Team No. R8

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 THE RESPONDENT

Counsel for Respondent
October 20, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. Did the Eagle City Border Patrol violate Ms. Koehler's Fourth Amendment rights when it searched her laptop at the border station without consent, suspicion, or a warrant?

II. Did the Eagle City Police Department violate Ms. Koehler's Fourth Amendment rights when it used a PNR-1 drone and handheld doppler radar device to gather intelligence about her home without first obtaining a warrant

STATEMENT OF FACTS

On August 17, 2016, at about 3:00 AM, Scott Wyatt ("Mr. Wyatt") was stopped by two Border Patrol Agents ("Agents") as he entered the United States at the Eagle City Border Patrol ("ECBP") Station. R. at 2. The Agents approached the car and asked Mr. Wyatt to explain why he was crossing the border. *Id.* Based on this one question, the Agents perceived Mr. Wyatt to be agitated and uncooperative. *Id.* The Agents asked whether an amount of $10,000 or more was being carried in the car and Mr. Wyatt replied in the negative. *Id.* Next, the Agents asked Mr. Wyatt to step out of the car and open the trunk. *Id.* Mr. Wyatt complied with the Agents' requests. *Id.* Mr. Wyatt opened the trunk and discovered $10,000 cash along with a laptop with the initials "AK" inscribed on it. *Id.* The Agents questioned Mr. Wyatt about ownership of the laptop and he replied that he shared it with his fiance, Amanda Koehler ("Ms. Koehler"). *Id.*

The Agents ran Ms. Koehler's name in a criminal intelligence and border watch database, though it is unclear whether the Agents also ran Mr. Wyatt's name. R. at 2. The queries identified Ms. Koehler as a felon and a person of interest in the kidnappings of a billionaire tech magnate's three children. *Id.* The children were being held for ransom but recently contact had been made and the kidnappers agreed to give proof of life in exchange for $10,000 delivered by noon on August 18, 2016. *Id.* The FBI and the Eagle City Police Department ("ECPD") were collaborating on the investigation and both Border Patrol Agents were aware of it. R. at 3.

Knowing this information and without asking Mr. Wyatt, the Agents opened the laptop and began snooping through the files. R. at 3. At first take, many of the documents in the laptop contained personally identifiable information belonging to the father of the missing children. *Id.* This caused the Agents to browse deeper into the laptop; their continued search led to the

discovery of a lease agreement with an address that did not match Mr. Wyatt's. *Id.* The Agents finished searching the laptop and then placed Mr. Wyatt under arrest. *Id.* He was not arrested for anything related to the laptop search, only for failing to declare cash in excess of $10,000 before crossing the border in violation of 31 U.S.C. § 5136. *Id.*

The Agents immediately gave the information from the laptop search to the lead ECPD Detective working on the disappearance of the billionaire's kids. R. at 3. The Detective traced the address to a secluded home atop Mount Partridge on the outskirts of Eagle City, belonging to Laura Pope ("Ms. Pope"). *Id.* The property, commonly known as Macklin Manor, is famous in Eagle City because it is perpetually covered in fog and clouds. *Id.* Planes and other aircraft often avoid Macklin Manor and opt to fly around Mount Partridge rather than take the short route due to the dangerously low visibility. *Id.* However, Macklin Manor is considered prime real estate, the prior owner (whose family name graced Macklin Manor) was the ECPD's police chief. *Id.* After the police chief passed away, Macklin Manor went on the market briefly, up until six months ago when a company purchased the property. *Id.* The company was allegedly owned by Ms. Pope, who hours after Mr. Wyatt's stop, the FBI identified to be Ms. Koehler's alias. *Id.*

Without a warrant, the Detective assigned two ECPD Police Officers to conduct "loose" surveillance on Macklin Manor. R. at 3. At or around 4:30 AM, one of the officers, who also happened to be ECPD's technology expert, deployed an advanced drone, while another officer patrolled the area on foot. *Id.* The ECPD is the "only police department in Pawndale" that uses drones for surveillance. *Id*. The department's drone of choice is the aerodynamic PNR-1, capable of capturing high definition videos and photographs, and of traveling about thirty miles per hour. R. at 3-4. Although Pawndale drone laws restrict the maximum altitude for drones to 1640 feet, the ECPD's PNR-1 drone has been known to fly as high as 2000 feet. R. at 4. The officer

deployed the PNR-1 from her squad car. *Id.* For at least twenty-nine minutes the PNR-1 secretly scanned over Macklin Manor and collected twenty-two high definition pictures and three minutes of high definition video. *Id.* The data collected from just this one trip provided the ECPD with a detailed layout and design of Macklin Manor. *Id.* The ECPD learned the distance of the main house from the pool house and even captured a high-resolution photo of a woman in her backyard. *Id.* The officers positively identified the woman in the photo Ms. Koehler. *Id.*

Around 5:30 AM, again without a warrant, an officer approached Macklin Manor with doppler radar in hand and began emitting radio waves in order to detect human movement inside Ms. Koehler's home. R. at 4. When used on a target within fifty feet, the doppler radar is designed to focus on human breath rather than movement, this offers more precise results. *Id.* After deploying the doppler radar on the main house and the pool house, the officers were able to detect human movement inside Macklin Manor. R. at 5. After surreptitiously gathering all of this information, the officers decided to retreat and requested a warrant to search Macklin Manor. *Id.* The search warrant was quickly approved and at about 8:00 AM a SWAT team burst into Ms. Koehler's home with guns drawn. *Id.* A total of seven people were in the home, three men, the billionaire's three children, and Ms. Koehler. Ms. Koehler was chased down and detained, a handgun was found on her person. *Id.*

