IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

NICK NADAULD,

Respondent.

PETITIONER'S BRIEF

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STATEMENT OF ISSUES

1. Did the California Fourth District Court of Appeals err in holding that the warrantless usage of the Automatic License Plate Recognition database violated the Respondent's Fourth Amendment Rights when the information gathered was limited to the movements of Respondent's vehicle on public roads, which was observable by the naked eye of a person on public roads, without the use of the technology?
2. Did the California Fourth District Court of Appeals err in holding that the warrantless entry and search of the Respondent's home violated the Respondent's Fourth Amendment Rights when the Respondent behaved evasively to police questioning at his residence after the police learned that a suspected mass shooter fled the scene of the shooting, had similar location data with the Respondent, a registered assault rifle owner, and observed the suspect give the Respondent a bag large enough to carry an assault rifle shortly after the Respondent was notified police would be checking his gun?

I. STATEMENT OF FACTS

A. Balboa Park Shooting

On September 14, 2021, Rafael Espinoza was with his family at Balboa Park when suddenly his arm exploded with pain and his wife laid face down unable to move. (R. at 29.) Moments prior, a masked gunman shot rounds from an assault rifle toward park goers in Balboa Park in broad daylight. (R. at 29, 31.) Hundreds fled or hid in terror. (R. at 29) As park goers ran for their lives, the gunman opened fire for thirty seconds from a rooftop before disappearing. (*Id*.) The shooting left nine dead and six wounded. (*Id*.) When police arrived, the gun and the gunman were nowhere to be found. (*Id*.)

However, a manifesto was recovered from where the gunman was seen. (*Id*.) The manifesto expressed that the gunman has suffered tragedy after tragedy and has "always been treated like scum." (R. at 36.) The gunman claimed he and his friends were going to show the world that there is "nothing but despair" and were "going to do this again . . . soon." (*Id*.)

B. Initial Investigation

The heinous nature of the mass shooting prompted a two weeklong investigation by law enforcement agencies from San Diego, the State, and the FBI to locate the shooter. (R. at 2-3, 31.) First, the police reviewed surveillance footage from security cameras in and around Balboa Park. (R. at 3.) The footage revealed forty unidentified individuals who fled on foot and fifty vehicles who left the scene before police could secure the area. (*Id*.)

A criminal records check was conducted on the owners of the fifty vehicles that fled. (*Id*.) Frank McKennery (the gunman) was among the list of fifty. (*Id*.) However, none of the owners on the list had a record of prior violent crimes. (*Id*.) Law enforcement then cross referenced this list with a list of registered assault rifle owners, excluding law enforcement officers, from the

area. (*Id*.) None of the fifty vehicle owners were on the assault rifle list. (*Id*.) However, Nick Nadauld ("Respondent") was one of the fifty registered assault rifle owners in the area. (*Id*.)

C. Automatic License Plate Recognition Database

Following the compilation and cross-referencing of the lists, law enforcement used the Automatic License Plate Recognition ("ALPR") database to review the movements of the fifty vehicles that fled the scene at the time of the shooting with the movements of vehicles registered under the individuals on the list of assault rifle owners. (*Id*.) The location data from the ALPR system is compiled from the records of license plate scans of passing cars made by special cameras installed at intersections or on police vehicles. (*Id*.) The license plate scans, along with the time and location at which they are recorded, are typically used only to check the registration and license status of passing cars without providing any inherently incriminating information unless the vehicle itself is unregistered or stolen. (R. at 3, 7.)

Furthermore, the purpose of the ALPR database is to capture vehicles, not its occupants. (R. at 40.) ALPR cameras are not equipped with technology to identify the driver. (*Id*.) When an occupant is captured on camera, it is due to the environment having sufficient lighting to capture the occupant. (*Id*.) The ALPR database only contains the license plate of the vehicle, a picture of the exterior of the vehicle and the vehicle's geospatial location. (R. at 38-39.)

