizens at the mercy of technologically savvy criminals. The Fourth Amendment protects people from unreasonable searches. U.S. Const. amend. IV. However, its protection is not absolute. Even if a person has a subjective expectation of privacy in an area, the area is only protected if society is prepared to accept that expectation as reasonable. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (defining "search" as an infringement on a reasonable expectation of privacy). As society modernizes, expectations of privacy change with it. Indeed, courts have historically responded to technological advancements by allowing police officers to use more than their five senses to prevent criminal wrongdoing. *See, e.g.*, *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978) (allowing devices such as binoculars, airplanes, and radar devices to contribute to police observation). A Fourth Amendment ruling that does not adapt to the digital age will greatly endanger the Nation.

The Thirteenth Circuit improperly held that the ECPD Officers' use of prevalent technology violated Respondent's Fourth Amendment rights. First, the Drone's aerial observations did not constitute a search under the Fourth Amendment. Second, the use of the Doppler also did not constitute a search. Third, the ECPD Officers had sufficient probable cause for a warrant before deploying the Drone and the Doppler. Finally, the ECPD Officers were otherwise justified in the presence of exigent circumstances. Therefore, this Court should reverse the holding of the Thirteenth Circuit.

A. The use of the Drone was not a search under the Fourth Amendment.

The use of the Drone over Macklin Manor was a standard surveillance technique that provided a broad overview of a dangerous situation from a safe distance. First, the Drone's aerial

observations were permissible under *California v. Ciraolo*, 476 U.S. 207 (1986). Second, the Thirteenth Circuit erred in concluding that Respondent had a reasonable expectation of privacy from the Drone's aerial observations.

1. The Drone's aerial observations were permissible under *Ciraolo*.

This Court has held that there is no reasonable expectation of privacy from aerial observations when: (1) they take place within public navigable airspace; and (2) they are not physically intrusive. *Id.* at 213. Here, the Drone remained within Pawndale's public navigable airspace. Additionally, the Drone was not physically intrusive. Therefore, Respondent did not have a reasonable expectation of privacy from the Drone's aerial observations.

a. The Drone observed Macklin Manor from public navigable airspace.

The Government has the right to make aerial observations within public navigable airspace. *See id.* at 213 (likening aerial observations to observations made from public roads while driving by an individual's home). In Pawndale, anyone can fly a drone up to 1640 feet, and there is no evidence that the ECPD Officer's drone exceeded that maximum when observing Macklin Manor. R. at 4, 10. Therefore, the first requirement under *Ciraolo* was satisfied because the Drone observed Macklin Manor from public navigable airspace.

b. The Drone was not physically intrusive when it observed Macklin Manor.

Aerial observations are not physically intrusive when they do not create undue noise, wind, dust, threat of danger, or prolonged interruption. *See Florida v. Riley*, 488 U.S. 445, 452 (1989) (plurality opinion) (holding that a helicopter flying less than 500 feet above a home was not physically intrusive); *see also United States v. Wideman*, No. 6:15-CR-390-KOB-SGC, 2016 WL 2765250, at *4 (N.D. Ala. May 13, 2016) (conducting aerial observations from a helicopter hovering above curtilage for forty minutes was not intrusive). The Drone is small with a "discreet" and "aerodynamic" design. R. at 46. Additionally, the Drone only hovered above Macklin Manor

for 15 minutes. R. at 3. Therefore, the Drone's small, quiet build and limited flight time over the property indicates that it was not physically intrusive.

The Drone's camera did not render the Drone physically intrusive. This Court determined that the use of a sophisticated camera to take aerial photographs of curtilage was permissible because the photographs were not so revealing as to extract information from within the buildings. *See Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986); *see also United States v. Van Damme*, 48 F.3d 461, 463 (9th Cir. 1995) (finding the use of a 600mm lens to photograph a greenhouse from a helicopter 500 feet above was not a search). The Drone's camera revealed the broad layout of the estate and a woman walking outside. R. at 4, 39. There is no evidence that the camera was so intrusive as to extract any intimate details from the home. Thus, the Drone's camera did not render the Drone physically intrusive.