In October 2016, Koehler was indicted for kidnapping under 18 U.S.C. § 1201(a) and being a felon in possession of a gun under 18 U.S.C. § 922(g)(1). R. at 5. Ms. Koehler filed a motion to suppress the evidence found on the day of her arrest arguing the government obtained evidence in violation of her Fourth Amendment rights. *Id.* The District Court denied the motion. R. at 13. Ms. Koehler preserved her right to appeal the ruling on the motion to suppress and entered a guilty plea on both charges. R. at 15. Ms. Koehler then appealed her conviction and the

Thirteenth Circuit Court of Appeals reversed and remanded, finding the District Court erred in not suppressing the government's evidence obtained in violation of Ms. Koehler's Fourth Amendment rights. *Id.* An appeal followed and this Court granted certiorari. R. at 22.

SUMMARY OF THE ARGUMENT

This case presents the Court with the opportunity to ensure Fourth Amendment rights are not diminished by technological advances. The ECBP violated Ms. Koehler's rights when it illegally searched her laptop at the border. This Court should find the ECBP's search of Ms. Koehler's laptop unjustified because it was beyond the scope of the narrow border search exception. Digital searches at the border are nonroutine searches requiring reasonable suspicion. Here the search of the laptop is unconstitutional because the ECPD's suspicion only amounted to a mere hunch did not rise rise to the requisite level of reasonable suspicion.

Even if this court finds the ECBP's search of Ms. Koehler's laptop valid, this court should still affirm the decision of the Thirteenth Circuit because the evidence gathered from surveillance of Macklin Manor was illegally obtained through the use of unreasonable and uncommon technology. First, the PNR-1's aerial surveillance of Macklin Manor by the ECPD to capture high resolution videos and pictures unreasonably violated Ms. Koehler's expectation of privacy. Moreover, the ECPD's use of a faulty PNR-1 to view Macklin Manor violated Pawndale maximum altitude laws for drones. Second, when the ECPD bypassed the warrant requirement and used the special ordered handheld doppler radar to peek inside Macklin Manor without entering, the officers violated Ms. Koehler's Fourth Amendment rights. Moreover, if the ECPD's handheld doppler radar and PNR-1 surveillance do not independently rise to Fourth Amendment violations, surely they do when considered together.

STANDARD OF REVIEW

Both issues in this case present mixed questions of law and fact under the Fourth Amendment. In reviewing a motion to suppress, this Court reviews challenges to warrantless searches and "determinations of reasonable suspicion and probable cause" *de novo* with findings of fact reviewed for clear error. *See Ornelas v. U.S.*, 517 U.S. 690, 699 (1996).

ARGUMENT

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches or seizures." U.S. Const. Amend. IV. The Amendment can be analyzed in two parts—the reasonableness clause and the warrant clause. *See Katz v. U.S.*, 389 U.S. 347, 365 (1967). First, courts generally assess whether the search at issue implicates an interest protected by the Fourth Amendment by turning to the "reasonable expectation of privacy" test. *Id.* at 361. Under the reasonable expectation of privacy test, an individual must exhibit a subjective expectation of privacy and society must objectively recognize that expectation as reasonable. *Id.* Second, the Fourth Amendment "requires the obtaining of a judicial warrant" supported by probable cause. *See Kentucky v. King*, 563 U.S. 452, 459 (2011).

The warrant requirement exists to ensure the inferences supporting a search are made by "a neutral and detached magistrate" and not by the police officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. U.S.*, 333 U.S. 10, 14 (1948). This Court has repeatedly announced that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *See King*, 563

U.S. at 459. This is consistent with the origins of the Fourth Amendment. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. Rev. 895, 943 (2002) (Fourth Amendment originated due to "a deep-rooted distrust and even disdain for the judgment of ordinary officers"). It is therefore wholly implausible the Framers would have approved of the broad use of warrantless intrusions we have today, because such intrusions would necessarily have rested solely on the officer's own judgment. *Id*.

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT BECAUSE IT CORRECTLY FOUND THE ECBP VIOLATED MS. KOEHLER'S FOURTH AMENDMENT RIGHTS WHEN IT ILLEGALLY SEARCHED HER LAPTOP AT THE BORDER.

The Thirteenth Circuit correctly found the government obtained evidence from Ms. Koehler's laptop at the border in violation of her Fourth Amendment rights. First, the Thirteenth Circuit correctly found the border search exception did not apply to the search of Ms. Koehler's laptop because it is a narrow exception that could not reasonably extend to the vast amount of highly personal information contained in digital devices. Second, the Thirteenth Circuit correctly found the search of Ms. Koehler's laptop was a nonroutine border search and the ECBP lacked the requisite reasonable suspicion.

A. The ECBP Conducted An Illegal Warrantless Search of Ms. Koehler's Laptop Because Digital Searches at the Border Are Not Within the Narrow Scope of the Border Search Exception to the Warrant Requirement.

Generally, a search without a warrant is unreasonable. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). However, a warrantless search may be reasonable if it falls

within an exception to the warrant requirement. *See King*, 563 U.S. 452 (2011). The exception at issue in this case is the "border search" exception and it justifies searches of "would-be entrants and their belongings" by customs officials without probable cause and without a warrant. *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Reasonableness remains the touchstone for a warrantless search even at the border where usual restrictions on searches and seizures are relaxed. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *see also U.S. v. Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008) (en banc) ("even at the border, we have rejected an *anything goes* approach") (emphasis added).

