Team 17

No. 1788-850191

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner

v.

NICK NADAULD,

Respondent

On Petition For Writ Of Certiorari

To The United States Court Of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Team 17

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Circuit Court Cases

Other Authorities

ISSUES PRESENTED FOR REVIEW

I. Under the Fourth Amendment privacy guarantees, did the Ninth Circuit Court of Appeals err in holding that the retrieval of defendant's information from the Automatic License Plate Recognition Database required a warrant?

II. Under our precedents, did the Ninth Circuit Court of Appeals err in holding that the warrantless entry and search of defendant's home violated defendant's Fourth Amendment rights?

STATEMENT OF FACTS

Retrieval of Location Data. On September 14, 2021, a masked shooter fired an M16A1 ("M16") automatic assault rifle on an open crowd from a rooftop in Balboa Park, killing nine people and injuring six others. R. at 2. Due to the lack of leads, officers employed various investigative methods to locate the shooter. R. at 3. Law enforcement first analyzed surveillance footage from security cameras in Balboa Park that captured forty unidentified individuals that fled on foot and fifty vehicles leaving the scene. R. at 3. Unable to match any of the forty faces with faces in the government database due to blurry footage, law enforcement then checked criminal records of the owners of the fifty vehicles that fled the scene and found no prior violent crimes. R. at 3. The list of fifty vehicle owners included a man named Frank McKennery. R. at 3. Law enforcement then cross referenced the list of fifty vehicle owners with registered assault rifle owners in the area and found none of them to be law enforcement and none of the fifty vehicle owners were on the assault rifle list, but one of the names on the assault rifle list was Nick Nadauld. R. at 3.

Police began retrieving public license plate information on the movements of the fifty vehicles that fled the scene of the shooting and the individuals on the assault rifle list. R. at 3. The public license plate information was obtained from the Automatic License Plate Recognition (ALPR) database, which only contained data sets of license plate numbers, photos of vehicles and geospatial locations from where the images were captured, no personal identifying information was associated with the data collected. R. at 38-39. Upon cross referencing the public vehicle movements of both groups, they found considerable overlap in Nadauld's vehicle and McKennery's vehicle being at the same location at similar times. R. at 3-4. On September 24,

2021, law enforcement placed cameras on utility poles to investigate the ten residences on the assault rifle list that corresponded most to the driving location data of the fifty vehicles that fled the scene including Nadauld's residence. R. at 4. On September 29th the pole mount cameras recorded McKennery pulling up at Nadauld's home and handing him a large duffle bag. R. at 4. FBI officers were then immediately dispatched to Nadauld's home to investigate R. at 4.

Warrantless entry and search of the home. On September 25th, 2021, and pursuant to California Penal Code 30915, law enforcement mailed letters to the ten residences stating that they would be coming in a month to verify the inoperability of their rifles. R. at 4. On September 27th, 2021, Nadauld received his letter. R. at 4. On September 28th, 2021, an anonymous call was made to the police stating that the caller was the Balboa Shooter, and the next target would be a school. R. at 4. On September 29th, 2021, Officers Hawkins and Maldonado arrived at Nadauld's house 30 minutes after McKennery left and after pole mount cameras recorded the exchange of the large duffle bag from McKennery to Nadauld. R. at 4. Upon arrival, Officers questioned Nadauld outside of the front door about his rifle. R. at 4. Nadauld's initial response was "I thought you guys were coming in a month to talk about that." R. at 23. When officers reminded Nadauld that his rifle was supposed to be rendered inoperable and asked to see the rifle, Nadauld stated "I don't want to show you that now, you said you would come in a month." R. at 23. Officers then insisted on seeing the rifle to make sure all assault weapons were accounted for and asked Nadauld if he had heard about the Balboa shooting. R, at 23. Nadauld replied that he "didn't have anything to do with that" and asked officers "why don't you wait here while I go get it?" R. at 23. When Officer Hawkins stated they needed to come into the house with Nadauld to verify the weapon was rendered inoperable, Nadauld then shifted his reason for wanting them to wait outside to the fact that his house was kind of messy. R. at 24. Officer Hawkins then walked into the home, Nadauld

stepped aside, and Officer Maldonado began searching the rooms. R. at 24. While searching the rooms, Officer Maldonado observed the rifle in plain view in Nadauld's bedroom. Stipulation and Order dated October 6, 2021, at 1. After Officer Hawkins informed Nadauld he was now the prime suspect for the Balboa shooting, Nadauld stated that he did not have the rifle at that time and had loaned the rifle to McKennery. R. at 24. Officer Hawkins then placed Nadauld under arrest. R. at 25.

SUMMARY OF THE ARGUMENT

Mass shootings have increased throughout the United States of America and have destroyed families and devastated communities, including the San Diego community that was terrorized by the Balboa Park shooter. This case is not about privacy right intrusions, but is about recognizing society's acceptance that reasonable tracking, aggregation of publicly available data, and entry into a home under exigent circumstances is a necessary cost for public safety.

