Team 13

No. 1788-850191

In the Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

NICK NADAULD,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

BRIEF FOR THE PETITIONER

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ISSUES PRESENTED

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II. Did the California Fourth District Court of Appeals err in holding that there was not probable cause and exigent circumstances that justified the warrantless entry and search of Nick Nadauld's house?

STATEMENT OF FACTS

I. Facts

A masked assailant killed nine people and wounded six others by firing an M16A1 ("M16") automatic assault rifle down onto a crowd from atop a rooftop in Balboa Park. R. at 2. As individuals ran for their lives, the assailant escaped from the scene without being identified. *Id.* at 2, 29. After the shooting, the police found on the roof a note labeled "Manifesto," which promised that the shooter and his friends were "going to do this again . . . [s]oon." *Id.* at 2, 36. The rounds used in the shooting were also found and identified as a kind of caliber used in assault rifles. *Id.*

Police quickly evaluated the footage from security cameras in and around the park and noticed fifty vehicles leaving the scene before police arrived. *Id.* at 3. One of these fifty vehicle owners was Frank McKennery, who was eventually identified as the sole shooter. *Id.* at 3, 37. The police also obtained the list of the fifty registered assault rifle owners in the area. *Id.* at 3. This list included Nick Nadauld, but none of the fifty on the first list. *Id.* The police then retrieved data about the movements of the vehicles from both lists using the Automatic License Plate Recognition (ALPR) database. *Id.* The ALPR system works by capturing images of vehicles and their license plates. *Id.* at 39. ALPR cameras are attached to police cars or at fixed locations and collect information from cars that pass in front of the cameras in public view. *Id.* The system stores the images along with the time and location that they were taken. *Id.*

Upon viewing the ALPR data, the police determined that there was overlap between the locations of Nadauld and McKennery's vehicles. *Id.* at 4. The police made a list of the ten residences of assault rifle owners that most correlated with the ALPR data from the fifty vehicles that fled the scene of the mass shooting. *Id.* One of those houses was Nadauld's. *Id.* The police, using cameras placed on utility poles, monitored those houses. *Id.* Eleven days after the shooting,

the police sent letters to each of the ten residences informing them that officers would be coming to check if their assault rifles had been rendered inoperable as California law requires. *Id.*

Two weeks after the shooting, an anonymous caller said to the police, "This is the Balboa Park shooter. This time, it's gonna be a school." *Id.* The day after the call and two days after Nadauld received the letter about his rifle, the camera by his house captured McKennery pulling into the driveway, handing Nadauld a large duffel bag, and then promptly leaving. *Id.* Thirty minutes after that drop-off, Officers Hawkins and Maldonado arrived at Naudald's house. *Id.* The officers decided that there was not time to wait for further backup. *Id.* at 21. After Naudald answered his door, Hawkins asked him if he still had the M16. *Id.* at 23. Nadauld verbally paused then stated that he thought the officers were coming for that in a month. *Id.* Hawkins informed Nadauld that he had been required to render the gun inoperable ninety days after receiving it, and that he would have nothing to worry about if he done so. *Id.* Hawkins asked Nadauld if he had something to worry about, to which Nadauld stared at the officers for several seconds and then answered in the negative. *Id.* Nadauld stated that he did not want to show the officers the gun. *Id.* The officers discussed the incident in Balboa Park and—unprompted—Nadauld denied having been involved. *Id.* Nadauld then told the officers to wait at his door so that he could retrieve his automatic assault rifle and bring it to them. *Id*. at 24. Immediately following that comment, Hawkins insisted that he had to enter to verify the gun was inoperable. *Id.* The officers quickly found the operable gun and placed Nadauld under arrest. *Id.* at 24, 25. After questioning Nadauld, police were able to find and confirm McKennery as the shooter.

II. Procedural History

After his arrest, Nadauld was indicted by a San Diego County grand jury on nine counts of second-degree murder, nine counts of involuntary manslaughter, one count of lending an assault

weapon, and one count of failing to comply with California Penal Code § 30915. *Id.* at 1. Nadauld filed a motion to suppress the evidence found when he was arrested. *Id.* He challenged the constitutionally of the police's warrantless use of the ALPR database, the warrantless mounting of pole-mounted cameras, and that his Fourth Amendment rights were violated when the officers entered and searched his house without a warrant. *Id.* at 5. The Superior Court for the County of San Diego denied Nadauld's motion in its entirety. *Id.* at 12. The California Fourth District Court of Appeals then granted Nadauld's motion to suppress based on all grounds he raised except that of the constitutionally of the pole-mounted camera. *Id.* at 18, 20, 21. The State of California sought certiorari but the California Supreme Court denied. The State of California requested and was subsequently granted review by the United States Supreme Court.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals erred because the retrieval of images and location-based information about Nadauld's car from the automatic license plate recognition (ALPR) database does not constitute a search under the Fourth Amendment. In *Carpenter v. United States*, this Court implicitly recognized that the dragnet-type of police investigation using cell-site tower location information (CSLI) triggered different Constitutional principles. Those principles prompted this Court to hold that the use CSLI was a search even though it was information held out to the public and given to a third-party. In this case, the Fourth District Court of Appeals, without properly analyzing the characteristics of ALPR data, rotely applied *Carpenter*'s logic. The factors relating to CSLI data that triggered different constitutional principles are not present to the same degree with ALPR data. Because *Carpenter*'s reasoning does not apply, this Court's precedent in *Katz* v. *United States* and *United States v. Jones* demonstrates that the retrieval of ALPR data was not a search in this case.