The information obtained from the ALPR database in furtherance of the mass shooter investigation included data on McKennery's vehicle as well as the Respondent's vehicle. (R. at 3-4.) Cross-reference of the ALPR information from both these lists revealed that, among other pairings on the list, there was significant overlap in movements and driving locations between McKennery's vehicle and Respondent's vehicle. (*Id*.)

D. Investigation onto Respondent

Law enforcement then covertly investigated ten residences of the registered gun owners that corresponded the most to the driving location of the fifty vehicles that fled the scene. (R. at 4.) The Respondent's residence was among this list. (*Id*.) On September 24, 2021, law enforcement placed cameras on utility poles facing the residences to monitor suspicious activity. (*Id*.) The next day law enforcement mailed out letters to these residences informing the resident that in one month, police officers would arrive at the residence to verify that their assault rifles were inoperable pursuant to Cal. Penal Code § 30915. (*Id*.) Respondent received the letter on September 27, 2021. (*Id*.) The next morning at approximately 10:37 am, police received an anonymous phone call from a phone booth where the caller claimed to be the Balboa Shooter. (*Id*.) The caller warned police that "this time, it's gonna be a school." (*Id*.)

On September 29, 2021, at approximately 5:23 pm, the pole mounted cameras surveilling Respondent's residence recorded McKennery pulling into Respondent's driveway. (*Id*.) McKennery was then seen giving Respondent a large duffel bag before leaving. (*Id*.). FBI Officers Jack Hawkins and Jennifer Maldonado were immediately dispatched to Respondent's residence to investigate. (*Id*.) The Officers arrived at the residence approximately thirty minutes after McKennery left. (*Id*.) Before knocking on the Respondent's door, Officer Hawkins informed Officer Maldonado that there was no time to call for backup. (R. at 23.)

The officers then greeted Respondent at his door and confirmed Respondent's identity. (*Id*.) The Respondent then asked the officers if he was in trouble. (*Id*.). Officer Hawkins informed him he might be and asked if he was still in possession of his M16 assault rifle. (*Id*.) Instead of answering the question, Respondent told the officers that he thought police would visit him in a month to discuss his M16. (*Id*.) Respondent legally acquired the M16 from his father

five years earlier but was required to render the weapon inoperable within ninety days of obtaining the weapon pursuant to Penal Code section 30915. (R. at 2, 35.) Officer Hawkins informed the Respondent that police wanted a head start on the letter and that Respondent had nothing to worry about since he was required to render the M16 inoperable five years prior. (R. at 23.) The Respondent replied, "I suppose." (*Id*.) Officer Hawkins then asked Respondent "Do you have nothing to worry about?" (*Id*.) Instead of answering, the Respondent stared at the officers for five seconds before answering that he had nothing to worry about. (*Id*.)

Officer Hawkins then asked to see the gun. (*Id*.) However, the Respondent told Officer Hawkins he did not want to show him the gun "now" and to come back in one month. (*Id*.) Officer Hawkins assured the Respondent that law enforcement was covering their bases to make sure that all assault rifles were accounted for due to the Balboa Park Shooting. (*Id*.) The Respondent then informed the officers that he would retrieve the gun but asked them to wait outside of the residence. (*Id*.) Officer Hawkins then informed Respondent that he and Officer Maldonado should come into the house to verify that the M16 was inoperable. (R. at 24.)

The Respondent claimed that his house was messy and preferred that the officers wait outside. (*Id*.) Officer Hawkins then entered the residence and ordered Officer Maldonado to check the rooms of the premises (*Id*.) Officer Maldonado recovered an operable M16 in plain view inside a bedroom while checking the premises. (*Id*., Order at 1.)

Law enforcement took the Respondent into custody and sought to arrest McKennery. (R. at 4.) When police arrived at McKennery's residence, police heard a gunshot from inside the house. (*Id*.) Police discovered McKennery's dead body next to a note written by McKennery where he claimed sole responsibility for the shooting. (R. at 37.) The note stated McKennery

received the gun he used from "another guy" but would not name him. (*Id*.) A forensics ballistics expert confirmed that the Respondent's M16 was used in the Balboa Park Shooting. (R. at 33.)

