No.1788-850191

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

NICK NADAULD

Respondent.

ON WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Counsel for Petitioner

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II. Whether the placement of pole mounted cameras outside of the defendant's house constituted a search under the Fourth Amendment, and whether the information from the pole camera's carries Fourth Amendment protections.

III. Whether law enforcement officers' entry into the defendant's house was justified by probable cause and exigent circumstances.

IV. Whether seizure of the M16 assault rifle used in the mass shooting was justified by the plain view doctrine.

STATEMENT OF FACTS

I. Factual Background.

The absence of justice itself is a threat to public safety. When a mass shooter remains at large, citizens grow restless wanting to take matters into their own hands to prevent further harm. Law enforcement's first priority is to bring the shooter to justice and return a distraught community back to tranquility.

On September 14, 2021, a masked man stood alone on a roof top in Balboa Park. Record at 2. He had with him a loaded, fully automatic rifle. R. at 2. He wasn't there by accident; this was the culmination of weeks of planning. R. at 37. He set up his rifle, found his target, and fired into the crowd killing nine and wounding six. R. at 2. He fled the scene successfully concealing his identity. R. at 29.

After two weeks of tireless police work and public outcry, the FBI identified the shooter as Frank McKennery confirmed by a confession found in his suicide note. R. at 2. McKennery had died from self-inflicted gun shots by the time law enforcement found him. R. at 2. The FBI also identified the owner of the gun used in the shooting as Nick Nadauld. R. at 2.

To conduct their search for the shooter, the FBI and local law enforcement used a variety of tools. R. at 3. First, immediately after the shooting, they acquired footage from surrounding security cameras to identify cars that were located at the scene. R. at 3. The police department ran criminal background checks on the owners of those fifty cars and crossed referenced those names with the registration of assault-rifle owners in the San Diego area. R. at 3. Next, they used the Automatic License Plate Recognition ("ALPR") database which was regularly accessed without obtaining a warrant. R. at 3. Here, the police accessed the database to retrieve information on the public movements of the cars from the crime scene and the cars of the rifle owners. R. at 3. Two

names, one from the rifle list and one from the cars at the scene of shooting, overlapped in their transportation significantly: Frank McKennery and Nick Nadauld. R. at 4.

Not wanting to narrow their suspect list so early in the investigation, law enforcement placed surveillance cameras on poles outside of the ten residences that overlapped the most between the rifle owner list and the vehicle owners from the scene of the crime. R. at 4. One of these residences was Nadauld's. R. at 4.

Nadauld inherited an M-16 assault rifle from his father when he passed away five years prior. R. at 2. California required that anyone who "obtains title to an assault weapon…shall within 90 days…(a) render the weapon permanently inoperable, (b) sell the weapon to a gun dealer, (c) obtain a permit…or (d) remove the weapon from this state." R. at 35. Nadauld received a letter on September 27th informing him that officers would arrive at his home in one month to verify that the weapon had been rendered inoperable. R. at 4.

On September 28th, still in the midst of searching for the shooter, San Diego Police Department received an anonymous call saying, "this time, it's gonna be a school." R. at 4. The very next day the pole-camera mounted outside Nadauld's residence recorded McKennery handing Nadauld a large duffel bag. R. at 4. With the possibility of a second shooting fresh on their mind, Officers Maldonaldo and Hawkins were dispatched to Nadauld's house. R. at 4.

Upon arrival, the officers inquired about the rifle, and dissatisfied with Nadauld's suspicious responses, the officers entered his home. R. at 4. Officer Hawkins ordered Officer Maldonado to check the rooms for the rifle. R. at 23. When Officer Maldonado entered Nadauld's bedroom, she saw the M-16 rifle in her line of sight and confirmed it was fully operable in violation of the California statute. R. at 4. Accordingly, the officers arrested Nadauld. R. at 4. Forensic

ballistics experts conducted examinations on the rifle and confirmed that it was the gun used in the Balboa Park shooting. R. at 33.

II. Procedural History.

A federal grand jury indicted Nick Nadauld on nine counts of second-degree murder, nine count of involuntary manslaughter, one count of lending an assault weapon, and one count for failure to comply with assault rifle requirements. R. at 1. Nadauld filed a motion to suppress the evidence obtained on the date of his arrest on the grounds that (1) the warrantless search of ALPR database, (2) the warrantless mounting of pole-cameras, and (3) warrantless entry into his house violated his Fourth Amendment rights. R. at 5.

The United States District Court for the Southern District of California denied the motion to suppress. R. at 1. A jury found Nadauld guilty of all charges except the second-degree murder charges. R. at 41-42. Nadauld appealed his conviction on the grounds that the district court erred by denying his motion to suppress. R. at 14. The Ninth Circuit Court of Appeals reversed, granted the motion to suppress, and remanded the case. R. at 21. The United States appealed, and the Supreme Court of the United States granted certiorari.