A warrantless search is reasonable only if it is "tethered" to the purposes justifying the exception. *Cf. Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (finding a warrantless digital search conducted for the purpose of gathering additional evidence unreasonable under the search-incident-to-arrest exception because that exception exists to protect officer safety and prevent destruction of evidence). The border search exception exists to safeguard the government's interest in protecting national security, regulating immigration, and preventing the smuggling of people or contraband. *See U.S. v. Ramsey*, 431 U.S. 606, 617-19 (1977) (upholding customs official's search of envelopes based on reasonable suspicion that envelopes contained heroin in light of the government interest in prohibiting contraband from entering the country). Although the border search exception may lead to arrests and criminal prosecutions, the exception was not "designed primarily to serve the general interest in crime control." *See U.S. v. Cotterman*, 709 F.3d 952, 956 (9th Cir. 2013) (emphasizing the narrow scope of the border search exception); *see also U.S. v. 12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123, 125 (1973) (historic justification for border search exception has been the government's right to exclude people or contraband from entering the country).

Even when the border search doctrine does not apply, Fourth Amendment protections can be waived where a party consents to the search. *U.S. v. Roberts*, 86 F. Supp. 2d 678, 687 (S.D. Tex. 2000). However, consent has to be given voluntarily under the "totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). This Court has cautioned that "submission is not effective consent." *Johnson v. U.S.*, 333 U.S. 10, 13 (1948) (finding the government could not show consent to enter home solely from the defendant's failure to object to the entry). Even where no implicit coercion is found, courts generally refrain from allowing the government to establish consent by evidence of a defendant's failure to object to the search. *U.S. v. Shaibu*, 920 F.2d 1423 (9th Cir. 1990) ("we will not infer both the request and the consent"); *U.S. v. Jaras*, 86 F.3d 383 (5th Cir. 1996) (finding defendant did not impliedly consent to search of suitcases by standing idly by without objecting while officer conducted search).

Here, the ECBP had no valid justification to search Ms. Koehler's laptop at the border other than to accumulate more evidence of crime in order to contribute to the FBI investigation. This Court should not create precedent granting border patrol, with varying degrees of interests, unfettered use of the border search exception in order to serve any and all crime control interests, such as the Agents did here. *Cotterman*, 709 F.3d at 956. In *Riley v. California*, this Court rejected the government's argument that all warrantless searches of an arrestee's cell phone should be permissible whenever it is reasonable to believe the phone contains evidence of the crime of arrest because the Court found the search-incident-to-arrest exception exists primarily to protect officer safety and prevent destruction of evidence. 134 S. Ct. 2473, 2484 (2014). Similarly here, this Court should reject the government's argument that laptop searches are always within the scope of the border search exception because the exception exists primarily to

protect national security, regulate immigration, and prevent the smuggling of people or contraband but none of those interests were at stake here. By the time the laptop was discovered, the Agents had already found Mr. Wyatt in violation of 31 U.S.C. § 5136, R. at 2, and no additional governmental interest justified the immediate search of the laptop. Unlike in *United States v. Ramsey*, where this Court upheld a search of incoming international mail based on the government's interest in preventing illegal drugs from entering the country, 431 U.S. 606 (1977), here, while Ms. Koehler admits the laptop may be seized, the personal contents of Ms. Koehler's laptop do not implicate the same concerns as illegal drugs and therefore cannot reasonably be subject to immediate search.

Moreover, the Agents were aware of their options to acquire consent or seek a warrant but proceeded to search Ms. Koehler's laptop anyway, R. at 27-29, and this is precisely the type of unreasonable law enforcement behavior the Fourth Amendment is designed to protect against. Once the Agents identified $10,000 in the trunk of the car, they certainly had enough evidence to arrest Mr. Wyatt and enough time to seize the laptop and obtain a warrant, R. at 27, but they chose to take a less onerous approach instead. At trial, the lead Agent stated he did not ask Mr. Wyatt for permission to search the laptop and Mr. Wyatt did not otherwise give explicit consent, yet he believed Mr. Wyatt's silence equated to consent. R. at 27-29. The Agent fails to see "submission is not effective consent." *Johnson*, 333 U.S. at 13. The ECBP Agent even conceded he conducted this digital search at the border although he "had time" to obtain a warrant. R. at 28. The Agent's admission that there was ample time to obtain a warrant confirms no urgent government needs justified the immediate search of the laptop at the border.

B. The ECPD violated Ms. Koehler's Rights When It Searched Her Laptop Based on A Mere Hunch That Did Not Rise to the Level of Reasonable Suspicion Requisite for a Nonroutine Digital Border Search.

Few cases in this Court have explored the categories of border searches requiring reasonable suspicion and none of those cases have dealt directly with the world of digital devices. *Cf. Ramsey*, 431 U.S. 606 (concerning customs official's search of defendant's mail); *Montoya de Hernandez*, 473 U.S. 531 (implicating a highly intrusive physical examination of the defendant's person); *U.S. v. Flores–Montano*, 541 U.S. 149 (2004) (involving destruction of defendant's auto gas tank). Generally, border officials may conduct "routine" searches of persons and property at the border without suspicion or a warrant. *Flores-Montano*, 541 U.S. at 152. A routine border search does not require reasonable suspicion because it does not pose a serious invasion of privacy and does not tend to embarrass or offend the average traveler. *Id.* at 155-56 (finding search of defendant's auto gas tank was "routine" because it did not involve the "dignity and privacy interests" associated with the "reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person"). This Court has never determined what makes a search "nonroutine," but other circuit courts agree the "intrusiveness" of the search is what distinguishes "nonroutine" from "routine" searches. *U.S. v. Braks*, 842 F.2d 509, 512-11 (1st Cir. 1988); *U.S. v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006); *U.S. v. Vega-Barvo*, 729 F.2d 1341, 1346 (11th Cir. 1984).