Carpenter addressed only CSLI data, and this Court declared that the decision was narrow. Throughout the *Carpenter* decision, this Court focused on three different broad characteristics to demonstrate the uniquely concerning use of CSLI. The Court looked at (1) the depth, breadth, and comprehensive reach of information, (2) how deeply revealing the nature of it is, and (3) the inescapable and automatic nature of its collection. Comparing ALPR to CSLI through these three factors demonstrates how ALPR is more like traditional investigative techniques than it is the kind of dragnet-type tool that CSLI can be.

Because *Carpenter* does not control this case, it is clear that under this Court's precedent no search occurred when the ALPR data was retrieved. The State did not physically intrude onto Nadauld's automobile, so *Jones* would not apply. Nadauld had no subjective expectation of privacy, and this Court has long held that information held out to the public, like a person's movements in an automobile, is not generally protected by the Fourth Amendment. No search occurred, so no warrant would be required.

Also, the entry and search of Nadauld's house did not violate his rights under the Fourth Amendment. Warrantless searches are constitutional if there is probable cause to search and accompanying exigent circumstances. Here, probable cause to search Nadauld's house for the rifle used in the Balboa Park shooting and exigent circumstances arising out of the threat of harm or destruction of evidence were both present.

The officers had probable cause to search Nadauld's house because there was a fair probability that his rifle was used in the shooting and was in his house. Probable cause merely requires a fair probability that evidence or contraband will be found. Here, there was a fair probability that Nadauld's rifle was used in the shooting because of his significant association with Frank McKennery. Nadauld's rifle was one of the relatively few assault rifles in San Diego, and

McKennery was one of the relatively few whose vehicle was recorded leaving the crime scene. Their association was shown through the overlap between the locations of their two vehicles during the police investigation, the overlap between Nadauld's house and the vehicles that left the crime scene, and the fact that McKennery dropped off a large duffel bag at Nadauld's house just two days after the police inquired into his rifle. If Nadauld's access to an assault rifle, McKennery's access to the crime scene, and their association with each other did not establish probable cause that the rifle was used in the shooting, then Nadauld's suspicious responses to questioning by officers did. Similarly, McKennery dropping off the bag at Nadauld's house and Nadauld's suspicious behavior when questioned created probable cause that the rifle was in his house.

Exigent circumstances justified the warrantless search of Nadauld's house because there was a reasonable threat of harm or a threat of destruction of evidence. Both the threat of harm and the threat of the destruction of evidence can constitute an exigent circumstance. When the police showed up to investigate Nadauld's home after probable was established, his actions—combined with the other circumstances surrounding the investigation—created the reasonable threat of harm to the officers. Any reasonable officer in those circumstances would believe that Nadauld's statement, that he would go get the assault rifle while they waited out front, constituted a threat to their safety. The only other reasonable conclusion is that Nadauld was going to tamper with or discard the evidence. Either way, this combination of events constituted exigent circumstances.

The Fourth District Court of Appeals also erred in its exigent circumstances analysis. First, although officers' delay in investigating can be evidence that circumstances are not exigent, there was no delay in this case, so the court erred by holding that this investigation was not immediate. Second, when there is sufficient probable cause to search a home, officers do not need to seek a warrant instead of knocking on the door to speak with an occupant or to obtain consent to search,

so the court erred by holding that the officers should have stopped to obtain a warrant. Last, the court erred by failing to view the circumstances from the perspective of the officers on the scene and second-guessing their reasonable assessment of the dangers.

STANDARD OF REVIEW

"Whether police conduct amounts to a 'search' within the meaning of the Fourth Amendment is a mixed question of law and fact that is reviewed de novo." *United States v. Broadhurst*, 805 F.2d 849, 852 (1986). Determinations of probable cause are generally reviewed de novo. *Ornelas v. Unites States*, 517 U.S. 690, 699 (1996). However, reviewing courts should "take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS ERRED BECAUSE THE RETRIEVAL OF DEFENDANT'S INFORMATION FROM THE AUTOMATIC LICENSE PLATE RECOGNITION DATABASE DID NOT CONSTITUTE A FOURTH AMENDMENT SEARCH OF THE RESPONDENT.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Individuals do not get Fourth Amendment protection when no search or seizure has taken place. Under the Fourth Amendment, a search can occur in two situations. First, a search has occurred if "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *see Katz v. United States* 389 U.S. 347, 361 (1967). Second, a search has occurred if the government has physically intruded into "a constitutionally protected area in order to obtain information." *United States v. Jones*, 565 U.S. 400, 414 (2012) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J. concurring)).