SUMMARY OF THE ARGUMENT

This court should reverse the Ninth Circuit's ruling and deny the defendant's motion to suppress the evidence for four reasons. First, the defendant had no expectation of privacy in his public movements. What a person knowingly exposes to the public is not subject to Fourth Amendment protection because there is no expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351 (1967). Additionally, the information collected by ALPR is not the type of information in which society holds reasonable expectation of privacy, so the data collection was not a search, and therefore, law enforcement did not need a warrant to access the ALPR database.

Second, the pole cameras recorded and observed only that which was already exposed to the public and that law enforcement could have observed via in-person surveillance. Cameras are widely available to the public, so there was no enhanced technology used to gain information that could not also be collected by the general population.

Third, Officers Maldonado and Hawkins had probable cause to believe Nick Nadauld was involved in the Balboa Park shooting. When looking at the facts and circumstances from the day of the shooting and information gathered after the shooting, a reasonable officer could have believed that Nadauld was connected to the shooting. The officers did not need to know precisely how Nadauld was involved, nor did they need to be absolutely certain of his involvement. Nadauld's ownership of the same type of assault rifle used to commit the mass shooting and connection to a person located at the scene of the crime was enough to suspect involvement and warrant further investigation.

Fourth, and finally, exigent circumstances allowed Officers Maldonado and Hawkins to enter Nadauld's home and seize the assault rifle. After the threat of a second shooting, Officers Maldonado and Hawkins reasonably believed there was an imminent threat of harm to the public

and concern for destruction of evidence. R. at 4. More than surveillance was necessary when Nadauld received a duffel bag large enough to hold an M-16 from McKennery, and upon arrival at Nadauld's home, suspicious answers to the officers' questions made it clear the rifle was fully operable. R. at 4.

A defendant's constitutional right to be free from unreasonable search and seizure is well-established. U.S. Const. Amend. IV. However, that right is not limitless. The purpose of suppressing evidence is to deter law enforcement from future Fourth Amendment violations. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). Granting this motion to suppress would not ensure future protection of constitutional rights because the officers here acted reasonably under emergency circumstances. Granting the motion to suppress would only allow this defendant to walk away with no consequences for his involvement in a mass shooting.

The district court made the correct decision by denying the motion to suppress the evidence. The appellate court failed to open up the timeline and take a broader look at the circumstances leading up to law enforcement's actions. Accordingly, the Ninth Circuit's decision should be reversed, the motion to suppress the evidence should be denied, and the defendant's conviction should be affirmed.

STANDARD OF REVIEW

The standard of review is de novo. The issues presented in this case concern questions of law related to the Fourth Amendment. The proper legal standard of review for determinations of a lawful search or seizure under the Fourth Amendment is de novo. *See Ornelas v. United States*, 517 U.S. 690, 691 (1996) (noting that the standard of review for warrantless searches is de novo).

ARGUMENT

The heart of this case is promoting justice and ensuring the safety of a grief-stricken, tension-filled community. Citizens trust law enforcement to use their experiences and knowledge of the field to find and arrest those who wish to harm others. In addition to their experience in the field, law enforcement is also encouraged to use the technology and information at its disposal to help them solve crimes. Law enforcement is trained to act reasonably when taking into account all facts and circumstances instead of viewing situations in isolation.

I. The warrantless use of ALPR did not violate the defendant's constitutional rights because it was not a search under the Fourth Amendment.

The Fourth Amendment protects citizens from unlawful searches and seizures. U.S. Const. Amend. IV. Warrantless searches are per se unreasonable, subject to a few well-defined exceptions, and are, therefore, violations of Fourth Amendment protections. *Katz v. United States*, 389 U.S. 347, 357 (1967). A search, as defined by the *Katz* court, must have (1) an actual, subjective expectation of privacy (2) that society is willing to accept as reasonable. *Katz*, 389 U.S. at 361 (1967) (Justice Harlan in concurrence noting the approach to determine when a search has occurred). If these elements are not satisfied, the action is not a search under the Fourth Amendment. *See id.* If actions are not a search, they may not constitute a violation of the Fourth Amendment. *See id.*

A. The use of the ALPR database did not violate the defendant's expectation of privacy.

The data collected from the ALPR data did not violate the defendant's reasonable expectation of privacy. For the data collection to be a violation of the defendant's rights, it must constitute a search as defined by the *Katz* court. *Id*. The defendant did not have an expectation of privacy in the location information data, nor would such an expectation be accepted as reasonable

by society. Without satisfying either prong of the test, the ALPR data collection was not a search. *See id.*

i. Nadauld did not have an expectation of privacy in that which he exposed to the public.

The Knowing Exposure Doctrine expresses that a person does not retain an expectation of privacy in that which he exposes to the public. *United States v. Knotts*, 460 U.S. 276, 281(1983) (noting that information voluntarily conveyed dispels the expectation of privacy); *Katz v. United States*, 389 U.S. 347, 351(1967) (information includes that which a person does not seek to keep private); *Florida v. Riley*, 488 U.S. 445, 445 (2014) (noting in the concurrence that the burden of proof should be on the individual to show that his expectation was reasonable).