Digital searches are categorically different from physical searches. *See Riley*, 134 S. Ct. at 2491 (finding a cellphone is quantitatively and qualitatively different from objects that may be found on a person); *see also Cotterman*, 709 F.3d at 964–65 (finding digital devices contain the "most intimate details of our lives including financial records, confidential business documents, medical records and private emails"). The breadth and volume of data capable of being stored on

a computer poses serious implications for the Fourth Amendment analysis and therefore digital devices should be analyzed differently. *See Riley*, 134 S. Ct. at 2491; *see also U.S. v. Kim*, 103 F. Supp. 3d 32, 54 (D.D.C. 2015) (recognizing *Riley* demonstrates how the digital device analysis should proceed). Moreover, this Court has specifically likened the border search exception to the search incident to arrest exception, reinforcing the view that an analysis similar to the one in *Riley* should be undertaken here. *See Ramsey*, 431 U.S. at 621.

A majority of circuit courts have erroneously likened the search of digital devices at the border to that of physical containers. *U.S. v. Ickes*, 393 F.3d 501, 504 (4th Cir. 2005) (labeling computer files as indistinguishable from any other "cargo" subject to routine search and inspection at the border); *U.S. v. Arnold*, 533 F.3d 1003, 1009 (9th Cir. 2008) (finding search of defendant's laptop and its electronic files to be the same as any ordinary luggage search). However, this Court has once before foreclosed the argument that physical items and digital devices are one and the same. *Riley*, 134 S. Ct. at 2488 (explaining that to insinuate data stored on a cellphone is "materially indistinguishable" from searches of physical items is "like saying a ride on horseback is materially indistinguishable from a flight to the moon"). Even before *Riley*, at least one circuit grappled more closely with the issue of digital border searches and reasonable suspicion. *See U.S. v. Cotterman*, 709 F.3d 952, 967 (9th Cir. 2013) (finding that border agents need reasonable suspicion before conducting a *forensic* digital search but not before conducting a *manual* search of a digital device). This Court should modify *Cotterman* and adopt an approach more in line with the spirit of *Riley* by requiring that all digital border searches be based on reasonable suspicion. *Cf. Riley*, 134 S. Ct. at 2492 (noting that "if police are to have workable rules, the balancing of the competing interests ... 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers'").

Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *U.S. v. Cortez*, 449 U.S. 411, 417–18 (1981). An officer must be able to articulate something more than a mere "hunch" of criminal activity. *U.S. v. Sokolow*, 490 U.S. 1,7 (1989). This requires an officer to be able to identify "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." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Factors such as a person's "nervousness" may be part of the reasonable suspicion analysis but are given minimal weight. *U.S. v. Arvizu*, 534 U.S. 266, 275–76 (2002) (finding nervousness to be an unreliable indicator especially in the context of a traffic stop where people often become nervous even having nothing to hide or fear). Reasonable suspicion must be based on the current criminal activity of the person being stopped, whose belongings will be searched. *Cf. Kim*, 103 F. Supp. 3d at 46 (finding it improper for the Agent to stop Kim and search his laptop based upon Agent's expectation the laptop would contain evidence of past criminal activity when there was no objective manifestation that Kim was or was "about to be, engaged in criminal activity"). Moreover, reasonable suspicion of criminal activity cannot only be based on a person's prior criminal record. *See U.S. v. Johnson*, 482 Fed. Appx. 137, 148 (6th Cir. 2012) (defendant's prior felony convictions were not determinative in reasonable suspicion analysis); *see also U.S. v. Walden,* 146 F.3d 487, 490 (7th Cir. 1998) (defendant's known participation in gang activity was insufficient on its own to give rise to reasonable suspicion).

In this case, the Court has an opportunity to resolve the constitutional requirements for a digital border search. All digital searches at the border should be defined as "nonroutine" searches requiring at least reasonable suspicion because this would a workable rule for law enforcement that would respect the significant individual interests in digital information. *Riley*,

134 S. Ct. at 2492. As the Thirteenth Circuit stated, it would be wholly unreasonable to pretend the search of Ms. Koehler's laptop, a device with thousands of personal files the government should not be privy to, R. at 17, could be the same as searching her suitcase, and this Court has long held that touchstone of the Fourth Amendment, even in the face of a warrantless search, is "reasonableness." *Brigham City*, 547 U.S. at 403. This Court has previously stated that an individual's privacy rights should be balanced against the interests of the government, even at the border, *Montoya de Hernandez*, 473 U.S. at 539, but to label this search "routine" would not serve to protect the privacy of any individual crossing the border with a laptop. On the other hand, requiring officers to find reasonable suspicion before engaging in digital border searches would protect individual privacy rights at the border without imposing a new and unfamiliar standard on police officers. This Court should modify the *Cotterman* approach because there is no precise point at which to draw the line between a manual and forensic search and police need "workable rules" that will not applied haphazardly by individual officers. 134 S. Ct. at 2492.