The Fourth Amendment provides protections for expected areas of privacy that are recognized as reasonable by society. Law enforcement's access to Nadauld's vehicle movement data is not a violation of Nadauld's Fourth Amendment rights because society does not recognize movements that occur on public roadways as private. Although law enforcement had aggregated captured ALPR data, the aggregation was for a short period of time and did not intrude upon any private areas that society would deem intrusive and unreasonable. However, even if the data from the ALPR is considered to fall within the purview of the Fourth Amendment, law enforcement acted on reasonable suspicion and good faith. In this case, law enforcement was able to determine that Nadauld was a person of interest because his vehicle movements cross referenced that of McKennery. As such, law enforcement has reasonable suspicion and acted in good faith when they accessed the ALPR data for investigatory purposes.

In addition, law enforcement's use of the mounted pole camera was not a violation of Nadauld's Fourth Amendment rights because the camera captured the external portion of Nadauld's home which was already in view by the public eye. As such, there was no expectancy of privacy and no applicability to Fourth Amendment protections.

Regarding the second issue, it has been well established under our precedents, that without probable cause and exigent circumstances a warrant is required for search and seizure of an individual's home. It has also been well established that determinations of probable cause and the existence of exigent circumstances must be viewed by the totality of the circumstances.

In *Welsh v. Wisconsin*, this court held that the gravity of the underlying offense was an essential part of the exigency calculus. In this case, the factors to be considered under the totality of the circumstances test were that nine people had been killed and six injured in a mass shooting, the anonymous call threatening a school would be the next target, the association of a rifle owner and a person who was at the park the day of the shooting and the recorded activity of a large duffle bag being passed between those two people. Given these factors, Officers had probable cause to reasonably believe that Nadauld had committed or was involved in a crime, that evidence to be sought would be found in his home and that there was sufficient basis to suspect that incriminating evidence would be destroyed and that there was an immediate threat to officer and public safety. Thus, the Court of Appeals erred in holding that warrantless entry and search of defendant's home violated defendant's Fourth Amendment rights.

STANDARD OF REVIEW

This Court reviews the Ninth Circuit's reversal of the district court's denial of Nadauld's motion to suppress evidence. The reviewing court should review findings of historical fact only

for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The district court's findings of fact are upheld unless clearly erroneous. *United States v. Hill*, 195 F.3d 258, 264 (1999). The government does not challenge the district court's finding of fact regarding the modality in which the evidence was obtained against Nadauld. Instead, the government's challenge is based on legal conclusions made by the district court related to the Fourth Amendment. As such, de novo is the appropriate standard of review that should be applied in this case.

ARGUMENT

I. LAW ENFORCEMENT'S RETRIEVAL OF NADAULD'S LOCATION DATA FROM THE ALPR SYSTEM DID NOT CONSTITUTE A FOURTH AMENDMENT SEARCH BECAUSE OF THE NONEXISTENCE OF PRIVACY EXPECTATIONS.

The Fourth Amendment stipulates that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. A person has an expectation of privacy when one has exhibited an expectation that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). (Harlan, J., concurring). Therefore, an intrusion in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless there is an expectation of privacy. *New York v. Class*, 475 U.S. 106, 106 (1986). This Court has recognized a lesser expectation of privacy in motor vehicles because vehicles travel on public throughfares. *New York*, 475 U.S. at 113 (quoting *Cardwell*, 417 U.S. 583, 590).

In this case, the Ninth Circuit incorrectly reversed the District Court's order, denying Nadauld's motion to suppress Nadauld's ALPR location data, because the Fourth Amendment protection against unreasonable searches and seizures does not apply to ALPR data which captures public movements in the interest of protecting society.

A. Nadauld Did Not Have an Expectation of Privacy With the Data Stored in the ALPR Because His Captured Vehicle Movements Had Occurred On Public Roadways That Were Already Visible to the Public.

Nadauld did not have an expectation of privacy because his vehicle movements were captured on public roadways. An expectation of privacy exists where one intends to keep an object, activities, or statements private. *Katz*, 389 U.S. at 361. Individual expectations of privacy must stand society's test of whether the government's intrusion jeopardizes privacy values protected by the Fourth Amendment. *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (court held that respondent's expectation of privacy concerning his marijuana plants was not reasonable because the Fourth Amendment does not require police traveling in public airways to obtain a warrant).

The *Knotts* case is an indication that driving an automobile on public roads are not grounds for a reasonable expectation of privacy. In *Knotts*, law enforcement installed a GPS beeper in a container of chloroform after receiving a tip that the defendant was stealing drugs that could potentially be used for manufacturing illicit drugs. *United States v. Knotts*, 460 U.S. 276, 277 (1983). The defendant placed the container in his vehicle which allowed law enforcement to track and discover that the defendant was operating an illegal drug laboratory. *Id.* at 279. The court held, "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. The court reasoned that the defendant voluntarily displayed his location, while traveling on public streets, and therefore did not have the same expectation of privacy that would have been evident in a dwelling. *Id.* at 281.