The United States Supreme Court has established that a person does not have an expectation of privacy when traveling in an automobile on a public thoroughfare, nor do they have an expectation in which they do not make efforts to keep private. *Knotts*, 460 U.S. at 281. In *Knotts*, the defendant took into possession a drum of chemicals used to manufacture controlled substances and placed it in his vehicle for transportation. *Id*. at 277. Unknown to the defendant, there was a beeper located inside the drum that transmitted the location of the drum, and thus the defendant's vehicle, to law enforcement. *Id*. The *Knotts* court held that the location data from the beeper was not a search under the Fourth Amendment because there is no expectation of privacy in that which an individual conveys to the public. *Id*. at 281.

Similar to *Knotts*, the defendant here did not have a reasonable expectation of privacy in his driving location because that information was available to the public. *See id*. As noted by the trial court, anyone at the given locations could have seen the defendant at that location. R. at 7. He voluntarily displayed his location by driving his car on public roads, did not take any measures to keep his location private, and did not carry his burden of showing his expectation as reasonable.

R. at 7. Therefore, the defendant did not have a reasonable expectation of privacy in his public driving location information.

ii. Nadauld did not have an expectation of privacy in property that belonged to a third party.

A person does not have an expectation of privacy in property that is not their own. *California v. Greenwood*, 486 U.S. 35, 42 (1988) (one forfeits their expectation of privacy in property that is no longer their own); *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (one does not have an expectation of privacy in information voluntarily conveyed to third parties).

In *Smith*, the Supreme Court held that there was no expectation of privacy in information voluntarily conveyed to a third party. *Smith*, 442 U.S. at 743-44. Law enforcement installed a "pen register" in the defendant's phone to record the numbers dialed on that particular phone. *Id*. at 737. The Supreme Court reasoned that the pen register was not a search because the data recorded by the telephone company was information that the defendant voluntarily conveyed to the telephone company. *Id*. at 745-746. Because the pen register was not a search, there was no Fourth Amendment violation. *Id*. at 746.

Here, neither the data points, nor the database is property of the defendant. Following the *Smith* rationale, the defendant voluntarily conveyed his location information to the public by driving on public roads, and therefore, has no expectation of privacy. *See id*. Without a violation of an expectation of privacy, there was no violation of his Fourth Amendment rights. *Id*.

iii. Nadauld did not have an expectation of privacy when police used widely available technology to observe what is already exposed to the public and could be observed by in-person surveillance.

If technology used in gathering information is not available to the general public, the information gathering constitutes a search. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Conversely, if technology that is used is readily available to the public, there is not a reasonable

expectation of privacy, and therefore the gathering of information does not constitute a search. *Id*. Additionally, the use of location data by law enforcement as merely a tool is not a search or a violation of the Fourth Amendment. *Knotts*, 460 U.S. at 284.

In *Kyllo*, the court found that law enforcement officials who used advanced technology to conduct a warrantless search violated an expectation of privacy because the technology was not readily available for general public use. *Kyllo*, 533 U.S. at 40. Law enforcement used thermal imaging technology to scan the defendant's home to determine whether the defendant was growing marijuana. *Id*. at 29-30. The court concluded that if a device that was not available for general use was used to explore details of the home that would previously be unknowable without physical intrusion, the use of such device is a search. *Id*. at 40. Conversely, if technology is available for use by the general public and does not explore details that would usually require physical intrusion, the use of such technology would not be a search. *See id*.

In *Karo*, the court held that the monitoring of public locations by law enforcement through a tracking device is not a search. *United States v. Karo*, 468 U.S. 705, 721 (1984). *Karo* came into possession of a container with a location tracking device inside by which law enforcement could track his public movements. *Id*. at 708. The court held that the location tracking device did not infringe on the individual's expectation of privacy. *Id*. at 712. The court notes that "it is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *Id*. It is not a Fourth Amendment violation for law enforcement to utilize location data of a defendant's public movements. *Id.*

Here, ALPR is simply an entry-level camera and a clock. R. at 38. The picture of the license plate is recorded with a time stamp and the location at which the camera sits. R. at 7. No descript photos of the contents of the vehicle or the driver are captured. R. at 7. This is not new or

revolutionary technology. Most of the general public has access to a camera on a regular basis through the use of their phone. This technology is not so advanced that it would trigger an expectation of privacy, and its widespread use refutes an expectation of privacy. Therefore, the defendant does not have a reasonable expectation of privacy against ALPR because the ALPR technology is rudimentary by today's standards, and its use is widespread.

B. Nadauld had no objective expectation of privacy in the ALPR information collected because society is not willing to accept the expectation as reasonable since it does not subvert the purposes of the Fourth Amendment.