Even if this Court were to adopt a reasonable suspicion standard, it should still find the search here was illegal because the ECBP did not have reasonable suspicion to search Ms. Koehler's laptop. First, the Agents testified they stopped Mr. Wyatt's car because they stop all the cars crossing the border in the middle of the night, R. at 26, this is like *United States v. Kim*, where the Agents stopped Kim without any objective manifestation that he was about to be engaged in criminal activity. 103 F. Supp. 3d at 46. Additionally, the Agents stated Mr. Wyatt seemed agitated and uncooperative, but the record shows Mr. Wyatt answered all the questions he was asked and complied with all commands. Even assuming Mr. Wyatt was nervous, this Court has previously found "nervousness" to be an unreliable factor in the totality of the circumstances analysis. *Arvizu*, 534 U.S. at 275.

Second, while the Agents may have had sufficient reasonable suspicion to search the car, they did not have reasonable suspicion to search Ms. Koehler's laptop. The discovery of $10,000 in the trunk of the car was suspicious but it did not seem to be what motivated the Agents to search the laptop. This is evidenced by the fact that even after finding the cash, the Agents did not try to ask Mr. Wyatt any follow-up questions. Instead, the Agents fixated on Ms. Koehler and only began to search the laptop when they discovered it was hers and that she was a felon. This was improper because (1) reasonable suspicion must be focused on the person stopped, *Kim*, 103 F. Supp. 3d at 46, and (2) must not be based solely on past criminal conduct, *Walden*, 146 F.3d at 490. The record shows the Agents were not actually focused on the person stopped, they were focused on Ms. Koehler as demonstrated by the fact that they ran her name in the criminal intelligence database and not Mr. Wyatt's. Additionally, the record shows the Agents focused on Ms. Koehler due to her criminal record, which as the Sixth Circuit found in *United States v. Johnson*, cannot be determinative in the reasonable suspicion analysis. 482 Fed. Appx. at 148. Looking at the totality of the circumstances, this was a search predicated upon the Agents' expectation the computer would contain evidence of criminal activity, based on the fact they were able to identify it belonged to a known felon who was not present at the time of the search, this cannot amount to reasonable suspicion. *Cortez,* 449 U.S. at 417.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT BECAUSE MS. KOEHLER'S CONSTITUTIONAL RIGHTS WERE UNREASONABLY VIOLATED WHEN THE ECPD USED SOPHISTICATED TECHNOLOGY TO SURREPTITIOUSLY SURVEIL HER HOME.

Established Fourth Amendment principles protect Ms. Koehler's home, Macklin Manor, from unreasonable government intrusion. The standard for assessing whether the government has intruded upon an individual's reasonable expectation of privacy is a two-pronged analysis known

as the Katz test. *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The first prong analyzes whether the individual has a subjective expectation of privacy in the place or thing searched, whereas the second prong analyzes whether society is willing to objectively recognize that expectation as reasonable. *Id.* Cases usually turn on the second prong of the *Katz* test because it is possible for an individual to have a subjective expectation of privacy that society does not find objectively reasonable. *See U.S. v. Jones*, 565 U.S. 400, 407 (2012); *see also California v. Ciraolo*, 476 U.S. 207, 211 (1986) (individual held valid expectation of privacy where he built a tall fence around his property protecting from passersby but it was not objectively reasonable with respect to overhead surveillance because it was well known that commercial planes often flew over his neighborhood). An individual must satisfy both prongs of the *Katz* test in order to be protected under the Fourth Amendment. *Lavan v. City of L.A.*, 693 F.3d 1022, 1035 (9th Cir. 2012).

Generally, naked eye aerial searches of open fields, through public navigable airspace, conducted in a physically nonintrusive manner do not violate neither an individual nor society's reasonable expectation of privacy. *Ciraolo*, 476 U.S. at 213. Open fields subject to aerial search need not be open nor be a field. *Oliver v. U.S.*, 466 U.S. 170, fn. 11 (1984). However, society recognizes a reasonable expectation of privacy for covered buildings in open fields. *Dow Chem. Co. v. U.S.*, 476 U.S. 227, 236 (1986). Aerial searches of open fields must be evaluated under a totality of the circumstances. *Oliver*, 466 U.S. at 177. Most courts focus on the steps an individual takes to protect the "claimed area" from the public view or government intrusion. *Ciraolo*, 476 U.S. at 213 (where an individual erected ten foot high double fences to protect his growing operation from government intrusion by land but not from above); *U.S. v. Broadhurst*, 805 F.2d 849, 854 (9th Cir. 1986) (individual installed metal roofing, translucent glass, sliding

doors, "no trespassing" signs and a guard to protect his growing operation from on ground government intrusions but nothing protected the greenhouse from being seen from within public airspace). However, no Fourth Amendment protection is extended to areas an individual knowingly exposes to public view. *Katz*, 389 U.S. at 351 (Fourth Amendment protects "people not places" therefore what a person seeks to preserve as private even in an area publicly accessible may be constitutionally protected).

An individual's claimed area may sit within the curtilage of the home. The curtilage is defined as "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling." *Ciraolo*, 476 U.S. at fn. 6. A reasonable expectation of privacy protects the curtilage of the home from government aerial surveillance. *Oliver*, 466 U.S. at 180 (explaining that at common law the curtilage of the home was afforded protection because it was associated with privacy and sanctity of life). The curtilage is not strictly defined in terms of feet or yards but rests upon the individual's expectation of privacy. *U.S. v. Broadhurst*, 805 F.2d 849, fn. 7 (9th Cir. 1986) (finding a building in an open farmland, 125 feet away from the main house feel within the curtilage because the individuals expected it to be private).