E. Procedural History

On October 1, 2021, the Respondent was charged with nine counts of second-degree murder, nine counts of involuntary manslaughter, lending an assault weapon and violating California Penal Code section 30915. (R. at 1.) The Respondent moved to suppress evidence collected on the date of his arrest. (*Id*.) The Superior Court of the State of California for the County of San Diego denied the Respondent's motion. (*Id*.) The Respondent was found guilty of the above charges, except for the nine counts of second-degree murder. (R. at 42.) The Respondent then appealed his conviction contending that the trial court erred in denying his motion to suppress evidence. (R. at 14.) The Fourth District Court of Appeal agreed with the Respondent and remanded the case for further proceedings. (R. at 13-21.) The United States government then appealed the Appellate Court's decision.

II. SUMMARY OF ARGUMENT

The usage of the ALPR database to investigate the movements of Respondent's vehicle did not give rise to a reasonable expectation of privacy. A reasonable expectation of privacy is determined by both a subjective expectation on the part of the individual and objective societal expectations for privacy. *Oliver v. United States*, 466 U.S. 170, 173 (1984). A person does not have a reasonable expectation of privacy to movements on public roads because their movements are in plain view from the public. *United States v. Knotts*, 460 U.S. 276, 281-82 (1983). The Respondent did not have an expectation of privacy to information obtained from the ALPR database because the information obtained could be seen by a person on public roads. Therefore, the warrantless use of the ALPR database was not a search under the Fourth Amendment.

Law enforcement had probable cause to believe that evidence of the Balboa Park Shooting would be in the Respondent's residence and exigent circumstances existed for a warrantless search of the residence. Probable cause is a commonsense application based on factual and practical considerations of a reasonable person. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In the present case, the vehicle of a possible mass shooter, who was not a registered assault rifle owner, was seen fleeing the crime scene. Furthermore, ALPR data indicated that this vehicle had location data similar to the Respondent, a registered assault rifle owner. Additionally, the suspect was seen giving the Respondent a bag large enough to fit an assault rifle just two days after the Respondent was informed police would be visiting him to check his assault rifle. Moreover, when police contacted the Respondent about his gun, the Respondent acted evasively. Thus, police were allowed to use their commonsense to reasonably conclude that the Respondent's residence may have evidence of the shooting. Finally, the Respondent's evasive behavior along with threats of future shootings by the supposed gunman gave police exigent circumstances to preserve life. Therefore, it was lawful for police to enter the Respondent's residence and retrieve his gun without a warrant.

III. STANDARD OF REVIEW

When reviewing whether a search under the Fourth Amendment has occurred, the ultimate question on whether the person invoking its protection has a reasonable expectation of privacy is reviewed *de novo*. *Knotts*, 460 U.S. 276 at 280-281.

When reviewing probable cause, the ultimate question on whether there is probable cause to search is reviewed *de novo*. *Ornelas*, 517 U.S. at 691. Furthermore, determinations of exigent circumstances are reviewed de novo because it requires the court to apply "established principle to the facts disclosed by the record." *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935).

IV. ARGUMENT

A. THE USE OF THE ALPR DATABASE DOES NOT QUALIFY AS A SEARCH UNDER THE FOURTH AMENDMENT; THEREFORE, A WARRANTLESS USE OF THE DATABASE IS CONSTITUTIONAL.

The use of the ALPR database does not qualify as a Fourth Amendment search. The Fourth Amendment assures people are secured "in their persons, houses, papers, and effects, against unreasonable searches and seizures." (U.S. Const. Amend. IV.) A Fourth Amendment search is determined by whether the government has intruded upon a constitutionally protected area to obtain information, and whether a reasonable expectation of privacy has been violated. *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (U.S. 2018). The parameters of a reasonable expectation of privacy requires the satisfaction of both a subjective and an objective expectation of privacy. *Oliver*, 466 U.S. at 173.