The second prong of the *Katz* search evaluation is whether the expectation of privacy is one that society is willing to accept as reasonable. *Katz*, 389 U.S. at 361. The *Carpenter* court notes that the Fourth Amendment has two purposes: to protect the privacy of individuals, and to protect against the overreach of a too permeating government. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

The *Kyllo* court discussed how what society is willing to accept as reasonable shifts with the evolution of technology. *Kyllo*, 533 U.S. at 33-34. In *Kyllo*, law enforcement used thermal imaging to record the heat emanating from the defendant's home. *Id*. at 29. The court notes that the privacy of an individual is not violated unless the technology used is so advanced that it is not available for general use, and yields information that would not ordinarily be attainable without a physical intrusion. *Id*. at 34. The court's reasoning was that these tenants protect the privacy of individuals. *Id.*

Here, society is not likely to accept the defendant's expectation as reasonable. The ALPR technology is the type of technology that is commonly used in public arenas, commonly used by the public, and the United States Supreme Court has held similar data collections not to be searches under the Fourth Amendment. *See Knotts*, 460 U.S. at 277. The technology used in ALPR data

collection does not subvert the purposes of the Fourth Amendment, so society is unlikely to accept an expectation of privacy in the information. Therefore, the use of ALPR did not violate the defendant's Fourth Amendment rights.

i. The driving location data collected by ALPR is unlike the CSLI data used in Carpenter that constituted a search.

The data stored in the ALPR database differs greatly in character and consequence from the cell site location information (CSLI) data that was collected by law enforcement in *Carpenter*. *Carpenter*, 138 S. Ct. at 2208. In *Carpenter*, the defendant's motion to suppress involved data that was far more invasive in character and extensive in quantity. *Id*. at 2209.

In *Carpenter*, the data collection was far more extensive than the ALPR data collection. *See id*. at 2209. Each CSLI data point indicated the location of the defendant's cell phone at the time of call origination and termination of both incoming and outgoing calls. *Id*. at 2212. The cell site locations spanned over two states and included data from when the defendant's phone was "roaming." *Id*. The total collected data amounted to 12,898 location points over 129 days. *Id*. That is the equivalent of approximately 101 data points per day for about 4.3 months. *See id*.

In contrast, the data collected from the ALPR database has three elements: a photo, a timestamp, and a geographic location tag. R. at 38. Additionally, ALPR data points are only recorded when a vehicle crosses paths with an ALPR camera unit, unlike the collection of CSLI data each time a cellular device connects with a cell site. *See* R. at 38; *Carpenter*, 138 S. Ct. at 2211.

The *Carpenter* data was also more invasive in nature. *See Carpenter*, 138 S. Ct. at 2212. Justice Sotomayor expressed her concern that mapping an individual's cell phone location provides an intimate window into a person's life, revealing not only his movements but his "familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565

U.S. 400, 415 (2012). Additionally, the *Carpenter* court reasoned that a cell phone is "almost a feature of human autonomy" with the way that we use them today. *Carpenter*, 138 S. Ct. at 2218. "While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time." *Id*. The *Carpenter* court found that the invasive character of the data justified its collection as a search under the Fourth Amendment. *See id*. at 2220.

Here, the ALPR data is distinguishable. The information collected from the ALPR database is a less sophisticated system, which is unable to record the contents of a vehicle or identify the driver of the vehicle. R. at 40. Vehicles do not travel with individuals into private spaces in the same way that a cell phone does, nor does the information gleaned from a license plate provide any additional information about one's personal associations. *Carpenter*, 138 S. Ct. at 2218. A vehicle is certainly not "almost a feature of human anatomy." *Id*. The ALPR data is far less invasive in nature.

The less extensive and less invasive character of ALPR data does not pose a threat to an individual's expectation of privacy the way that the CSLI data does. *See id*. at 2220. For the very reasons that the *Carpenter* court ruled that the CSLI data is a search, ALPR data is not. *See id*. at 2223. ALPR is not invasive in nature, and the amount of information collected for the case at hand is not enough to constitute a Fourth Amendment violation.

ii. The driving location data collected by ALPR is akin to the data used in Knotts which did not constitute a search.

The data retrieved by law enforcement in the present case is analogous to the data retrieved in *Knotts*. *See Knotts*, 460 U.S. at 277. In *Knotts*, the defendant filed a motion for suppression of evidence of data collected showing his location. *See id*. at 279. The location data was collected by law enforcement from a beeper placed in the defendant's car that emitted periodic radio signals, to monitor the progress of the car. *Id*. at 277. The court explained that there is an established, lesser

expectation of privacy in automobiles at the outset. *Id*. at 281. Continuing their analysis, the *Knotts* court notes that the location data collected was "merely a more effective means of observing what [was] already public." *Id*. at 284. The court ruled the information collected did not violate an expectation of privacy and, therefore, was not a search under the Fourth Amendment. *Id*. at 285.

Similar to *Knotts*, the data location information obtained with ALPR is captured on a periodic basis; only so often as the vehicle comes into contact with an ALPR camera. *See id*. at 277. The ALPR data monitors the location of a given vehicle in public spaces. R. at 38. The ALPR data, like the *Knotts* court noted, is "merely a more effective means of observing what is already public." *See Knotts*, 460 U.S. at 274. Following the rationale and holding of the *Knotts* court, the ALPR data that observed public movements, on a periodic basis, of the defendant's vehicle, was also not a violation of an objectively reasonable expectation of privacy, and therefore, not a violation of the defendant's Fourth Amendment rights. *Id*. at 277, 281.