A. The ECPD Deployed a Faulty $4,000 PNR-1 Drone to Intrude on Macklin Manor in Violation of Ms. Koehler's Fourth Amendment Rights and Reasonable Expectation of Privacy.

The use of drone surveillance without a warrant is an issue of first impression before this Court. In this case, Ms. Koehler satisfies both prongs of the Katz test. She had no reason to expect the ECPD would snoop on her home, Macklin Manor, with a highly advanced drone for nearly thirty minutes and neither do reasonable members of society. It is undisputed Ms. Koehler satisfies the first prong of the Katz by simply living in Macklin Manor; this is her home and the

Fourth Amendment explicitly grants individuals freedom from government intrusion while in their homes. *Silverman v. U.S.*, 365 U.S. 505, 511 (1961) ("at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

The second prong of Katz is equally satisfied here because societal notions of privacy have not evolved to allow backyard drone intrusions such as the ECPD's search. In *Katz v. United States*, Justice Harlan considered the evolution of technology and found it "bad physics as well as bad law, for reasonable expectations of privacy" to be shattered by electronic invasions. 389 U.S. 347, 362 (1967). Unlike C*alifornia v. Ciraolo*, where the court found no objective expectation of privacy could exist because private and commercial flights in the the United State are so common and routine, 476 U.S. 207, 215 (1986), here, even the officer that used the PNR-1 drone admitted that "planes typically avoid[ed] Mount Partridge" because of poor visibility issues. R. at 42.

Four key facts distinguishing this case from open fields cases and merit discussion: (1) Ms. Koehler was not suspected of growing marijuana, (2) the allegedly "open field" here is not a farm or rural land, it is her backyard within the curtilage of her home, (3) the ECPD's aerial surveillance was not conducted with the naked eye, and (4) when compared to other cases the ECPD nearly doubled the normal distance of most aerial observations. Despite these key differences, the Supreme Court's open fields precedent is still instructive in examining the ECPD's use of the PNR-1 to intrude on Ms. Koehler in the confines of her home.

First, unlike *Florida v. Riley*, *Ciraolo*, *Broadhurst*, and *Oliver* where the court found that each individual had no Fourth Amendment protection from government intrusion in their open fields where marijuana was being grown because hiding illicit growing operations is not

objectively reasonable, here, there is zero suspicion of a drug manufacturing operation. This Court should not find precedent that granted the government power to intrude on plants rooted in the ground can extend to intrusions on citizen walking in their own backyards. Reversing the Thirteenth Circuit would expose every home in America to intrusive secret government drone surveillance and surely not be protective of "[t]he right of the people to be secure in their . . . *houses* . . against unreasonable searches or seizures." U.S. Const. Amend. IV.

Second, this is the home and "since the enactment of the of the Fourth Amendment [this Court] has stressed the overriding respect for the sanctity of the home." *Oliver*, 466 U.S. at 178. Ms. Koehler might reasonably expect to be caught in photographs walking down the street but not in her own backyard. Unlike *Florida v. Riley*, where the court found the defendant had no reasonable expectation of privacy in the five acres of land where he conducted his marijuana growing operation, 488 U.S. 445, 450 (1989), here, the total distance between Ms. Koehler's main house and pool house would be the equivalent of less than 1% of the land involved in *Riley*, making aerial surveillance a significantly greater intrusion. If society's objective expectation of privacy does not extend to residential areas like Macklin Manor, this would greatly diminish the right of citizens to be free from governmental intrusion in their homes.

Third, the ECPD is the only department in Pawndale that uses the PNR-1 for surveillance. R. at 3. While Ms. Koehler concedes drones are common devices in society, society's understanding of backyard privacy should not succumb to the ECPD's use of a highly advanced drone. Considering its features, the ECPD's PNR-1 is distinguishable from the common drone a reasonable citizen would expect for five reasons: (1) it starts at $4,000, (2) it is exclusively sold from the manufacturer (not widely available at a retailer like Wal-Mart or Amazon.com), (3) it has high-definition lenses, (4) travels roughly at the speed of a motor

scooter, and (5) is stealthy designed to be imperceptible to the reasonable citizen enjoying his backyard. R. at 46. The number one selling drone on Amazon costs $3891 less than the PNR-1,[1] some drones are as low as $50. R. at 38. While it may be the case that society recognizes and understands some drones, the ECPD's use of the PNR-1 to spy on individuals in their backyards is unprecedented.

Even more alarmingly, the ECPD's PNR-1 drone is equipped with a high-definition digital single-lens reflex (DSLR), greatly surpassing the standard "naked eye" test used to analyze aerial surveillance. In *Florida v. Riley*, *Ciraolo*, and *Broadhurst* the courts considered the police's "naked eye" surveillances of growing operations. In each of these cases, the police rented aircraft and from the aircrafts used only their eyes (and prior experience) to identify marijuana plants growing in the open fields. 488 U.S. at 448; 476 U.S. at 211; 805 F.2d at 854. This case is specifically distinguishable from *Ciraolo*, where the officers used a single-lens 35mm hand-operated camera to manually take aerial photographs, 476 U.S. at 209, whereas here the detective was able to sit in his squad car two blocks away from Ms. Koehler's home and for nearly thirty minutes use the PNR-1's mirrored lens and digital imaging capabilities to capture crisp action shots of her walking in her backyard. R. at 4. To extend the naked eye doctrine into the territory of self-propelled high-definition cameras is dangerous and intrusive.