The ALPR only collects license plate information from vehicles on public roadways, public property, and vehicles that are within public view. In this present case, Nadauld, like the defendant in *Knotts* who traveled in an automobile on public thoroughfares, had also traveled in an automobile on public thoroughfares where there was a lack of expectation of privacy. As such, law enforcement, like in *Knotts* where the police were able to use the publicly tracked vehicle movements to discover illegal activity, were also permitted to use publicly captured ALPR vehicle movements as part of law enforcement's investigation. The ALPR publicly collected information is therefore excluded from any reasonable expectation of privacy and does not violate Nadauld's Fourth Amendment rights.

B. The License Plate On Nadauld's Vehicle was in Plain View to the Public which Dissipated Any Reasonable Expectation of Privacy in the Information Contained in His License Plate and Therefore Permitted Law Enforcement to use Nadauld's License Plate Number to Obtain Information in the ALPR.

The license plate on Nadauld's vehicle was in plain view to the public which removed any reasonable expectation of privacy. The Fourth Amendment protects that which an individual wants to keep private. *United States v. Ellison*, 462 F.3d 557, 561 (2006). There is no expectation of privacy for objects that are required to be visible on the exterior of an automobile. *Id.* at 561 (quoting *Harris* 390 U.S. 234, 236). A car's license plate number is constantly open to public view of passersby. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (1999) (court held that there was no expectancy of privacy in the defendant's license plate number because like the area outside the curtilage of a dwelling, a car's license plate is not hidden and is openly viewable).

The nonexistence of an expectation of privacy for the investigation of a license plate is present in the *Ellison* case. In *Ellison*, a patrol officer noticed that the defendant was illegally

parked in a fire lane. *Ellison,* 462 F.3d at 559. The patrol officer observed the defendant's license plate and entered the license plate number into a police database. *Id*. at 559. The search revealed the defendant had an outstanding felony warrant and the defendant was subsequently arrested. *Id.* at 559. The court held that there is no expectancy of privacy related to a license plate number. *Id.* at 561. The court reasoned that the location of the license plate in plain view and the need for the government to regulate automobiles removes any indication that privacy is warranted. *Id.* at 561. Further, the court reasoned that since a license plate number has no expectation of privacy, non-private information retrieved from a license plate does not fall under purview of the Fourth Amendment. *Id.* at 562. The court argued that the use of law enforcement database is to make information available for carrying out legitimate law enforcement duties. *Id.* at 562.

Nadauld does not have an expectation of privacy of his license plate because his license plate was externally located on his automobile. Like in *Ellison,* where the police observed the defendant's license plate in a location that the police were legally permitted to make such an observation, the ALPR captured public views of Nadauld's vehicle that would have been viewable by the police absent the ALPR technology. The ALPR technology was nothing more than an investigation tool to aid law enforcement in facilitating societal safety. Like in *Ellison,* where the police, after observing the defendant illegally parked in a fire lane, had a lawful purpose for cross referencing the defendant's license plate to a police database, the police had a lawful purpose of cross referencing Nadauld's ALPR data because Nadauld's vehicle movements had overlapped with McKennery's vehicle movements that were captured leaving the scene of the violent shooting.

Nadauld's name appeared on a list of registered assault rifle owners in the area where the shooting occurred, which subsequently led to the police cross referencing Nadauld's movements

with that of vehicles captured leaving the crime scene. Nadauld's movements were publicly captured and examined within the confines of a legitimate law enforcement purpose and investigation. There can be no expectation of privacy for non-private information held in an electronic database. In this case, the ALPR was used as a "pointer system" that enhanced law enforcement's ability to protect the safety and wellbeing of society.

C. Nadauld's ALPR Aggregated Location Data Over a Short Period of Time Are not Grounds to Permit Nadauld to Be Afforded Fourth Amendment Expectation of Privacy Because the Information Was Limited in Scope.

Law enforcement's use of the ALPR data to aggregate Nadauld's location data is not a violation of Nadauld's Fourth Amendment rights, because the aggregation was limited in scope and was publicly available information. Societal expectation of the reasonableness of privacy expectation is based not on what a person could do but what a reasonable person expects another might actually do. *Bond v. United States*, 529 U.S. 334, 338 (2000).

Societal expectations of the reasonableness of aggregated positioning data can be seen in the *Jones* case. In *Jones,* the defendant was under investigation for an illegal drug distribution operation. *United States v. Jones*, 565 U.S. 400, 402 (2012). During the investigation, agents installed a GPS tracking device on the defendant's automobile. *Id.* at 403. Over 28 days, law enforcement tracked the vehicle's movements which provided over 2,000 pages of data. *Id.* at 403. Subsequently, the defendant was charged based on the location data that was obtained from the GPS tracking device. *Id.* at 403. The court held that the installation of the GPS device on the defendant's vehicle was a physical trespass and the use of the device to monitor the vehicle's movements was a search. *Id.* at 404. The court reasoned the *Katz* reasonable expectation of privacy test was added to and not substituted for the common law trespassory test and therefore

was applicable. *Id.* at 409. However, Justice Sotomayor highlighted that long term non-trespassory surveillance techniques over an extended period of time impacts expectations of privacy. [1] *Id.* at 415. (Sotomayor, S., concurring).