II. The warrantless placement of pole mount cameras did not violate the defendant's constitutional rights because it was not a search under the Fourth Amendment.

A. Nadauld had no expectation of privacy in what he exposed to the public.

While unaddressed by the appellate court, the pole cameras were also not a violation of the defendant's Fourth Amendment rights. Following the same rationale as the ALPR data, a person has no reasonable expectation of privacy in public places. *See Knotts*, 460 U.S. at 281. (The Knowing Exposure Doctrine refutes the expectation of privacy in that which an individual makes public). Security cameras monitor our public movements on a regular basis; on toll roads, in shopping centers, or outside libraries. As the trial court notes, it is reasonable in these modern times to expect that individuals will encounter surveillance cameras throughout their regular routine. R. at 7.

Previously, it has been acknowledged that law enforcement's use of technology of this type is constitutional. In *United States v. Houston*, the Sixth Circuit held very similar technology was not a search under the Fourth Amendment. *United States v. Houston*, 813 F.3d 282, 285 (6th Cir. 2016). A camera, mounted atop a utility pole, monitored the exterior of a defendant's property for ten weeks. *Id*. The *Houston* court reasoned that the same view could be seen by any bystander. *Id*. at 287. What can be seen by the public is not a search. *Id*.

Additionally, in *United States v. Bucci*, surveillance poles were installed and recorded public behavior for eight months. *United States v. Bucci*, 582 F.3d 108, 116 (1st. Cir. 2009). The court in *Bucci* reasoned that the defendant did nothing to conceal the actions that took place in his front yard. *Id*. Therefore, the surveillance cameras did not violate an objectively reasonable expectation of privacy and could not have been a search. *Id*. at 117.

Here, the cameras monitored public behavior from a similar position to any bystander. These cameras were placed outside of the defendant's property for only five days, a mere fraction of the duration of the cameras in *Houston* and *Bucci*. *See Houston*, 813 F.3d at 285; *Bucci*, 582 F.3d 116. These pole cameras, like in *Houston* and *Bucci*, do not constitute a search under the Fourth Amendment.

B. The information gained from the pole mount cameras was not invasive.

There was no violation of an objectively reasonable expectation of privacy due to the pole cameras because the information recorded was not invasive information. *Jones*, 565 U.S. at 415. In *Jones*, Justice Sotomayor expressed concern about the level of invasiveness of the recorded information. *Id*. Information that "reflects a wealth of details about [an individual's] familial, political, professional, religious, and sexual associations" would raise the concern that the collection of such information was too invasive to avoid being classified as a search. *See id*.

The rationale of the *Houston* court directly addressed Justice Sotomayor's concern. *Houston*, 813 F.3d at 290; *Jones*, 565 U.S. at 415. The stationary manner of the cameras, and the limitation to surveillance of public areas alone, prevent the surveillance from becoming too comprehensive so as to create a Fourth Amendment violation. *Houston*, 813 F.3d at 290. The pole mounted surveillance cameras in Houston recorded the defendant in illegal possession of firearms in his yard. *Id*. at 286. The publicly viewable actions were held by the court not to be a search. *Id*. at 290.

The cameras here, like in *Houston*, are stationary, and only recorded the happenings outside of the defendant's home in a space observable by the public. R. at 8-9. The event of an individual handing off a large duffel bag to the defendant in the view of the public eye is not information that would expose the defendant's familial, political, professional, religious, or sexual associations. R. at 4; *Jones*, 565 U.S. at 415. The recording of this interaction between McKennery and the defendant is not of such an invasive nature that it would constitute a search.

III. The warrantless entry of Defendant's house was not a violation of his Fourth Amendment rights because the officers had probable cause and there were exigent circumstances allowing immediate entry.

The Fourth Amendment protects citizens from unreasonable searches and seizures by the government. U.S. Const. Amend. IV. The Fourth Amendment requires law enforcement to obtain a warrant that is based on probable cause, lays out specifically the places to be searched and items to be seized, and is signed by a neutral and detached magistrate. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). This requirement protects citizens from unjustified governmental intrusion and gives notice as to the subject and scope of the government's ability to intrude. *Id*. If law enforcement does not obtain a warrant, the search or seizure is deemed to be unreasonable, and it is the burden of the officers to show reasonableness. *Payton v. New York*, 445 U.S. 573, 586 (1980).

To meet this burden, the officers must have both (1) probable cause and (2) and an exception to the warrant requirement such as exigent circumstances. *See Id.* at 587-88.