2. The Thirteenth Circuit erred in holding that Respondent had a reasonable expectation of privacy against the Drone's aerial observations.

The Thirteenth Circuit impermissibly deviated from this Court's precedent established in *Ciraolo*. First, the court ignored the prevalence of drones when it analyzed expectations of privacy. Second, the court mistakenly read a third prong into the *Ciraolo* test to assert that Respondent's expectation of privacy was reasonable.

a. The Thirteenth Circuit failed to consider the prevalence of drones.

In *Ciraolo,* this Court accounted for the prevalence of technology in its Fourth Amendment analysis of aerial observations. *See* 476 U.S. at 215 (asserting that planes were so common and routine that aerial observations from them were permissible). Today, drones have attained a comparable normality to the planes in *Ciraolo*. Anyone from a child to a "drone enthusiast" can purchase a drone at an affordable price. R. at 38–39, 46. Moreover, the Drone is in use by police departments in thirty-five states. R. at 46. The Thirteenth Circuit, however, did not consider these

factors at all. *See* R. at 19. The court therefore erred in its Fourth Amendment analysis because it did not consider the prevalence of drones in today's society.

b. The Thirteenth Circuit mistakenly added a third prong to the Ciraolo *test.*

The Thirteenth Circuit mistakenly relied on Justice O'Connor's concurrence in *Florida v. Riley* to assert that Respondent had a reasonable expectation of privacy from aerial observation. *Florida v. Riley* was a plurality opinion, and when no single rationale of a decision garners the support of the majority, the controlling holding is the position taken by the justices who concurred on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Courts interpret narrowest grounds as the "least common denominator" upon which a majority of justices can agree. *See United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990). While the plurality in *Florida v. Riley* applied the two-prong *Ciraolo* test, *see* 488 U.S. at 698 (plurality opinion), Justice O'Connor's concurrence added an additional prong that required frequent and routine flight over the area in question, regardless of legal permissibility, *see id.* at 455 (O'Connor, J., concurring). Her concurrence is therefore not controlling because it was not the least common denominator upon which a majority of justices agreed.

The Thirteenth Circuit improperly relied on Justice O'Connor's concurrence in holding that the infrequent flight of planes over Mount Partridge rendered Respondent's expectation of privacy from aerial observation reasonable. *See* R. at 19. The court should have instead applied the traditional *Ciraolo* test, under which Respondent's expectation of privacy was unreasonable. *See supra* Section II.A.1. This Court should clarify that the correct test for aerial observations does not include the third prong articulated by Justice O'Connor in *Florida v. Riley*.

B. The use of the Doppler was not a search under the Fourth Amendment.

The use of Doppler radar technology helps law enforcement operate safely in the presence of armed, dangerous criminals. An officer may use a sense-enhancing device from a permissible

vantage point where: (1) the officer uses the device to observe an area within an open field, *United States v. Ishmael*, 48 F.3d 850, 859 (5th Cir. 1995), *cert. denied*, 516 U.S. 818 (1995); or, (2) the device passes the test set out in *Kyllo v. United States*, 533 U.S. 27 (2001).

The ECPD Officers' use of the Doppler did not constitute a search. First, the pool house and the area around the front door were not within curtilage, so the ECPD Officers did not trespass on a constitutionally protected area. Second, the pool house was within an open field so the use of the Doppler was permissible. Third, the use of the Doppler on the main house was permissible under *Kyllo*. Therefore, the use of the Doppler at Macklin Manor was not prohibited by the Fourth Amendment.

1. The pool house and the area around the front door were not within the curtilage of Macklin Manor.

Curtilage is an area so intimately associated with the home that it merits constitutional protection. *Oliver v. United States*, 466 U.S. 170, 180 (1984). However, areas not intimately linked with the home are "open fields" and are not protected by the Fourth Amendment. *Id.* at 179. Areas do not fall within curtilage when they are: (1) not proximate to the home; (2) not surrounded by any enclosures; (3) used for purposes distinct from those associated with the home; and, (4) not purposely shielded from observation. *United States v. Dunn*, 480 U.S. 294, 301 (1987). While each of these factors is persuasive, no single factor is dispositive. *See id.* Under this analysis, the pool house and the area around the front door do not fall within the curtilage of Macklin Manor.

a. The pool house was not a constitutionally protected area.