In this case, law enforcement's use of the ALPR did not infringe upon Nadauld's expectation of privacy. Unlike in *Jones,* where a GPS device was used to track every move of the defendant's vehicle movements, the ALPR database does not provide continuous data of defendant's movements as the ALPR can only collect a snapshot of vehicle information where the ALPR cameras are physically located. As such, the use of the ALPR database is not intrusive as GPS monitoring and therefore no reasonable societal expectation of privacy exists. Although law enforcement aggregated the ALPR data points to determine the overlapping of locations between Nadauld's vehicle and McKennery's vehicle, the aggregated data was still limited to where the ALPRs were publicly located; unlike in *Jones,* where law enforcement physically intruded on the defendant's vehicle, monitored his movements 24 hours a day for 28 days, and collected 2,000 pages of aggregated data.

The aggregated APLR data did not infringe upon Nadauld's Fourth Amendment rights because it was not continuous in nature and its intrusiveness was limited to the physical locations of the ALPR. As such, there is no societal expectations of privacy and therefore no search.[2]

D. Even if Law Enforcement's Retrieval of the Defendant's Electronic Location Data from the ALPR is Considered a Search, the Requirement For A Warrant Was Not Necessary Due to Law Enforcement's Reasonable Suspicion and Good Faith conduct.

[1] Short term monitoring of one's movements on public streets are expectations of privacy that society has recognized as reasonable. *Id.* at 430 (Alito, S., concurring).

[2] Justice Alito in his concurrence notes that the availability of new technology will continue to "shape the average person's expectations about the privacy of his or her daily movements" and that a legislative body is in the best position to balance privacy and public safety. *United States v. Jones*, 565 U.S. 400, 429-30 (2012).

Law enforcement had the right to use the ALPR database to retrieve Nadauld's vehicle location information because of reasonable suspicion that Nadauld was a suspect in the horrific Balboa Park shooting. The Fourth Amendment permits an officer to conduct a traffic stop to prohibit a person from criminal activity. *Kansas v. Glover*, 140 S. Ct. 1183, 1186 (2020) (quoting *United States v. Cortez*, 449 U.S. 411, 417-418). "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Id.* at 1186 (quoting *Navarette v. California*, 572 U.S. 393, 397). The standard is dependent on the factual and practical considerations of everyday life that reasonable and prudent men act. *Id.*at 1188 (quoting *Navarette v. California*, 572 U.S. 393, 402). Reasonable suspicion falls below 51% accuracy. *Id.* at 1188 (quoting *United States v. Arvizu*, 534 U.S. 266, 274). Reasonable suspicion is abstract and cannot be reduced to a set of neatly placed legal rules. *Id.* at 1190 (quoting *Arvizu*, 534 U.S. at 274). Reasonable suspicion considers the totality of the circumstances. *Id*, at 1191 (quoting *Navarette*, 572 U.S. at 397).

Law enforcement's reasonable suspicion to proactively ensure public safety was evident in the *Glover* case. In *Glover*, the police officer was aware that the register owner of a truck had a revoked license and that the observed vehicle matched the register's owner's truck. *Glover*, 140 S. Ct. at 1188. Based on these facts, the officer drew an inference that Glover was likely the driver of the vehicle and initiated a stop based on this inference. *Id.* at 1188. The court held that the officer had enough facts to establish reasonable suspicion to initiate the stop. *Id*. at 1188. The court reasoned that drivers of vehicles are usually the owner of the driven vehicle and that such an inference is made by ordinary people daily. *Id.* at 1189.

Reasonable suspicion connected to binding appellate precedent enables law enforcement to act towards the furtherance of public safety without privacy infringements. In *Davis*, police officers made a traffic stop and arrested the defendants. *Davis v. United States,* 564 U.S. 229, 235 (2011). The police then searched the passenger compartment and found a revolver. *Id*. at 235. The court held that the exclusionary rule would not apply because the police conducted a search based on a good faith reliance on binding judicial precedent.[3] *Id.* at 240. The court reasoned that the officer's conduct was not deliberate, reckless, or grossly negligent and that they acted in accordance to binding precedent. *Id.* at 240.

Law enforcement had reasonable suspicion and acted in good faith when they accessed the ALPR database to examine Nadauld's vehicle movements. Like in *Glover*, where the officers drew inferences to support the stop of the defendant, the officers in this case drew a reasonable inference from their experience and common knowledge that the shooter would more likely than not be one of the vehicles caught leaving the scene on the security surveillance footage. The officers then compared the identified vehicles to the vehicle movements of those who were registered as assault rifle owners. Like in *Davis*, where the officers relied on previously set precedent that allowed for law enforcement to conduct searches of vehicle compartments, the officers in our case relied on good faith accepted precedent that allowed access to ALPR data for law enforcement investigatory purposes.

Reasonable men would not disagree on the need to use good faith and reasonable, customary law enforcement efforts to identify an assault rifle shooter, who indiscriminately killed nine people and injured six others, and who had the propensity to attack innocent people

[3] This search was based on the *Belton* Rule. In *New York v. Belton,* the question was raised whether the occupants Fourth Amendment rights were violated when a search of the inside of

again. The officers in this case did not act recklessly and their efforts were minimally intrusive and necessary to save lives. As such, there was no violation of Nadauld's Fourth Amendment rights.