Because the California Fourth District Court of Appeals' opinion focused heavily on this Court's decision in *Carpenter v. United States* it is important to note that *Carpenter* did not modify or change the fundamental understanding of when a search has occurred. Rather *Carpenter* merely evaluated whether a reasonable expectation of privacy existed in a specific fact pattern. The Court of Appeals erred when it attempted to transplant the reasoning of *Carpenter* onto the distinct fact pattern of the case at hand. A proper application of this Court's precedent demonstrates that the retrieval of information from the ALPR database was not a search under the Fourth Amendment.

A. The Fourth District Court of Appeals incorrectly extended *Carpenter* beyond its limited holding because the factors this Court discussed there are not satisfied in this case.

The *Carpenter* decision applied specifically to the recovery of cell-site location information (CSLI). CSLI is generated when cell phones scan the environment for the best possible signal; to do this, most modern phones connect to a wireless network multiple times a minute. *Carpenter v. United States* 138 S. Ct. 2206, 2211 (2018). When the phone connects to a network a time-stamped record is generated. *Id.* The location information generated increasingly becomes more precise as more cell sites are built within a geographic area. *Id.* at 2211–12. This process creates a vast amount of location data about anyone carrying a cell phone. *Id.* In *Carpenter*, police, through court orders, compelled Carpenter's wireless carriers to turn over CSLI generated from his phone. The government used that information to prove that Carpenter was "right where the . . . robbery was at the exact time of the robbery." *Id.* at 2213 (citation omitted). Carpenter challenged the government's retrieval of the CSLI data as a warrantless search. *Id.* at 2212–13. This Court ultimately held that it was a search under the Fourth Amendment and as such required a warrant because "an individual maintains a legitimate expectation of privacy in the record of his physical movements *as captured through CSLI*." *Id.* at 2217 (emphasis added).

Importantly, this Court noted that the decision it made was a "narrow one." *Id.* at 2220. This Court specifically stated that the decision does not "call into question conventional surveillance techniques and tools, such security cameras." The decision emphasized that the holding was intentionally narrow because "the Court must tread carefully . . . when considering new innovations" to ensure that it does not "embarrass the future." *Id.* (citing *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)). The Fourth District Court of Appeals did not properly evaluate if ALPR is the type of investigative tool that should be evaluated under the kind of analysis found in *Carpenter*. Simply overlaying the holding in *Carpenter* onto a wholly different set of facts incorrectly ignores this Court's insistence that the decision was narrow.

This Court in *Carpenter* stated that "no single rubric definitively resolves which expectations of privacy are entitled to protection" but attempts to anchor the decision around two "guideposts." *Id.* at 2214. The first is the idea that the Fourth "Amendment seeks to secure 'the privacies of life' against 'arbitrary power.'" *Id.* (quoting *Carroll v. United States* 267 U.S 132, 149 (1925)). The second is the idea that the "aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" *Id.* (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). In concluding that the retrieval of CSLI is a search, the Court with those guideposts in mind, appeared to focus on three specific factors: (1) the "depth, breadth, and comprehensive reach," of information, (2) its "the deeply revealing nature," and (3) "the inescapable and automatic nature of its collection." *Id.* at 2223. An analysis comparing the retrieval of CSLI data to that of ALPR data, through the lens of these three factors, reveals that ALPR is qualitatively different than that of CSLI and therefore should not be consider a Fourth Amendment search in the same way.

i. <u>The depth, breadth, and comprehensive reach of ALPR are all less than that of CSLI.</u>

This Court in *Carpenter* focused heavily on just how extensive the depth, breadth, and reach of CSLI is; the nature of ALPR data pales in comparison. Depth, breadth, and reach are closely related concepts. There are not precise definitions of these terms, but depth can be understood as having to do with how detailed and precise the information is. Paul Ohm, *The Many Revolutions of Carpenter*, 32 Harv. J. Law & Tech. 357, 372. Breadth can refer to the frequency of data collection, and comprehensive reach can be understood as being concerned with the number of individuals whose information is within the database. *Id.* at 372–73.

This Court expressed concern over the depth of CSLI data stating that it gives "the government near perfect surveillance." *Carpenter*, 138 S. Ct. at 2210. Further the Court noted that CSLI stores "the *whole* of [an individual's] physical movements." *Id.* at 2216-12 (emphasis added). CSLI provides the whole of an individual's movements because a "cell phone faithfully follows its owner beyond public thoroughfares" to essentially anywhere that its' owner goes as cell phones are "almost a 'feature of human anatomy.'" *Id.* at 2218 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). Because CSLI continues to create location data everywhere that a cell phone is taken, the Court concluded that it gives the government the ability to track an individual just as if they "had attached an ankle monitor" to the person.

The depth of ALPR data is far more shallow. Unlike CSLI data, ALPR data has no ability to create location-based data of an individual anywhere except on public thoroughfares. ALPR data does not "follow" an individual in the way that CSLI data does. CSLI data is made anywhere a cellphone is carried, so it tracks everywhere an individual goes. On the other hand, ALPR data is not even created everywhere someone may travel on a public road, rather it is far more sporadic. ALPR data is only created and logged when the license plate of an automobile passes by the lens of a special ALPR camera, and ALPR cameras are not omnipresent. ALPR data does not create

nearly the same precise or detailed kind of location-based information that CSLI does; at most ALPR provides intermittent information of only cars on public thoroughfares that happen to pass by an ALPR camera.