A. The officers had probable cause to believe that Nadauld was involved in the shooting.

Probable cause exists where the facts or circumstances are such that a reasonably prudent and cautious person could think that a crime has been committed. *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994). These facts and circumstances are determined through a totality of the circumstances. *Illinois v. Gates*, 461 U.S. 213, 235 (1983). The totality of the circumstances means a common-sense decision, when given all the facts set forth, that there is a fair probability that evidence of a crime will be found in the place to be searched. *Id* at 214. The reasonableness inquiry is one of complete objectivity; subjective intentions of the officers play no role in the Fourth Amendment analysis. *Whren v. United States*, 517 U.S. 806, 813 (1996).

In *Gates*, officers received an anonymous letter informing them of two drug dealers' future plan to transport drugs across state lines. *Gates*, 461 U.S. at 213. The officers took steps to corroborate as much information from the anonymous letter as possible. *Id.* After confirming significant portions of the letter, officers acted on this information claiming it gave rise to probable cause. *Id.* However, the trial court later suppressed the evidence because the anonymous letter did not lay out the circumstances or the manner in which the author acquired the information. *Id.* The lack of such information made the letter unreliable and an insufficient basis for probable cause. *Id.* After review, the United States Supreme Court reversed and adopted the totality of the circumstances approach. *Id.* at 214. The Supreme Court reasoned that with the corroboration of multiple facts from the letter, including future events, the totality of the circumstances would lead any reasonable officer to believe that there was probable cause to act on this information. *Id.* at 214-15.

Similarly, here, Officers Hawkins and Maldonado had probable cause by relying on the totality of the circumstances. First, using the ALPR database, law enforcement observed substantial overlap in public movements between a car located at the scene of the crime (McKennery) and a registered owner of an assault rifle (Nadauld). R. at 3. Being one of only fifty people in the area to own an assault rifle, Nadauld's connection with McKennery warranted suspicion. Next, just twenty-four hours after an anonymous call threatened a school shooting, McKennery is recorded in Nadauld's front yard handing Nadauld a duffel bag big enough to fit the M-16 assault rifle. R. at 4. The potential contents of the duffel bag combined with significant overlapping location data of McKennery and the defendant as well as fear of a second mass shooting at a school was alarming enough for law enforcement to send officers to investigate. See R. at 4.

Upon arriving at Nadauld's home, Officers Hawkins and Maldonado questioned him about the assault rifle. R. at 4. State statute required that the gun be rendered inoperable or disposed of in some way within 90 days of receipt. R. at 35. Nadauld had possessed this gun for over five years. R. at 2. Nadauld's evasive responses to Officer Hawkins' questions were a clear indication that the gun was fully operable. See R. at 23-24. Nadauld offered to retrieve the rifle, but no reasonable officer would allow a potential suspect in a mass shooting to go retrieve a fully operable automatic rifle. See R. at 23. This would have provided Nadauld with an opportunity to become armed and dangerous, escape out of the back of the house, or attempt to dispose of the gun and destroy any evidence of involvement.

Because of the ALPR data, connection with McKennery, receipt of a large duffel bag in close proximity to a threat of a second shooting, and suspicious behavior regarding the gun, Officers Maldonado and Hawkins had probable cause to believe that:

1. Nadauld was involved in the shooting;

2. the gun was evidence of the shooting; and

3. that the gun was in the house at the time of the search.

B. There were exigent circumstances that allowed the officers to enter the house without securing a warrant.

"Exigent circumstances exist… [when] the totality of circumstances known to the police [are] such that a reasonable person could…believe that immediate entry [is] necessary to safeguard public safety and to preserve evidence." *United States v. Wilson*, 865 F.2d 215, 217 (9th Cir. 1989). These circumstances provide an exception to the warrant requirement of the Fourth Amendment. *Id.* at 216. The analysis of whether exigent circumstances exist is done on a case-by-case basis by looking at the facts on the ground. *Lange v. California*, 141 S. Ct. 2011, 2018 (2021). "When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting." *Id.* at 2021. The courts have weighed the public's right to privacy against these exigent circumstances and have found that the right to be free from governmental intrusion is not inviolable. *Id.* at 2018. When a police officer reasonably believes one or more of these circumstances exist, the need for immediate action outweighs a person's Fourth Amendment rights. *Id.*

i. Nadauld posed a threat of imminent harm to the community and the officers.

"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). In determining whether a concern of imminent threat of harm is reasonable, many circuits have adopted a two-prong test: "(1) considering the totality of the circumstances, law enforcement

had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008) (*see also United States v. Huffman*, 461 F.3d 777, 783 (6th Cir. 2006); *United States v. Najar*, 451 F.3d 710, 715, 718 (10th Cir. 2006); *United States v. Holloway*, 290 F.3d 1331, 1338 (11th Cir. 2002); *accord Koch v. Brattleboro*, 287 F.3d 162, 169 (2d Cir. 2002)).