II. OFFICERS USE OF A STATIONARY MOUNTED POLE CAMERA DID NOT VIOLATE NADAULD'S RIGHTS UNDER THE FOURTH AMENDMENT BECAUSE THE CAMERA OBSERVED THE SAME VIEW AS ANY PASSERBY ON PUBLIC ROADS.

Nadauld Fourth Amendment rights were not violated with the use of the mounted pole camera, because there is no expectation of privacy for areas that are viewable by any passing pedestrian on a public road. A person has an expectation of privacy when one has exhibited an expectation that society recognizes as reasonable. *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

This Court's viewpoint on the constitutionality of the use of mounted pole cameras can be seen in the *Houston* case. In *Houston*, law enforcement agents, without a warrant, installed a surveillance camera on a public utility pole that was pointed directly at the defendant's trailer and barn. *United States v. Houston*, 813 F.3d 282, 286 (2016). The agents monitored the defendant's home for ten weeks and during that period had obtained a warrant due to the holding of the *Anderson-Bagshaw* case.[4] *Id*. at 286. The defendant was subsequently arrested pursuant to the pole camera video which captured the defendant's illegal possession of guns. *Id.* at 287. The court held that there was no Fourth Amendment violation, because the defendant did not have a reasonable expectation of privacy from a camera that was located on top of a public utility pole. *Id.* at 288.

[4] The court in dicta had expressed concern regarding long term video surveillance, but failed to formally decide on this issue given that any possible Fourth Amendment violation was harmless in this case. *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 405 (6th Cir. 2016)

The court reasoned that what was captured on video was nothing more than what the defendant made public to any person traveling on the road. *Id.* at 288. The court also reasoned that the length of the surveillance and the warrant that was not initially obtained, was irrelevant because the Fourth Amendment does not punish law enforcement for using technology to conduct their investigations more efficiently in the confines of a public setting. *Id.* at 288.

Nadauld did not have an expectancy of privacy towards the outside of his home because it was viewable by the public. Like *Houston,* where the agents installed a mounted pole camera that directly faced the defendant's trailer and barn, the mounted pole camera in this case was directly pointed towards the exterior of Nadauld's home already accessible to the public eye. Further, the pole cameras in this case viewed Nadauld's home from September 24, 2021, through September 29, 2021, where in *Houston,* the pole cameras viewed the defendant's home for ten weeks of which the *Houston* court determined the length of time of the surveillance was irrelevant given that the captured views were the same views that would have been witnessed by the public.

The First[5], Fourth[6], Ninth[7], and Seventh[8] Circuits have also approved the use of cameras in police investigations and have decided that there is no expectation of privacy for viewable areas to the public eyes, which includes the publicly observable areas of one's home. As such this Court

[5] See *United States v. Bucci*, 582 F.3d 108, 116-17 (1st Cir. 2009) holding no expectation of privacy even though his home was under surveillance from a utility pole for eight months.
[6] See *United States v. Vankesteren,* 553 F.3d 286, 288-91 (4th Cir. 2009) holding a video camera placed in open fields did not violate the Fourth Amendment.
[7] See *United States v. Gonzalez,* 328 F.3d 543, 548 (9th Cir. 2003) holding defendant did not have reasonable expectation of privacy that prevented the video surveillance of activities already visible to the public.
[8] See *United States v. Tuggle*, 4 F.4th 505, 514 (7th Cir. 2021) holding defendant's house and driveway were plainly visible to the public which eliminated any expectation of privacy that society would be willing to accept as reasonable in front of one's home.

should follow the precedent set by the First, Fourth, Ninth, and Seventh Circuits, and hold that the use of the mounted pole cameras did not violate Nadauld's Fourth Amendment rights.

III. THE EVIDENCE OBTAINED FROM THE APLR AND THE POLE MOUNTED CAMERA DID NOT INFRINGE UPON THE DEFENDANT'S FOURTH AMENDMENT RIGHTS AND THEREFORE THE EVIDENCE OBTAINED IS IMMUNE TO THE FRUIT OF THE POISONOUS TREE DOCTRINE.

The evidence obtained from the ALPR and pole mounted camera was derived from public settings where there is no reasonable expectation of privacy. "[T]he 'fruit of the poisonous tree' doctrine bars the admissibility of evidence which police derivatively obtain from an unconstitutional search or seizure." *United States v. Galaviz*, 645 F.3d 347, 354 (6th Cir. 2011) (quoting *Pearce,* 531 F.3d 374, 381 (6th Cir. 2008). The exclusionary rule is supplemented by the fruit of the poisonous tree doctrine because it prevents the admissibility of evidence that derives from an unconstitutional search or seizure. *United States v. Pearce*, 531 F.3d 374, 381 (6th Cir. 2008). In this case, there was no search because there was no reasonable expectation of privacy as the evidence obtained from the ALPR and pole cameras were viewable to any passerby. Without an unconstitutional search, there can be no application of the fruit of the poisonous tree doctrine. Therefore, this Court should permit the admissibility of the evidence obtained.