The breadth of CSLI data collection is also far fuller than that of ALPR data collection. Because ALPR data can only be generated when a car happens to pass by an ALPR camera, the frequency of data collection is substantially lower than that of CSLI data. In *Carpenter*, the government obtained 129 days of CSLI records which produced 12,898 location points. *Carpenter*, 138 S. Ct. at 2212. On average, the CSLI produced 101 data points per day that catalogued Carpenter's movements. *Id.*

Although the record here does not indicate how frequently data points are created for individual vehicles in the San Diego area, other ALPR systems are illustrative. In *United States v. Rubin*, the ALPR database captured the license plate of Rubin's vehicle once in San Francisco and "several" in Vallejo. *United States v. Rubin*, 556 F. Supp. 3d 1123, 1129 (N.D. Cal. 2021). The number of data collections that occurred in Vallejo was not in the record but the court concluded that information gathered "was not remotely comparable to the 'detailed encyclopedic' information" in *Carpenter*. *Id.* at 1129-30 (quoting *Carpenter*, 138 S. Ct. at 2216). ALPR does not gather location information in a volume that is comparable to that of CSLI.

This Court also found it critical that CSLI was "continually logged for all of the 400 million devices in the United States." *Carpenter*, 138 S. Ct. at 2218. The reach of ALPR is far smaller—only the license plates of those who pass by special cameras can be logged. Because ALPR systems only intermittently collect data points on the same vehicle, ALPR's reach is far less comprehensive compared to that of CSLI.

Due to the sheer number of times that CLSI data is collected at all times of the day, the detailed nature of the information, and the fact that it gathers data from all cell phone users it essentially provides 24-hour surveillance on a large swarth of the population. This is exactly the kind of "dragnet-type" of law enforcement that this Court in *Knotts* suggested might trigger "different constitutional principles" because it allows "twenty-four hour surveillance of any citizen of this country." *Knotts*, 460 U.S. at 283–84. Although the Court of Appeals claimed that dragnet-type practices are not limited to 24-hour surveillance, the court went too far when it defined any "coordinated measure of tracking location data to apprehend criminals" as dragnet. R. at 16. If this were the case, the fact pattern of *Knotts* would have triggered the different principles that this Court specifically declined to engage with. In *Knotts*, the police, with the permission of a chemical company, installed a beeper into a container of chloroform that was subsequently purchased. *Knotts*, 460 U.S. at 278. The police followed the purchaser of the container on public roads by coordinating visual surveillance and signals from the beeper that were received on a monitor. *Id.* The *Knotts* Court made it clear that this kind of coordinated search, even though it allowed police to follow the defendant's entire journey, was not dragnet and did not rise to the level of a "search." *Id.* at 281, 283-84. The defendant complained that the beeper allowed the police to be too efficient; this Court responded stating that it has "never equated efficiency with unconstitutionality" and would not start to. *Id.* at 284. Unlike the impermissible access of CSLI data or even the permissible beeper in Knotts, ALPR data would not enable police to completely follow an individual's car on its' entire journey. ALPR's sporadic images of cars on public roadways empower police to be more efficient, but it lacks the kind of depth, breath, and reach that led this Court to consider CSLI a "search" in *Carpenter*.

ii. <u>The nature of ALPR is not deeply revealing in the way that CSLI is.</u>

ALPR data does not have the same potential to reveal deeply sensitive information that the CSLI does. This Court worried about the kind of personal information that CSLI might show, stating that it could reveal "an intimate window into a person's life." *Carpenter,* 138 S. Ct. at 2217. Through CSLI, a person's "familial, political, professional, religious, and sexual associations" might be revealed. *Id.* (quoting *Jones,* 565 U.S. at 414 (Sotomayor, J., concurring)). This intimate window can be generated because individuals carry their cellphones "into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Id.* at 2218. Unlike the overarching image that can be painted with CSLI, ALPR can reveal nothing once an individual is not on a public thoroughfare; once an individual is not directly in front of a special ALPR camera they are no longer being monitored in anyway.

Travel on a public road can reveal information about an individual, but that information is not nearly as deep or private as that revealed by CSLI. ALPR data could demonstrate that an individual drove toward a city's downtown, were as CSLI data could demonstrate that a person spent a considerable amount of time downtown in church, at a bar, or convention center. Further, the only information that can be gleaned from ALPR is that which is clearly held out to the public. Generally, information held out to the public is not protected by the Fourth Amendment. *Katz,* 389 U.S. 347, 350 ("What a person knowingly exposes to the public, even in his own home or office is not subject to Forth Amendment protection"). Even in public, a person may be able to knowingly not expose certain behaviors or movement, but "[a] car has little capacity for escaping public scrutiny." *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). Based on those concepts, this Court has already decided that "the movements" and the "final destination" of a vehicle are not information that is protected by the Fourth Amendment. *Knotts,* 460 U.S. at 281. ALPR data does not generally shed the light on the full movements of a vehicle or necessarily reveal its' final

destination. *See United States v. Yang*, 958 F.3d 851, 855 (9th Cir. 2020). Information that can be gathered from ALPR is not deeply revealing in the way that CSLI data is.

iii. ALPR data collection is not inescapable and automatic in the way that CSLI data collection is.