Unlike in the naked eye search cases where the officers were able to identify marijuana growing operations but not many additional details, here the ECPD was not only able to see a sharp image of a woman and identify her as Ms. Koehler, but also a detailed layout of her estate. A single PN-R drone launch provided an entire detailed layout of Macklin Manor, collecting over nine specific data points (including square footage and detailed patio placement) of Ms.

[1] Holy Stone F181 RC Quadcopter Drone, Amazon.com, Oct. 15, 2017 9:32 AM, https://www.amazon.com/Holy-Stone-F181-Quadcopter-Altitude/dp/B00SAUAP5C/ref=br_lf_m_kmvmyk68tmr28bz_ttl?_encoding=UTF8&s=toys-and-games

Koehler's home. R. at 4. Prior to Ms. Koehler purchasing Macklin Manor, the property was home to the ECPD's former police chief but surely he never reasonably expected he would be photographed in his own backyard the way Ms. Koehler was here. This Court cannot allow the highly intrusive and unnecessary investigation tactics used by the ECPB in this case.

Fourth, the altitude at which the ECPD used the PNR-1 to spy on Ms. Koehler is especially intrusive on her Fourth Amendment rights. Initially, it is important to note that the officers lost signal of the PNR-1 for almost 20% of the time it surveyed Macklin Manor. R. at 41. Again, unlike in *Florida v. Riley*, *Ciraolo*, and *Broadhurst*, where the court found the aerial observations were made from no higher than 1100 feet, 488 U.S. at 451; 476 U.S. at 209; 805 F.2d at 850, here, we know for certain the ECPD's drone flew as high as 1640 feet (legal maximum in Pawndale) and with some degree of certainty that it likely flew higher than 1640 feet. R. at 4. A higher altitude is likely more intrusive in this instance because of the stealthy design of the PNR-1. A small drone with a high powered camera, much like the PNR-1, is able to see specific details from higher altitudes as if it were only a few feet above ground. R. at 46. Further, in *Florida v. Riley* and *Ciraolo*, the officers used a helicopter and an airplane, respectively, to conduct their aerial searches of the marijuana growing operations. 488 U.S. at 451; 476 U.S. at 209. In those cases, a person standing in their backyard would be able to easily see a helicopter or airplane hovering over their property, on the contrary, here the PNR-1's sleek design and the perpetual fog covering Mount Partridge make it very unlikely Ms. Koehler, the former police chief, or any other citizen standing in that backyard would be able to see the PNR-1 with the naked eye. R. at 46. This fourth fact combined with the location of Mount Patridge coupled with the perpetual fog and cloud create the perfect storm for undetected illegal governmental intrusion.

1. In Addition to Violating Ms. Koehler's Fourth Amendment Rights, the ECPD's Use of the PNR-1 Drone Also Violated FAA Regulations and Local Law.

The Federal Aviation Administration ("FAA") regulates unmanned aircraft systems ("UAS")[2] and the navigable airspace within the United States. 49 U.S.C. § 40101(a). UAS are aircrafts operated without the possibility of direct human intervention from within the aircraft. *FAA MODERNIZATION AND REFORM ACT OF 2012*, PL 112-95, Feb. 14, 2012, 126 Stat 11. Broadly, the FAA has divided navigable airspace into two categories, controlled and uncontrolled. Controlled airspace is where there are air traffic control towers and uncontrolled airspace where air traffic controllers are replaced by "visual flight rules"[3].[4] There are six lettered classes of airspace within this framework and each is determined by the complexity of flight movements and air pressure. *Id*. The most relevant classes here are E and G. Class E is regulated airspace and accounts for much of the airspace in the United States, it is limited to 1,200 feet above ground level but no higher than 18,000 feet above mean sea level. *Id.* Class G is uncontrolled airspace limited to 1,200 feet above ground level with at least 5,280 feet of visibility for flight in the day time. *Id.*

The ECPD's PNR-1 falls squarely within the FAA's regulation of UAS because the officer could not operate the PNR-1 from within and flew it between Class E and Class G navigable airspaces to spy on Macklin Manor. *Supra n*. 3. While the facts to not stipulate the how low visibility was atop Mount Partridge, based on the time of day the PNR-1 was flown, FAA regulations required at least 1 nautical mile of visibility (equivalent to 5,280 feet). *Id.*

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[2] Also known as "drones."

[3] Set of regulations under which a pilot operates an aircraft in weather conditions generally clear enough to allow the pilot to see where the aircraft is going.

[4] Federal Aviation Administration, PHAK Chapter 15 Airspace, FAA.gov, Oct. 12, 2017 12:33 PM, https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/phak/media/17_phak_ch15.pdf

Further, Pawndale (and many other local municipalities) strictly prohibits drones from being flown at an altitude over 1640 feet. Here, the ECPD deployed the drone knowing it was faulty and had been flying as high as 2000 feet. R. at 4, 40. This becomes more egregious considering this was the first time the ECPD had deployed the drone in the field and the officer "had no way of telling whether the drone exceeded the Pawndale limit." R. at 40-41. This Court cannot allow the ECPD to recklessly violate the constitution, federal regulations, and state law to bypass the warrant requirement.

B. The ECPD Unreasonably Violated Ms. Koehler's Fourth Amendment Rights When It Used Advanced Wavelength Measuring Technology From Outside Macklin Manor to Snoop Inside It.

The right to retreat into one's home to be free from governmental intrusion is the first right among equals under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). This protection extends to the curtilage and areas immediately surrounding the home because it is "intimately linked to the home, both physically and psychologically." *Id.* at 7. Unreasonable surveillance occurs when the government uses an uncommon device to "explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo v. U.S.*, 533 U.S. 27, 40 (2001). The commonality of a device has no bearing on the court's analysis when the government uses a device to explore the intimate details of home. 569 U.S. at 11.