IV. THE WARRANTLESS ENTRY AND SEARCH OF DEFENDANT'S HOME DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS BECAUSE OFFICERS HAD PROBABLE CAUSE.

Under the 4th amendment all persons are provided the right to be secure in their homes, against unreasonable searches and seizures. U.S. Const. amend. IV. Probable cause is not a high bar, it only requires the kind of 'fair probability' on which 'reasonable and prudent' people, not legal technicians, act. *Kaley v. United States,* 571 U.S. 320, 338

(2014). "Probable cause exists where, under the totality of the circumstances, there is "a fair probability or substantial chance of criminal activity." *United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019). While "exigency may be substituted for a warrant, probable cause must be present before either a warrant or exigency will allow a search.". *United States v. Quarterman*, 877 F.3d 794, 799 (8th Cir. 2017). "Despite the protections of the Fourth Amendment, and the preference for search warrants, a search without a warrant is legal when "justified by both probable cause and exigent circumstances." *Kleinholz v. United States*, 339 F.3d 674, 676 (8th Cir. 2003).

In this case, the lower court's holding that the warrantless entry and search of the Nadauld's home violated his Fourth Amendment rights was improper because probable cause and exigent circumstances existed.

A. Probable Cause Existed, Under the Totality of the Circumstances Test Because Officers Drew Inferences Based on All Factors.

The totality of the circumstances test under the Fourth Amendment requires that determinations of probable cause should focus on all circumstances of a particular case rather than any one factor. *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994). When law enforcement identifies particular facts and rationally draw inferences from those facts, those facts must create a reasonable suspicion of criminal activity, when viewed under the totality of the circumstances. *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993). "In establishing probable cause, law enforcement officials enjoy substantial latitude in interpreting and drawing inferences from factual circumstances." *Id. at* 589. In this case, the totality of the circumstances and inferences were based on and drawn from the recent anonymous call, the ALPR data, the pole mount camera recording and the association with McKennery.

B. The Warrantless Search of Nadauld's Home was Justified Under the Fourth Amendment Because Officers Reasonably Believed There Was a Fair Probability that Evidence of a Crime Would be Found.

There was probable cause to believe that Nadauld was involved in criminal activity because of the seamless relationship of his ownership of a rifle, personal associations and overlap of movements with persons that fled from the shooting. "Probable cause will be found to have been present if the officers at the scene collectively possessed reasonably trustworthy information sufficient to warrant a prudent policeman in believing that a criminal offense had been or was being committed." *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995).

"Probable cause for a search exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that evidence of a crime would be found." *Kleinholz*, 339 F.3d at 676; *United States v. Meyer*, 19 F.4th 1028, 1031 (8th Cir. 2021).

The totality of circumstances and fair probability requirements are highlighted in the *Kleinholz* case. In *Kleinholz*, law enforcement had received an anonymous tip of an illegal methamphetamine lab in the front bedroom at a home with a description similar to where Kleinholz lived. *Id*. at 677. The officers smelled a substance known to be used in the making of methamphetamine when they approached his porch and they had just arrested his friend on the porch for possession of drug paraphernalia. *Id*. Officers entered the home without a warrant, found the illegal lab and Kleinholz was indicted for manufacturing methamphetamine and moved for a motion to suppress under the Fourth Amendment. *Id*. at 676. The court held that the entry without a warrant was not unconstitutional under the Fourth Amendment. *Id*. at 677. The court reasoned that the facts of the case taken together indicated probable cause existed and due to the volatile nature of methamphetamine labs, exigent circumstances also existed and justified an immediate, but limited search. *Id*.

Here, defendant was found to have a legally registered assault rifle and his vehicle had considerable overlap of being at the same location of McKennery, a person identified as one of fifty people whose car fled the scene the day of the shooting. Officers had received an anonymous call from someone claiming to be the Balboa shooter and threatening to shoot up a school next. One day after receiving the threat that the next target would be a school, the pole mount cameras recorded McKennery pulling into Nadauld's driveway and giving him a duffle bag large enough to hold an assault rifle. When officers arrived at Nadauld's home thirty minutes after McKennery left, questioning him about his rifle, Nadauld refused to show them the rifle and stated, "I don't want to show you that now, you said you'd come in a month." At that point, like the officers in *Kleinholz*, officers Hawkins and Maldonado had probable cause to enter and search Nadauld's home, given the totality of the circumstances and facts known to officers at the time. In *Kleinholz*, as in the instant case, probable cause was based on the fair probability the defendant was involved in or had been involved in criminal activity. Officers were not sure who the Balboa shooter was, but Nadauld was one of the few leads they had with an association to an individual who was at the shooting. Hawkins and Maldonado had a reasonable belief that the evidence sought was connected with criminal activity and would be found in Nadauld's home.