This Court viewed CLSI data as inescapable because cell phones are "'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society." *Carpenter*, 138 S. Ct. at 2220 (quoting *Riley*, 573 U.S. at 385). This observation from *Riley* and *Carpenter* has only grown truer. This Court in *Riley* noted that cellphones could "easily be called cameras, video players . . . or newspapers." *Riley*, 573 U.S. at 393. Today, cell phones serve as physical credit cards, college IDs, event tickets, menus at restaurants, vaccine passports, and more. As phones continue to replace items that are needed in day-to-day life the inescapable nature of CLSI data continues to grow. Conversely, individuals are able to completely circumvent ALPR anytime they are not driving their vehicles on public thoroughfares. When a person exists their vehicle, ALPR cannot generate data location about them. Further, ALPR only reads license plates, so a person can avoid data information specific to them if they travel in a vehicle that is not their own (perhaps by using their cellphone to hail a ridesharing service). Notably, because ALPR cameras are not omnipresent, traveling on a road does not necessarily mean that ALPR data will be generated. ALPR data is not inescapable in the way that CSLI is.

ALPR data capture is also not automatic in the same way that CSLI data is. A "cell phone logs a cell-site by dint of its operation." *Carpenter* 138 S. Ct. at 2220. On the other hand, merely driving a vehicle does not generate ALPR data; only driving directly in front of an ALPR camera will generate location-based data.

The reasoning of *Carpenter* should not be overlayed onto any and all kinds of technological data gathering. Rather it should only apply when the depth, breadth, and comprehensive reach of

the information gathered is comparable to that gathered by CSLI, the information is of a deeply revealing nature as it is with CSLI, and the method of collection is as inescapable and automatic as CSLI. Data gathered by ALPR is not similar enough in any of these factors to extend the logic of *Carpenter* onto it.

B. Without an erroneous overextension of Carpenter's logic, a proper application of this Court's precedent demonstrates that no search was conducted against Nadauld.

Without the reasoning of Carpenter applied to the case, this Court should evaluate the gathering and retrieval of the ALPR data location of Nadauld's car using *Jones* and *Katz*. Under these cases, the gathering and retrieval of the ALPR data does not constitute a search because there was no physical intrusion onto Nadauld's property and Nadauld did not have a subjective expectation of privacy that was not objectively reasonable.

The Fourth District Court of Appeals blurred the *Jones* reasoning to make it more applicable to the case at hand. The court quoted the case saying that it held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" R. at 16. (quoting *Jones*, 565 U.S. at 404). The court then mistakenly focused only on the nature of the GPS device "as a continuous location indicator" and decided that, although the ALPR database does not act in that manner, it is still within the same "purview and should be designated as a search." R. at 16. Not only did the Court of Appeals fail to explain why the ALPR database falls into the same purview of GPS tracking devices, but it ignored the fact that the installation and use of the GPS device on Jones's car was held to be a search specifically because the police physical encroached onto a protected area, essentially committing common-law trespass, in order to obtain information. *Jones*, 556 U.S. at 408, 411. In

Nadauld's case, the Government did not physical intrude at all, so Nadauld cannot claim that a Fourth Amendment search occurred under *Jones*.

Nadauld's claim that a Fourth Amendment search occurred also fails under the *Katz* test because (1) he did not have the required subjective expectation of privacy regarding the location of his car while operating it on public streets, and (2) society is not ready to recognize such an expectation as reasonable. *See Kyllo*, 533 U.S. at 33.

The Court of Appeals incorrectly discarded the first factor because it felt that Nadauld had not done anything to "vitiate" his subjective expectation of privacy like the defendant in *Yang* did when he kept a rental car "six days after the contracted return date and disabled its GPS locater features." R. at 15. A subjective expectation is evident when an "individual has shown that 'he seeks to preserve [something] as private.'" *Knotts*, 460 U.S. at 281 (quoting *Katz*, 389 U.S. at 351) (alterations in original). Unlike the defendant in *Yang*, Nadauld never demonstrated an expectation of privacy that he could have spoiled because he drove on public roads.

Even if Nadauld expected privacy while driving an automobile on public roads, this is not an expectation that society would view as reasonable. The examination of the exterior of a vehicle, like photographing and scanning a license plate, does not constitute a search because it "is thrust into the public eye." *New York v. Class*, 475 U.S. 106, 114 (1986). Importantly and mentioned previously, when traveling in a car on public roads a person has "no reasonable expectations of privacy in his movements from one place to another." *Knotts* 460 U.S. at 281. The *Knotts* Court makes clear that a driver on public roads does not have a reasonable expectation of privacy in the information of what "particular roads" he traveled over, in "what particular direction" he traveled in, the "fact(s) of whatever stops he made," nor the "fact of his final destination when he exited from public roads onto private property." *Id.* 281–82. Additionally, given the relatively common

use of red-light cameras, toll booth cameras, and dashboard cameras, citizens are well aware that when they are driving in public there is a chance they may be recorded multiple times throughout their journey; nothing in modern society supports overturning this Court's previous caselaw. Because Nadauld traveled in an automobile over public roads, he had no reasonable subjective expectation that his route or final destination would be kept private.