In *United States v. Dunn,* this Court held that a barn's distance from the main house, its lack of enclosures, its use for illicit drug production, and its clear visibility demonstrated that it was not within curtilage and instead was within an open field. *Id.* at 302–03. Because each factor weighed against a finding of curtilage, this Court had "little difficulty" determining that the area

in question did not deserve constitutional protection. *See id.* at 301. The pool house in this case is no different.

The pool house was fifty feet from the main house. R. at 4; *cf. United States v. Calabrese*, 825 F.2d 1342, 1350 (9th Cir. 1987) (holding a structure fifty feet from the main house was outside of curtilage). Additionally, it was not enclosed by any fences. R. at 4; *cf. Schumacher v. Halverson*, 467 F. Supp. 2d 939, 950 (D. Minn. 2006) (finding lack of enclosures around a deck weighed against curtilage). Moreover, the pool house was not used for intimate activities associated with the home—there was no evidence that anyone was even residing at Macklin Manor, let alone using the pool house, for at least six months prior to the kidnapping. R. at 4; *cf. United States v. Barajas-Avalos*, 377 F.3d 1040, 1045 (9th Cir. 2004) (finding a trailer devoid of household items weighed against curtilage); *United States v. Thomas*, 216 F. Supp. 942, 944 (N.D. Cal. 1963) (finding apparent abandonment for three to four months rendered a shack outside of curtilage). Finally, Respondent did not take any steps to shield the pool house from observation. R. at 4; *cf. United States v. Hayes*, 551 F.3d 138, 149 (2d Cir. 2008) (holding lack of structures shielding an area weighed against curtilage). Under the *Dunn* factors, this Court should have little difficulty determining that the pool house did not merit constitutional protection.

b. The area around front door was not a constitutionally protected area.

In *Florida v. Jardines*, this Court held that the use of a drug-sniffing dog on a front porch violated the Fourth Amendment by the sheer fact that the officers stood on the front porch, which is a "classic exemplar" of the home's curtilage. *See* 569 U.S. 1, 7 (2013). However, the area around the front door of Macklin Manor is distinguishable from *Jardines*; while a front porch is used for intimate purposes and often has a railing defining its connection to the home, the area around the front door at Macklin Manor showed no such intimate associations. In fact, the *Dunn* factors weigh heavily against a finding of curtilage. While the area around the front door was proximate to the

home, it was not demarcated by a fence, there were no structures deterring observation, and there was no evidence that it was used for intimate activities associated with the home. *See supra* Section II.B.1.a.; *see also* R. at 4–5, 34. Thus, as the area around the front door is not within curtilage, it is distinguishable from *Jardines* and the ECPD Officers' presence there was permissible.

2. The use of the Doppler on the pool house was not a search and not subject to *Kyllo*.

The use of a sense-enhancing device to observe a structure in an open field is not a search under the Fourth Amendment. *See Ishmael*, 48 F.3d at 857 (holding that the use of a thermal imager around a building was constitutional because the building was within an open field). The entire structure of the pool house was not within curtilage, but rather an open field, so it did not deserve constitutional protection. *See supra* Section II.B.1.a. Therefore, the use of the Doppler on the pool house was not a search and not subject to the analysis in *Kyllo*.

3. The use of the Doppler on the front door was permissible under *Kyllo*.

Under *Kyllo*, an individual does not have a reasonable expectation of privacy against technology that is in "general public use." 533 U.S. at 34. If the device's technology is not in general public use, the use of the device is still permissible if the information collected was otherwise obtainable without physical intrusion. *Id.* The use of the Doppler on the front door was permissible because Doppler radar technology is in general public use. Further, the ECPD Officers could have detected the presence of individuals at Macklin Manor without any physical intrusion.

a. Doppler radar technology is in general public use.