In Meyer, agents knew and had drawn inferences from several pieces of evidence before and after talking with Meyer at his home. *Meyer*, 19 F.4th at 1032. Because agents knew of Meyers ties to individuals involved in the abuse, had stayed with them when he visited, paid money to them and had not told his wife about the money he spent, agents had probable cause to enter Meyer's home at the time they decided to do so. *Id.* As in the instant case, officers Hawkins and Maldonado knew of Nadauld's ownership of the rifle, his overlap between he and McKennery's locations as well as the duffle bag that had been handed to him by McKennery. Officers had

probable cause like the agents in Meyer because it was not hard to conclude there was a fair probability of Nadauld's involvement.

Considering all of these facts, a reasonably prudent person would conclude there was a substantial chance Nadauld was involved in the criminal activity being investigated and contraband or evidence would be found in his home.

V. EXIGENT CIRCUMSTANCES JUSTIFIED A WARRANTLESS ENTRY AND SEARCH TO PREVENT DESTRUCTION OF EVIDENCE AND ENSURE PUBLIC SAFETY.

The circumstances surrounding the warrantless entry and search were exigent because there was a sufficient basis to suspect incriminating evidence would be destroyed. Exigent circumstances cause a reasonable officer to believe "that entry was necessary, urgent to act upon and impractical to secure a warrant" in order to prevent physical harm to officers or other persons. *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984). The exigency is viewed from the totality of circumstances known to the officer at the time of the warrantless intrusion. *United States v. George*, 883 F.2d 1407, 1412 (9th Cir. 1989). If "the exigencies of a situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable" then the warrantless search of a home is not unreasonable under the Fourth Amendment. *Quarterman*, 877 F.3d at 797. Exigent circumstances commonly include, threatened destruction of evidence inside a residence before a warrant can be obtained and a threat, posed by a suspect, to the lives or safety of the public, or police officers. *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995). "When there is "a sufficient basis" to suspect that incriminating evidence will be destroyed, exigent circumstances exist." *Meyer*, 19 F.4th at 1031.

The court's decisions and reasoning in the *Meyer* case reflect the understanding of the law governing exigencies. In *Meyer*, federal agents discovered financial ties between Meyer and pedophiles in the Philippines. *Id*. Agents decided to do a knock and talk with Meyer to gather information, this talk occurred in the agent's car. *Id*. During the discussion Meyer admitted to using his cellphone and computer to contact individuals involved in the abuse and that he had personal and financial ties to them. *Id*. When agents asked if he would turn the devices over for examination, Meyer stated that he would hand them over later and that he needed to check his email first. *Id*. Agents expressed they thought Meyer handing the devices over later would give him a chance to destroy evidence and at this time Meyer again refused stating his house was a mess. *Id*.

Meyer then went back into his home, agents worried that he would destroy evidence called a prosecutor for advice on if the circumstances were exigent. *Id*. When agents were told that exigent circumstances existed, they knocked on Meyer's door, searched his home for the electronics and seized two computers, a cellphone, and a hard drive. *Id.* The devices revealed evidence of child pornography, Meyer moved to suppress everything the agents found. *Id*. The court held that a reasonable person could believe that there was a fair probability that evidence of a crime would be found in the place to be searched and that officers had a sufficient basis to reasonably believe Meyer would imminently destroy evidence. *Id*. at 1032. The court reasoned that Meyers suspicious answers and insistence to have time alone with the devices created a sense of urgency and the exigency. *Id*. at 1033.

Like in *Meyer*, where police arrived in a knock and talk situation to ask questions, Officers arrived at Nadauld's to ask questions about his rifle. In *Meyer*, when defendant was questioned about examining his devices, he first refused because he wanted to have time alone with them,

then he shifted to stating his home was messy. This created a reasonable suspicion and a sense of urgency to obtain the devices. As in the instant case, Nadauld's initial response for not getting the rifle was that officers weren't supposed to be there for a month, when officers asked again, his answer was that he would go and retrieve it, but they should wait at the door. When officers stated they should come with him, he shifted to the cleanliness of his home. From these responses and drawing inferences from what they knew, Officers Hawkins and Maldonado believed a sense of urgency existed to obtain the rifle and prevent any destruction of evidence that could occur.

The exigency arose in *Meyer* when Meyer made suspicious statements, gave multiple excuses, and would not allow agents to examine his electronic devices. As in this case, the exigency arose when Nadauld gave excuses, did not want to show the rifle at that time and then asked that he go and get the rifle while officers waited outside. Given that Meyer had already admitted that the devices were in his home, there was a fair probability that the agents would find evidence of a crime inside. Just as in our case, Nadauld had already admitted his rifle was inside and officers could reasonably believe there was fair probability there was evidence to the crime being investigated inside his home.

Given the totality of the circumstances, officers had a sufficient basis to suspect incriminating evidence would be destroyed.

A. Exigent Circumstances Justified a Warrantless Entry and Search because there was a Need to Ensure Public Safety.

The warrantless entry and search of Nadauld's house was proper because there was an ongoing threat to officer and public safety. Exigent circumstances exist when there is a risk that the officers or innocent bystanders will be endangered. *United States v. Yanez*, 490 F. Supp. 2d

765, 772 (S.D. Tex. 2007). Sometimes officers must act in fast-moving situations to discover a possibly hidden weapon for their protection and that of the public. *Id*. at 773.