The factors from *Carpenter* that recognize the uniquely pervasive nature of CSLI simply do not apply to ALPR data to any close degree. As such, the retrieval of the location data stored in the ALPR database of where and when Nadauld's car passed by an ALPR camera has to be evaluated under *Katz* and *Jones* without consideration to *Carpenter*. Under neither test can the retrieval be considered a search, therefore the Fourth District Court of Appeals erred in its decision holding that the use of the ALPR database was unconstitutional.

II. THE SEARCH OF THE DEFENDANT'S HOME DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS BECAUSE THERE WAS PROBABLE CAUSE TO SEARCH AND THE EXIGENT CIRCUMSTANCES JUSTIFIED A WARRANTLESS SEARCH.

"Because the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" search warrants are not always required to enter and search a home. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Ker v. California*, 374 U.S. 23, 33 (1963) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (overruled on other grounds)). Under this Court's established precedent, law enforcement officers can enter and search a home without a warrant if (1) the totality of the circumstances give rise to a probable cause that the place searched will contain evidence of a crime, and (2) there are accompanying exigent circumstances that make the entry and search reasonable. *See United States v. Ogden*, 485 F.2d 536, 539 (9th Cir. 1973). These exceptions align with the purpose of the Amendment, which "is

to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials." *Carpenter*, 138 S. Ct. at 2213 (emphasis added) (quoting *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 528 (1967)). Here, the entry and search of Nadauld's home was not arbitrary because there was both probable cause and exigent circumstances that made the warrantless search reasonable.

A. The officers had probable cause to search Nadauld's home for his rifle because there was a fair probability that it was the illegal weapon used in the shooting and that it was in the home.

"A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present." *Florida v. Harris*, 568 U.S. 237, 243 (2013) (alteration in the original) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion)). Probable cause is a "commonsense, practice question" that depends on the "totality-of-the-circumstances" and the specific facts of the case. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). This standard protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while also giving "fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Thus, probable cause merely requires "a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. A more stringent standard "would unduly hamper law enforcement." *Brinegar*, 338 U.S. at 176.

Appellate courts should "review findings of historical fact only for clear error and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, 517 U.S. at 699. They should give due weight to these inferences because appellate courts are "far removed from the scene and with the opportunity to dissect the elements of the situation." *Ryburn v. Huff*, 565 U.S. 469, 475 (2012) (per curiam).

Both Nadauld's rifle and McKennery could have been involved in the Balboa Park shooting. Because the shooting was committed with an automatic assault rifle, and Nadauld was one of fifty people in the area with a registered assault rifle, Nadauld's rifle could have been used to commit the crime. Likewise, because McKennery's vehicle was one of fifty to leave the crime scene, and the police could reasonably infer that the shooter must have left in a vehicle to conceal an assault rifle, McKennery could have been involved in the shooting. Although these facts alone are not enough to establish probable cause to search for Nadauld's rifle, they show that there was a probability that both it and McKennery could have been involved in the shooting.

The police also found a significant association between McKennery and Nadauld, which created a fair probability that Nadauld's rifle was used in the shooting. First, when cross-checking the movement of the vehicles of the fifty assault rifle owners and the fifty vehicles which left the crime scene, the police found considerable overlap between Nadauld and McKennery's vehicles. The Fourth District Court of Appeal erred by not giving weight to the officers' inference that the two drivers were associated. Instead, the court described the association as "arbitar[y]" because it did not include the people who left the scene on foot. R. at 19. However, because there were no reports of a person fleeing on foot carrying an assault rifle, the officers could reasonably infer that the suspect must have fled in a vehicle to conceal one. Of course, the shooter must have had access to an automatic assault rifle, so it was not arbitrary to infer a connection between the two drivers—one who could have left the scene with a rifle, and the other with access to a rifle.

Second, Nadauld's residence was one of ten that corresponded most to the location data of the fifty vehicles which left the crime scene—a fact which the Court of Appeals ignored. Last, McKennery was caught on video dropping off a large duffel bag at Nadauld's home, only two days after Nadauld received a letter inquiring about his rifle. If cross-checking the two lists of vehicles

did not establish an association between McKennery and Nadauld, surely these two facts do. Because there was a probability that both Nadauld's rifle and McKennery were involved in the shooting, this significant association between Nadauld and McKennery created probable cause that Nadauld's rifle was used in the shooting.

Despite its holding that there was not probable cause to search Nadauld's home, the Court of Appeals seemed to implicitly agree with the above reasoning. It noted, "the police already had reason to suspect McKennery. All the suspects known at this point could have been investigated with warrants." R. at 21. The only reasons in the record to suspect McKennery are identical to the reasons to suspect that Nadauld's rifle was used. Because probable cause is required to obtain a warrant, the court implied that there was probable cause to suspect that McKennery and Nadauld's rifle were involved in the shooting.