1. The Respondent Did Not Have A Reasonable Expectation Of Privacy In The ALPR Data Because The Information Obtained Is Information That Could Be Obtained By The Naked Eye Of A Person On Public Roads.

The Respondent did not have a reasonable expectation of privacy in his ALPR data because the information obtained could be obtained by an officer observing the Respondent on a public road. The Supreme Court has held that a person traveling in a vehicle on public roads has no reasonable expectation of privacy in his movements. *Knotts*, 460 U.S. at 282. The reasoning behind this reduced expectation of privacy is that when a vehicle is traveling on public roads, both its occupants and the vehicle are in plain view. *Id*. at 281.

The police in *Knotts* arranged with a seller to place a tracking device in a container which was then placed on the Defendant's vehicle. *Id*. at 278. Police monitored the vehicle through both direct observation and through the tracker. *Id*. When the container was placed in the

Defendant's cabin, police obtained a search warrant. *Id*. at 279. The Defendant argued the tracking violated his Fourth Amendment rights. *Id*. The Supreme Court disagreed stating that the electronic tracking did not raise any constitutional issues that visual surveillance would not also raise. *Id*. at 285. The Court explained that an officer could have obtained the same information as the tracker, and the tracker itself did not reveal any movement of the container inside the cabin or any information that would not be visible to the naked eye. *Id*. Thus, the court held that the tracking was not a search under the Fourth Amendment because the Defendant did not have a reasonable expectation of privacy to his movements on public roads. *Id*.; *see also United States v. Hufford*, 539 F.2d 32, 33-34 (9th Cir. 1976) (Defendant had no reasonable expectation of privacy to movements recorded by a tracker that was placed in a drum that was subsequently placed in his vehicle because he knowingly exposed his movements to the public.)

Furthermore, observing the VIN of a vehicle by manually removing obstruction from the inside of a car to view the VIN does not constitute a search under the Fourth Amendment. *New York v. Class*, 475 U.S. 106, 114, 119 (1986). The officer in *Class* pulled over the Defendant and sought to check the VIN of the Defendant's vehicle which was located on the vehicle's dashboard. *Id*. at 108. To view the VIN, the officer entered the vehicle and moved papers obstructing the VIN. *Id*. The Supreme Court held that police do not violate the Fourth Amendment when entering a vehicle to clear an obstructed VIN because a person does not have a reasonable expectation of privacy to such information since automobiles are subject to pervasive regulations and an unobstructed VIN can be seen by a person standing outside of the vehicle. *Id*. at 114, 119.

Moreover, people lack a reasonable expectation of privacy to events captured on video surveillance in public areas. *United States v. Houston*, 813 F.3d 282, 288 (6th Cir. 2016). The

police in *Houston* conducted a ten week-long video surveillance of the Defendant's residence without a warrant, which the Defendant argued was an unconstitutional search. *Id*. at 285. The Sixth Circuit held that such a surveillance was not a search because the surveillance only recorded what a bystander would be able to see from a public road. *Id*. at 288.; *see, e.g*., *United States v. Bucci*, 582 F.3d 108, 117 (1st Cir. 2009); *United States v. McIver*, 186 F.3d 1119, 1125-26 (9th Cir. 1999).

The information obtained from ALPR is similar to the information obtained in *Knotts* and *Class* which the Supreme Court has held people do not have a reasonable expectation of privacy in. ALPR only captures three pieces of information which are the license plate of the vehicle, a picture of the vehicle and the geospatial location of the vehicle. (R. at 38-39.) The Court in *Knotts* held that using an electronic tracker was similar to direct observations by an officer on public roads, which is akin to the capturing of the picture and geolocation of a vehicle through ALPR because an officer could have captured such information while on patrol. Furthermore, a license plate is more readily seen by a bystander than a VIN, which the Court in *Class* held people had no reasonable expectation of privacy in. Moreover, the current case is less invasive than *Class* because ALPR only captures the exterior of the vehicle while the officer in *Class* had to enter the vehicle to obtain the VIN. (R. at 40.) Under these circumstances, a person would not have a reasonable expectation of privacy to information obtained from ALPR. Thus, the police were not required to obtain a search warrant to obtain the Respondent's geospatial location.