In *Yanez*, Officers heard gunshots while conducting an auto theft investigation. *Id*. at 767. Officers began driving around searching for the source of the gunfire, they were flagged down and directed to the residence where the shots came from. *Id*. Officers encountered two sisters, frightened from the gunshots, and removed them from the residence. *Id*. at 768. Officers entered the home based on exigent circumstances of safety of others still in the home and public safety. *Id*. Officers then located the men left in the home, arrested them, and asked where the guns were and lifted the mattress and found a sawed off shot gun. *Id*. The court held that the exigent circumstances existed because officers faced a fast-moving situation in which the safety of the public was at risk from an unknown gunman. *Id* at 771. The court reasoned that officers reasonably acted when entering the premises to stop a shooting spree they reasonably believed was endangering neighborhood citizens. *Id*.

In the instant case officers had entered the premises due to the belief that public safety was at risk due to the phone call they had received stating there would be another shooting and it would be a school. Unlike the officers in *Yanez* who were responding to actual gunshots they heard while performing another investigation. Officers in *Yanez* knew there were weapons inside the home, just as Officers Hawkins and Maldonado knew Nadauld's rifle was in his home. In the instant case, officers were looking for a weapon that they believed had threatened and injured the public, just as the officers were in *Yanez*. Officers Hawkins and Maldonado were also trying to stop another mass shooting of children from happening, like the officers in *Yanez* were trying to stop a shooting spree in the neighborhood. Officers in *Yanez* did not know who the gunman was or where the weapon was exactly but had probable cause to believe the gunman and weapon were inside the

premises. Like in *Yanez*, Officers Hawkins and Maldonado also did not know who the gunman was or where the rifle was exactly, but they too had probable cause to believe that Nadauld was the Balboa Shooter or was involved with the shooter. Giving these facts, the need to ensure public safety provided the exigent circumstances and justified the warrantless entry and search of Nadauld's home.

VI. THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO THE SEIZURE OF NADAULD'S RIFLE BECAUSE HE EXHIBITED NO INTENTION TO KEEP THE OBJECT TO HIMSELF.

The seizure of Nadauld's rifle should not be suppressed because it falls under the plain view exception to the warrant requirement. "A man's home is a place that he expects privacy, but objects or activities he exposes to the plain view of outsiders are not protected because he has not exhibited an intention to keep them to himself." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

The plain view doctrine states that police may seize an object without a warrant if the Fourth Amendment is not violated in arriving at the place the evidence could be plainly viewed, the object's incriminating character is immediately apparent, and the officer has a lawful right of access to the object. *United States v. Collins*, 321 F.3d 691, 694 (8th Cir. 2003).

In *Collins*, Officers were responding to reports of shots fired when they came across a parked car with three individuals inside. *Id*. at 693. The woman in the backseat told officers that the front occupants were sleeping. *Id*. Officers yelled at the two men in the front seat asking if they were shot, but they did not respond. *Id*. One officer then reached into the vehicle through an open window to determine if this was a crime scene and observed a black handgun sticking out of Collins's pocket. Collins was arrested and taken into custody and after being charged he moved to suppress the evidence obtained. The court held that exigent circumstances existed because officers

reasonably believed that the occupants of the car might be in need of aid as they were responding to a "shots fired" call in that area and two men were slumped over in the car. *Id* at 694. The court reasoned that if the officer leaning into an open window constituted a search, the warrantless search was justified by the exigent circumstances and the gun was seized under the plain view doctrine. *Id*.

Although the exigency in the instant case was not based on a belief that a person was in immediate need of aid justifying entry and search of a car as it was in Collins, exigency and probable cause still existed and was justified based on preventing destruction of evidence. Like in *Collins*, once the officers entered and searched the car based on exigent circumstances, anything in plain view could be taken note of and seized. In the instant case, Officer Maldonado searched in any space the weapon might be, and observed the rifle in plain view in Nadauld's bedroom. In *Collins*, and in the instant case, officers did not violate the Fourth Amendment in arriving at the place the evidence was in plain view, officers had a lawful right of access to the gun and the incriminating character was immediately apparent in both cases. For these reasons there should be no suppression of evidence of Nadauld's rifle under the plain view doctrine.

Officers reasonably relied on all of the facts known to them at the time they arrived at Nadauld's home and the totality of the circumstances support probable cause and exigent circumstances, the warrantless entry and search of defendant's home did not violate his Fourth Amendment rights. Thus, the lower court erred in granting the motion to suppress evidence.

CONCLUSION

For the reasons stated above the defendant's motion to suppress evidence should be barred because Nadauld's Fourth Amendment rights were not violated given the lack of an expectation of privacy, reasonable suspicion, and the totality of the circumstances that support

probable cause and exigent circumstances. Therefore, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Date: October 18, 2022 Respectfully submitted,

/s/_____
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon the United States of America, through counsel of record by certified U.S. mail return receipt requested, on this, the 18th day of October, 2022.

/s/_____
Attorneys for the Petitioner