There was probable cause to search Nadauld's home because there was a fair probability that his rifle was there. The police reasonably inferred that the duffel bag which McKennery handed Nadauld contained Nadauld's rifle because of the suspicious circumstances. The police had reason to suspect that McKennery and Nadauld's rifle were involved in the shooting, so it was especially suspicious when McKennery dropped off a large duffel bag at Nadauld's home two days after Nadauld had been contacted about an inspection of his rifle. There was a fair probability that the bag contained the rifle because the police inferred that Nadauld asked McKennery to return it after he got the inspection notice.

Even if probable cause had not been established before the police arrived at Nadauld's home, his suspicious response to questioning allowed the police to reasonably infer that an illegal weapon was there. A person's suspicious response to questioning supports a finding of probable cause. *United States v. Ortiz*, 422 U.S. 891, 897 (1975). Even lawful conduct can "be regarded as

a matter of concern." *Ryburn*, 565 U.S. at 476. Here, Nadauld's noncommittal response and long pause to questions about whether the rifle had been rendered inoperable in accordance with state law allowed the officers to draw the reasonable inference that an illegal gun—and likely mass-murder weapon—was in the house. The Court of Appeals erred by discrediting the officers' inference about the suspiciousness of the responses because Nadauld "had a right to the privacy of his home and the privacy of his weapons." R. at 19. However, Nadauld's right to privacy is limited if the officers had probable cause to search his home, and suspicious but lawful responses still support probable cause. Along with totality of the circumstances, Nadauld's responses established probable cause to search the home for the rifle.

B. Exigent circumstances justified the warrantless entry and search because there was an objectively reasonable threat of imminent harm or destruction of evidence due to the combination of events leading up to the search.

When a search is "objectively reasonable under the Fourth Amendment" due to "the exigencies of the situation," a warrant to enter and search a home is not required. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)). Two commonly cited examples of exigent circumstances which create exceptions to the warrant requirement are "the need to . . . protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Carpenter*, 138 S. Ct. at 2223. Here, the officers' need to protect themselves or the public from the threat of imminent harm, as well as the need to prevent the imminent destruction of evidence, constituted exigent circumstances that made the search of Nadauld's home reasonable. The Fourth District Court of Appeals also erred by holding that the investigation was not immediate, and thus not exigent, and by requiring that the officers obtain a search warrant before going to speak with Nadauld.

i. The combination of events created circumstances that would make an objectively reasonable officer believe there was an imminent threat of danger or destruction of evidence.

"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Brigham City*, 547 U.S. at 403 (quoting *Mincey*, 437 U.S. at 392). However, officers do not have to be "motivated primarily by a desire to save lives" for the circumstances to be exigent. *Id.* at 404. Instead, the test is whether an objectively reasonable officer in that position would have believed "that there was an imminent threat to their safety." *Ryburn*, 565 U.S. at 475. Appellate courts should be cautious about second-guessing officers' fear of danger because they are far removed from the situation. *Ryburn*, 565 U.S. at 475.

A "combination of events," such as threats of a shooting and suspicious behavior when questioned, can create an exigent circumstance. *Id.* at 476–77. In *Ryburn*, police received word from a high school principal that there were rumors of a student writing a letter threatening to "shoot up" the school. After interviewing several of the student's classmates, the officers decided to go to the student's home to interview him. After the officers knocked on the door, called the home phone, and called the student's mother's cell phone, the student and his mother eventually came outside to talk to the police. After telling the student why they were there, the police asked the mother if they could continue the interview inside, to which she responded in the negative. The officers, in their experience, found that odd and asked if there were any guns in the house. Instead of responding, the mother ran back into the house, so the officers, fearing that she may get a gun, followed her in. They ultimately found that the rumors were false. *Id.* at 470–72.

When the student and mother challenged the entry under the Fourth Amendment, this Court held that exigent circumstances justified it because the officers reasonably concluded "that there was an imminent threat to their safety and to the safety of others." *Id.* at 474–75. This Court

reasoned that "a combination of events each of which is mundane when viewed in isolation may paint an alarming picture." *Id.* at 476–77. The combination of the rumors, the suspect's lack of response to knocking and calling, and the mother's suspicious response to questions were enough to create an imminent threat of violence. *Id.* Also, this Court said that it did not matter that the mother's act of turning and running into the house was lawful, because lawful acts can "be regarded as a matter of concern." *Id.* at 476. Even though there ended up being no threat of violence, the Court could not use "the benefit of hindsight and calm deliberation" to conclude that the entry was unreasonable. *Id.* at 477.

In this case, a very similar combination of events created a reasonable threat of danger to the police officers and others. Just like in *Ryburn*, where there were rumors of a school shooting threat, the Balboa Park shooter had left a note that more shootings were coming, and the police had just the day before received a call allegedly from the Balboa Park shooter that he was going to commit another mass shooting at a school. The main difference between this case and *Ryburn* is that the threat here was more imminent because there had actually been a shooting with nine fatalities just 15 days before, where the threat in *Ryburn* was solely based on school rumors.