In *Thacker v. City of Columbus*, police officers responded to a 9-1-1 dispatch call about an imminent threat of harm and an injured individual. *Thacker v. City of Columbus*, 328 F.3d 244, 249 (6th Cir. 2003). When they arrived at the residence, Thacker answered the door. *Id.* The police could see shattered glass and blood stains on the carpet through the open door and noticed that Thacker was bleeding profusely. *Id.* Thacker was clearly intoxicated. *Id.* The officers concluded he was not a reliable source of information and entered the home based on a fear that Thacker was a threat to the officers, paramedics, and anyone potentially in the house. *Id.* Thacker filed a § 1983 civil suit against the officers claiming that the warrantless entry was a constitutional violation of his Fourth Amendment rights. *Id.* The Sixth Court of Appeals analyzed whether the conduct of the officers fell into the "risk of danger" exception to the warrant requirement. *Id.* at 253. The court held that when looking at the totality of the circumstances including the 911 emergency call, Thacker's conduct, and the uncertainty of the situation, entry was justified to secure the safety of the police, paramedics, and other people possibly inside the home. *Id.* at 254.

Here, similar facts that led the officers in *Thacker* to have a reasonable sense of urgency and threat of imminent harm also support the reasonable belief that Nadauld posed a threat of imminent harm to the officers or community. *See id.* at 249. Less than twenty-four hours after the police department received an anonymous call threatening a school shooting, the officers were

dispatched to Nadauld's house when he received a duffel bag big enough to carry a rifle. R. at 4. At this point, the officers knew that Nadauld was potentially in possession of the murder weapon. *See* R. at. 4. When they arrived at his home and began questioning him about the rifle, Nadauld was evasive and, like Thacker, could not be a reliable source of information. See R. at 23-24; *Thacker* 328 F.3d at 249. The officers had every reason to believe that the gun was inside the house and fully operable. The officers were dispatched specifically due to the concern that the gun would be used imminently. The officers could not allow Nadauld to re-enter the home alone knowing the gun was inside when their very purpose for being there was to ensure the prevention of the gun's use. These facts created the same sense of urgency as in *Thacker*. *See Thacker* 328 F.3d at 254.

The police had information of Nadauld and McKennery's overlapping behavior. R. at 4. Nadauld had the means of supplying a weapon and McKennery had an incriminating location at the crime scene. R. at 3. In the wake of another threat to public safety and growing restlessness from the communing, Nadauld's and McKennery's combined behaviors were enough to create a reasonable basis for concluding that there was an immediate need to protect others. See R. at 4; *Mincey* 437 U.S. at 392. Additionally, the officers did not break down doors or enter the home violently. R. at 24. They did not stay for an extended period or rummage through drawers and cabinets. See R. at 24. They engaged Nadauld in conversation, calmly entered the house, and briefly searched for objects in plain view. Therefore, the scope and manner were reasonable to meet the exigent need.

ii. There was a concern about the destruction of property.

Another category of exigent circumstances arises when there is a fear that defendants will destroy evidence unless law enforcement acts immediately. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). "Judging the legality of warrantless searches involves…a delicate question of balancing

the rights of the individual to be secure in his home against the interest of society in preventing the disappearance of evidence necessary to convict criminals." *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973). Officers do not need actual knowledge that evidence is being destroyed or removed. *Id.* at 266. If law enforcement has probable cause to believe contraband is present and, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. *Id.* at 268. When considering whether a threat of destruction of property existed in *Rubin*, the Third Circuit looked at five factors:

1. the degree of urgency involved and the amount of time necessary to obtain a warrant;
2. reasonable belief that the contraband is about to be removed;
3. the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought;
4. information indicating the possessors of the contraband are aware that the police are on their trail; and
5. the ready destructibility of the contraband.

Id. at 268-69.

In *Rubin*, law enforcement officers apprehended a defendant and recovered evidence due to exigent circumstances. *Id.* at 268. Law enforcement received reliable information about a potential drug shipment. *Id.* at 264. After confirming the shipment, the police officers arrested the defendant during which the defendant yelled to surrounding bystanders "call my brother." *Id.* The officers understood this to be a warning sent back to the defendant's residence to get rid of the evidence because police were about to arrive. *Id.* The officers, without a warrant, entered the

residence and found three men packaging drugs. *Id.* The Third Circuit Court of Appeals held that "considering all the circumstances…the agents could reasonably have concluded that even a short wait might have been too long [because] an urgent emergency had arisen due to [the defendant's] arrest and apparent signal." *Id.* at 270. Applying the five factors, the officers in *Rubin* were confronted with an emergency, and had a reasonable belief that the individuals at the house knew they were arriving shortly and were destroying readily destructible contraband. *See id.*

Similarly, in this case, the facts are such that Officers Maldonado and Hawkins could have reasonably concluded that a short wait might have been too long. They were confronted with an emergency due to the transfer of the bag large enough to contain a rifle from McKennery to Nadauld, in which the delay necessary to obtain a warrant threatened the destruction of evidence. R. at 4.

Applying the five factors: First, the degree of urgency was high. *See Rubin*, 474 F.2d at 268-69. A second shooting could have happened at any time. Thirty minutes had passed by the time the officers had reached Nadauld's house. R. at 4. Nadauld needed to be questioned and the weapon needed to be secured before it could be used again, disposed of, or destroyed. The officers needed to act immediately and without hesitation. There was no time to obtain a warrant in the emergency situation.