When the Thirteenth Circuit applied *Kyllo*, it erred by only looking at whether the *device* was in general public use. *See* R. at 20. However, the test asks whether the *technology* was in general public use. *See Kyllo*, 533 U.S. at 34. Doppler radar technology has been used by weather channels and websites for years. *See* U.S. Doppler Radar, The Weather Channel, https://weather.com/maps/usdopplerradar (last visited Oct. 16, 2017). Additionally, courts widely

accept the use of radar technology by law enforcement. *See United States v. Michael*, 645 F.2d 252, 259 (5th Cir. 1981), *abrogated on other grounds by United States v. Holt*, 777 F.3d 1234 (11th Cir. 2015); *United States v. Allen*, 633 F.2d 1282, 1289 (9th Cir. 1980). The Doppler's technology is in general public use so Respondent's expectation of privacy is objectively unreasonable.

The Doppler is also distinguishable from the uncommon and intrusive thermal imaging device in *Kyllo*. In *Kyllo*, the "Agema Thermovision 210 thermal imager" operated like a video camera, converting infrared radiation into images based on relative warmth. *Kyllo*, 533 U.S. at 29–30. The images specifically revealed that the petitioner was using a "halide" light to grow marijuana. *Id.* In contrast, the Doppler could not reveal any specific details about the people within Macklin Manor, such as their age or gender. R. at 4. The Doppler is far less intrusive than the device in *Kyllo* because it could not reveal specific information.

b. The information from the Doppler could have been obtained without physical intrusion.

Even if the Court finds that the Doppler radar technology is not in general public use, the information from the Doppler could have been obtained without physical intrusion. Police officers are constitutionally permitted to observe anything in plain view from a public vantage point. *See Ciraolo*, 476 U.S. at 213; *see also United States v. Burns*, 624 F.2d 95, 100 (10th Cir. 1980) (asserting the "plain view doctrine" also applies to observations derived from hearing or smelling). The ECPD Officers had a clear line of vision into Macklin Manor as there were no fences, structures, or awnings to obstruct their view. R. at 4. Additionally, even though the Ford Children were restrained to chairs, there is no evidence that they were muzzled or gagged in any way to inhibit their ability to scream. *See* R. at 5. Therefore, the ECPD Officers could have seen or heard people at Macklin Manor without physical intrusion.

C. Even if the uses of the Drone and the Doppler constituted searches, the ECPD Officers had probable cause to obtain a warrant for Macklin Manor.

Probable cause exists where a reasonable officer would believe there is evidence of a crime. *Florida v. Harris*, 568 U.S. 237, 243 (2013); *see United States v. Pheaster*, 544 F.2d 353, 373 (9th Cir. 1976) (finding probable cause to search defendant's apartment when the FBI had strong reason to believe defendant was involved in a kidnapping). Furthermore, evidence need not be suppressed as fruit of the poisonous tree where probable cause existed prior to the alleged illegal government activity. *Segura v. United States*, 468 U.S. 796, 815 (1984). The information obtained from Wyatt's border stop linked Respondent and Macklin Manor to the kidnappings. *See supra* Section I.A.4.c. Thus, the search of Macklin Manor and Respondent's resulting arrest were not fruits of the poisonous tree because the information from the border search established probable cause.

D. The endangerment of the Ford Children created exigent circumstances.

The need to protect or preserve life or avoid serious injury is sufficient justification for what would otherwise be an impermissible entry. *See Mincey v. Arizona*, 437 U.S. 385, 392 (1978). Furthermore, time is of the essence when children go missing. *See Hunsberger v. Wood*, 570 F.3d 546, 555–56 (4th Cir. 2009) (finding exigent circumstances for the search of stepfather's home because there was reason to think he had a missing child). Here, the ECPD Officers feared that Wyatt could have warned Respondent, causing her to flee with the Ford Children. R. at 42. Therefore, this danger created sufficient exigent circumstances to permit a warrantless search.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the judgment of the United States Court of Appeals for the Thirteenth Circuit be reversed.

Respectfully Submitted,
/s/ Team Number 7
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