Also, like *Ryburn*—where the mother's response to questions of whether there were guns in the house were suspicious and constituted a threat to the officers—Nadauld's response to questions were suspicious and constituted a threat to the officers. When asked about the rifle, Nadauld deflected and said he thought the officers were coming later. Then, when asked if there was anything to worry about, Nadauld had an unnatural pause before responding to the question. Finally, after initially refusing to allow the officers to see the rifle, Nadauld told the officers that he would get the rifle while they waited out front because his house was "messy." The officers could reasonably fear that Nadauld was going to get the rifle to use it against them. This threat was

even more imminent than in *Ryburn*—where the officers had no reason to believe that guns were in the house other than the mother's suspicious response—because as discussed above, the officers had probable cause to believe that a fully automatic and operational assault rifle was in the home and that Nadauld was a suspect in a mass shooting. It is irrelevant that Nadauld could lawfully refuse to allow the officers to enter his home to inspect the rifle because lawful conduct can "be regarded as a matter of concern," especially under these circumstances. *Ryburn*, 556 U.S. at 476. Any officer forced to make a split-second decision under these circumstances would be reasonable in believing that a threat to their safety was imminent, and the Court of Appeals should not have second-guessed the officers' fear of danger.

Alternatively, the reasonable "need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." *Kentucky v. King*, 563 U.S. 452, 462 (2011) (quoting *Brigham City*, 547 U.S. at 403). Under these circumstances, the only other reasonable conclusion an officer could draw after Nadauld's remarks is that he would attempt to render the weapon inoperable or otherwise try to discard the evidence. Once Nadauld offered to get the weapon while the officers waited outside, a reasonable officer would conclude that Nadauld would either become a threat to them, or a threat to destroy the evidence. In either event, these circumstances created an exigency that justified the entry and search of the home.

ii. <u>The Court of Appeals also erred by holding that the investigation was not immediate and by requiring the officers to obtain a warrant instead of speaking with Nadauld.</u>

Government agents' delay in entering and searching a premises that has been under investigation can be evidence that there are no exigent circumstances. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 358–59 (1977). In *G.M. Leasing*, IRS agents without a warrant, who had already entered the petitioner's building two days earlier, came back to seize the petitioner's

business records. This Court held that the agents' actions were proof that there were no exigent circumstances because if there had been, then the agents would not have delayed for two days. *See id.* However, it was not relevant to this Court's analysis that the tax fraud, which was the subject of the investigation, occurred two to three years earlier. *See id.*

In this case, there was no delay in the investigation that would indicate that circumstances were not exigent. The Court of Appeals noted, "The investigation took place two weeks after the Balboa shooting. At this point, the investigation was no longer immediate." R. at 20. However, it is clear from the facts of this case that the officers did not delay in searching the house for evidence once probable cause was established. Unlike the agents' two-day delay in *G.M. Leasing*, the officers in this case showed up to Nadauld's house to investigate within thirty minutes of McKennery dropping off a duffel bag that the officers had reason to believe contained an operable M16. Then, when Nadauld's evasive responses to questioning confirmed the officers' suspicion, they immediately searched the house for the dangerous weapon before it could be used against them or tampered with. The fact that the shooting occurred two weeks prior did not make the threat at the time of entry any less imminent. Thus, the court erred when it held that there were no exigent circumstances partly because the investigation was not immediate.

Additionally, when there is sufficient probable cause to search a home, officers do not need to seek a warrant instead of knocking on the door "to speak with an occupant or to obtain consent to search." *King*, 563 U.S. at 466; *see also id.* at 467 ("[L]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause.") (quoting *Hoffa v. United States*, 385 U.S. 293, 310 (1966)). In *King*, this Court listed several reasons for the rule, including that "a short and simple

conversation may obviate the need to apply for and execute a warrant" and obtaining consent to search "is simpler, faster, and less burdensome than applying for a warrant." *Id.*

In this case, the Court of Appeals held that there were no exigent circumstances in part because "there was ample time to procure a warrant." R. at 21. That reasoning directly conflicts with this Court's analysis in *King*. Once probable cause was established, the officers decided to continue the investigation and speak with Nadauld instead of pausing to obtain a warrant. The decision was especially reasonable in light of the ongoing threat of a school shooting. During their conversation with Nadauld, exigent circumstances arose which justified the entry and search of his home. Thus, the court erred when it held that the officers should have stopped to obtain a warrant instead of continuing its investigation.

Due to the events surrounding the entry and search of Nadauld's home, the officers were reasonable in believing that there was a threat of imminent harm or destruction of evidence at the time of entry. Also, the Court of Appeals erred by holding that the investigation was not immediate and by requiring that the officers obtain a warrant instead of speaking with Nadauld. Thus, there were exigent circumstances that justified the officers' entry and search of Nadauld's home.

CONCLUSION

The retrieval of information about Nadauld's vehicle from the ALPR database was not a search under the Fourth Amendment, so it did not require a warrant. Also, probable cause and exigent circumstances were present that justified the warrantless entry and search of Nadauld's house. Thus, the Petitioner asks this Court to reverse the California Fourth District Court of Appeals' decision and deny Nadauld's motion to suppress evidence.