Second, there was a reasonable belief contraband was about to be removed. Nadauld would be concerned about his rifle's potential involvement because he had lent it to someone else. See R. at 26. He would be eager to get rid of any suspicion of his own guilt. This was later made clear by the texts sent to McKennery immediately after hearing about the shooting. R. at 26. He also knew that he was violating the statute that mandated the gun be inoperable. See R. at 26. After

receiving the gun back from McKennery in the duffel bag, it is reasonable to believe that Nadauld would try to get rid of any incriminating evidence that could link him to the crime.

Third, Nadauld possessed a fully operable rifle that had potentially just been used to commit a mass shooting R. at 4. If officers waited at the scene to obtain a warrant, Nadauld could have used the gun to keep the officers out of his house. Additionally, he could have fled resulting in the need for police pursuit and creating an opportunity for injury.

Fourth, Nadauld had information that would lead him to believe police would be arriving at his residence in the near future. He received the letter indicating that residential visits would be made to ensure the assault rifle was inoperable. R. at 4. He had knowledge of the shooting, and that the shooter used the same type of gun as his own. R. at 26. He knew the police had not yet apprehended the shooter. A reasonable person would know that as part of an investigation, police were likely to interview the owners of potential murder weapons.

Finally, the gun could have been rendered inoperable at any time. The Bureau of Alcohol, Tobacco, Firearms, and Explosives defines inoperable as "as firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition." 27 C.F.R. § 478.11. An acceptable method of rendering most firearms permanently inoperable is to fusion weld the chamber closed and fusion weld the barrel solidly to the frame. *Id.* According to the National Institute for Standards and Technology, in order to confirm that a specific gun was the same one used in a given crime, ballistics experts test fire the gun and compare the bullet cartridges to see if they match. National Institute of Standards and Technology, *Ballistics*, https://www.nist.gov/ballistics. Had Nadauld gotten the opportunity to render the rifle inoperable, experts would not have been able to test fire the rifle to determine that it was the weapon used in the Balboa Park shooting. *See Id.*

In the time it would have taken the officers to get a warrant, Nadauld could have tampered with, disposed of, or destroyed a crucial piece of evidence. The concern for destruction of evidence was reasonable, and therefore, the officers were justified in their warrantless entry of Nadauld's home to protect this evidence.

IV. The warrantless seizure of the M-16 rifle was not a violation of defendant's Fourth Amendment rights because it was legitimate under the plain view doctrine.

The Fourth Amendment requires that the seizure of items by law enforcement be authorized by a warrant based on probable cause and signed by a neutral and detached magistrate. *Johnson v. United States*, 333 U.S. 10, 14 (1948). However, similar to searches, "it is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971), holding modified by *Horton v. California*, 496 U.S. 128 (1990). Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. *Id.*

A. Officer Hawkins entered Nadauld's home under recognized exigent circumstances, and the gun was in plain view.

An officer may seize property if: (1) The item was in direct line of sight or plain view; (2) the officer is in the location lawfully; (3) the incriminating characteristic of the item is immediately apparent; and (4) the officer has lawful right of access to the object itself. *Horton v. California*, 496 U.S. 128, 128-29 (1990). These seized items do not need to be inadvertently found to be legitimate under the plain view doctrine. *Id.* The officers, lawfully in the place to be searched, can specifically look for an item so long as they only look in places that are in plain view. *Id.*

In *Michigan v. Tyler*, evidence of arson was legitimately seized when defendants set fire to a furniture store. *Michigan v. Tyler*, 436 U.S. 499, 499 (1978). While in the building dousing

the fire, the fire chief saw two plastic containers of flammable liquid in plain view. *Id.* After the fire was put out and the building was safe to re-enter, the firefighters retrieved the containers as possible evidence of arson. *Id.* The United State Supreme Court held that the firefighters were lawfully in the building because a burning building qualifies as an exigent circumstance. *Id.* At 500. Additionally, this Court held that "once in the building to extinguish a blaze, and for a reasonable time thereafter, firefighters may seize evidence of arson that is in plain view and investigate the causes of the fire." *Id.*

Similar to *Tyler*, Officers Maldonado and Hawkins were lawfully in Nadauld's house due to exigent circumstances and probable cause to believe that Nadauld was involved in the Balboa Park shooting. *See id*. When Officer Maldonado entered the bedroom, the gun was in her direct line of sight, and she had immediate lawful access to it. Stipulation and Order at 1. It was clear that the gun had not been rendered inoperable in violation of the California statute, so its incriminating character was immediately apparent. R. at 24.

Because Officer Maldonado seized the gun pursuant to the plain view doctrine, it was not a violation of Nadauld's Fourth Amendment rights. Accordingly, the district court was correct to deny the motion to suppress this evidence.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the ruling of the Ninth Circuit Court of Appeals.

Respectfully submitted,
Team 1
Counsel for Petitioner