Kyllo draws a hard line for government agencies attempting to intrude inside the home from outside the home. Despite its alleged popularity among law enforcement, R. at 4, the handheld doppler radar used by the ECPD to find out who was inside Macklin Manor violated Ms. Koehler's rights. Like in *Kyllo v. United States*, where the government's use of an uncommon thermal camera to see heat emitting from an individual's home constituted an

unlawful search because it essentially allowed the government to see through the walls of a home, 533 U.S. 27 (2001), here, in a similar fashion the ECPD used a handheld doppler radar to gather information about inside of Ms. Koehler's home by obtaining data on the breathing of the humans inside. The doppler search allowed the ECPD to determine how many individuals where in Ms. Koehler's home and where they were located, giving access to areas previously unknown. R. at 33. Like in *Jardines*, where the Court found the government's use of a drug sniffing dog on an individual's porch constituted an unlawful search because the officers physically intruded on the individual's property to gain evidence without a warrant, here, the ECPD completed its searched of Macklin Manor by physically approaching the door to the main house and the pool house to emit waves in order to determine how many human bodies were present inside.

Even if this Court is not persuaded that the handheld doppler radar independently violated Ms. Koehler's rights, the handheld scans in addition to the drone surveillance surely rise to a Fourth Amendment violation. The ECPD's drone surveillance provided a detailed layout of Macklin Manor and its handheld doppler radar use provided details of who was in the house. The use of these two technologically advanced searches taken together surely intruded on Ms. Koehler's home, and together violated her Fourth Amendment. This Court cannot permit the ECPD to cut corners by piecemealing the layout and inside of Ms. Koehler's home.

C. All the Evidence Obtained From The SWAT Teams Search Warrant Execution Must Be Excluded Under the Fruit of the Poisonous Tree Doctrine Because the Information Used for the Search Warrant was Acquired by An Illegal Search of Macklin Manor.

To be reasonable under the Fourth Amendment, most searches by law enforcement must occur pursuant to a warrant. *Vernonia School Dist. 47J*, 515 U.S. at 653. The warrant requirement serves as a check against unfettered police discretion by requiring police to apply to

a neutral magistrate for permission to conduct a search. *See King*, 563 U.S. 452, 459 (2011). Without an exception to the warrant requirement, searches without warrants are presumptively invalid. *Id.* All evidence discovered during invalid searches must be excluded at trial. A search conducted without a warrant will be invalid (and evidence discovered during the search must be excluded from evidence) unless an exception to the warrant requirement applies. *Id.*

An officer requesting warrant must submit to the magistrate an affidavit containing sufficient facts and circumstances to enable the magistrate to make an independent evaluation of probable cause. *U.S. v. Ventresca*, 380 U.S. 102 (1965) (officers cannot merely present conclusory statements that probable cause exists). A warrant will be issued only if there is probable cause to believe that seizable evidence will be found on the premises or person to be searched. *Carroll v. U.S.*, 267 U.S. 132 (1925). Probable cause is determined by assessing "the probabilities in particular factual concepts." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). A warrant must specify with reasonable precision "the place to be searched and the items to be seized." *Groh v. Ramirez*, 540 U.S. 551 (2004).

The exclusionary rule prohibits the introduction of evidence obtained in violation of a defendant's Fourth Amendment rights. *U.S. v. Leon*, 468 U.S. 897 (1984). Generally, illegally obtained evidence and all evidence obtained or derived from exploitation of the illegally obtained evidence must be excluded. *See Wong Sun v. U.S.*, 371 U.S. 471 (1963) (evidence derived from illegally obtained evidence is deemed to be "fruit of the poisonous tree"). Exclusion of tainted evidence, including "fruit of the poisonous tree," it not automatic, rather whether exclusion is warranted depends on "the culpability of the police and the potential of the exclusion to deter wrongful police conduct." *Herring v. U.S.*, 555 U.S. 135 (2009).

This Court must exclude all of the evidence flowing from the execution of the invalid

search warrant because the warrant was supported only by the illegal PNR-1 drone and doppler searches of Macklin Manor. Here, the government cannot reasonably contend it would have had probable cause to "believe seizable evidence" would be found, *Carroll*, 267 U.S. 132, at Macklin Manor based solely on the $10,000 found in Mr. Wyatt's car, the laptop with the initials "AK", and the lease documents showing Macklin Manor was owned by a shell company. R. at 2, 3. These three facts alone fall short of probable cause and surely would not have permitted the government to obtain a specific warrant detailing which parts of Macklin Manor to search and what "things" to seize. *Groh*, 540 U.S. 551. In fact, before deploying the drone and using the doppler radar, the ECPD did not know whether Macklin Manor was being occupied because "no one had seen residents at the property." R. at 3. The officers were only able to link Macklin Manor to the kidnappings after (1) using the PNR-1 drone to obtain visual confirmation of Ms. Koehler's presence and (2) using the handheld doppler radar revealing three human bodies unmoving inside the pool house, which the officers believed to be the kidnapped children. If the officers had the requisite probable cause as the government claims then the ECPD would have obtained a search warrant before conducting the searches rather than risking comprising the validity of their search. This Court cannot allow the ECPD to work backwards to reconstruct probable cause it never had.

CONCLUSION

Reversal of this decision would greatly diminish citizen rights in favor of overzealous police force. For all the foregoing reasons, this Court should affirm the decision of the Thirteenth Circuit.