Additionally, ALPR is less invasive than video surveillance, which the courts have upheld to not be a search under the Fourth Amendment. The video surveillance in *Houston* captured events that occurred over the span of 10 weeks. ALPR only captures a snapshot of a vehicle moving through public areas. (R. at 39.) Therefore, video surveillance has the ability to

reveal more of a person's intimate life than ALPR. Since video surveillance from public areas is constitutional without a warrant, then surely ALPR usage without a warrant is constitutional. Furthermore, ALPR data is distinguishable from technologies that require a warrant to use.

2. ALPR Data Is Distinguishable From Information That The Supreme Court Has Held People Have A Reasonable Expectation of Privacy In.

The information obtained from the ALPR database is distinguishable from information that people have a reasonable expectation of privacy in. For example, a warrant must be secured to observe the historical movements of an individual through cell site data ("CSLI"). *Carpenter*, 138 S. Ct. at 2223. The police in *Carpenter* monitored the Defendant's movement through CSLI data. *Id*. at 2214. The Court explained that a person does not surrender all Fourth Amendment protections while moving in the public sphere. *Id*. at 2217. The Court stated that "while individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time . . . beyond public thoroughfares and into private residences." *Id*. at 2218. The Court then emphasized that a cell phone is essentially a part of the human anatomy, therefore the information obtained from CSLI could reveal intimate information of a person's life, because a cell phone is almost always pinging data for CSLI to record. *Id*. at 2212, 2218, 2223. As such, the Court held that a person has a reasonable expectation of privacy in CSLI data. *Id*. 2223.

Furthermore, the standard for reasonable expectation of privacy evolves along with the evolution of the surveillance technology that is available to law enforcement and the general public. *Kyllo v. United States*, 533 U.S. 27, 36 (2001). The police in *Kyllo* used a thermal-imaging device to determine if the heat emanating from the Defendant's home was consistent with the heat emitting from high-intensity lamps used for marijuana growth. *Id*. at 29. The scan showed that the Defendant's garage and part of a side wall were noticeably hotter when

compared to the rest of the house and the neighboring units. *Id*. 30. The court held that when the government uses a device that is not in public use to explore details of an individual's private home which would have been unknowable without physical intrusion, the surveillance is a Fourth Amendment search and is not valid without a warrant. *Id*. at 40. *See also Katz v. United States*, 389 U.S. 347, 352 (1967) (Listening in on someone's phone call intrudes on a reasonable expectation of privacy, however simply observing someone making a call in a telephone booth would not intrude on privacy interests.)

The present case is distinguishable from the CSLI data in *Carpenter*. The court in *Carpenter* emphasized the differences between cell phones and a car. The court explained that while people regularly leave their cars, people rarely are without their phones because the phone has become a part of the human body. *Carpenter*, 138 S. Ct. at 2218. Therefore, information from CSLI could reveal the intimate details of a person's life through its constant recording nature. Here the ALPR, at best, only captures intermittent movements of a vehicle on public roads which is the same information an officer could obtain by physically being on the road. (R. at 39.) Thus, ALPR data is far less invasive than CSLI.

Moreover, ALPR data is distinguishable from the thermal imaging device in *Kyllo*. While both technologies are not in general public use, the thermal imaging device was far more invasive because it allowed police to see details of a home beyond what the naked eye could see. *Id*. ALPR cameras are not equipped with technology that could peer into a person's car. (R. At.40.) ALPR was designed to capture vehicles, not occupants. *Id*. The only way ALPR can capture the occupant of a vehicle is if the lighting of the street gives the camera the opportunity to capture such details which is something that would be seen by the naked eye. *Id*. ALPR data

could best be described as being akin to police observing someone making a phone call rather than listening in on that call as discussed in *Katz*.

The data tracked by the ALPR is minimally invasive and limited to records of the intermittent location of vehicles that come within range of its cameras. The information obtained from the ALPR database is not unique to its methodology. The intermittent plotting of movements of a vehicle on public roads is comparably available to regular police patrols, public passerby, or even the conglomeration of private CCTV systems that we have come to expect that would be observing the Respondent without the use of the ALPR database. If use of the ALPR database were to be ruled unconstitutional, the information obtained from it is still easily obtained through police patrol/investigation with the naked eye, but with a subsequent increase in waste of public resources. This would lead to a frustration of public policy without providing any additional protections to the private lives of individuals. Since the data obtained from the ALPR database could be obtained from the naked eye, a person would not have an objective expectation of privacy in their ALPR data. Thus, the use of the ALPR database did not violate the Respondent's reasonable expectation of privacy. Therefore, police were not required to obtain a warrant to retrieve the Respondent's ALPR data.

B. WARRANTLESS ENTRY AND SEARCH ONTO RESPONDENT'S RESIDENCE WAS LAWFUL BECAUSE POLICE HAD PROBABLE CAUSE TO SEARCH AND EXIGENT CIRCUMSTANCES EXISTED TO ENTER AND SEARCH THE RESPONDENT'S RESIDENCE.

Police had probable cause to believe evidence of the Balboa Park Shooting would be present in the Respondent's residence and exigent circumstances existed to allow a warrantless entry and search of the Respondent's residence. Probable cause exists when, under the totality of the circumstances, the facts and circumstances of the case are sufficient to warrant a reasonable

officer in the belief that evidence will be found in the area searched. *Ornelas*, 517 U.S. at 696. Probable cause is measured on an objective standard; therefore, the subjective intentions of the officers are irrelevant. *Whren v. United States*, 517 U.S. 806, 813 (1996). Furthermore, when multiple law enforcement agencies are cooperating in an investigation, the knowledge of one officer is presumed to be shared by all. *Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983).

Moreover, police must obtain a warrant to search a home unless exigent circumstances are present. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The burden is on the prosecution to prove that there is probable cause to believe exigent circumstances existed. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

1. Police Obtained Probable Cause To Believe Evidence of the Balboa Park Shooting Would Be In Respondent's Residence After Police Learned That McKennery's Vehicle Fled The Crime Scene, Respondent's Vehicle Had Similar Location Data To McKennery's Vehicle, And The Respondent Acted Evasively After McKennery Gave Respondent A Bag Large Enough to Fit an Assault Rifle.

Police obtained probable cause to believe the Respondent's residence contained evidence of the Balboa Park Shooting when they discovered that McKennery fled the scene of the shooting, had overlapping location data with the Respondent, a registered assault rifle owner, and the Respondent acted evasively with police after McKennery suspiciously gave Respondent a bag large enough to fit an assault rifle two days after the Respondent was informed police would visit him regarding his rifle. (R. at 3-4.) Whether there was probable cause to believe Respondent was involved in the shooting is irrelevant because probable cause to search does not require probable cause to believe the owner or possessor of the property committed a crime. *Zurcher v. Stanford Daily*, 436 U.S. 547, 560 (1978).

Nine police officers in *Zurcher* were injured attempting to remove demonstrators from a Stanford University Hospital. *Id*. at 550. One person was seen photographing the incident. *Id*. at 551. Two days later, the school's newspaper published an article with photos of the clash that indicated that a member of the newspaper took photos of the incident and may have photos of the wanted demonstrators. *Id*. A warrant was issued to search the newspaper office for photos that may contain the suspects. *Id*. The warrant did not allege that any members of the newspaper were suspected of a crime. *Id*. The newspaper and its staff then brought a civil action against the government alleging a Fourth Amendment violation since they were not suspected of any crime. *Id*. at 552. The Supreme Court disagreed with the newspaper and held that police may obtain probable cause to search even if the person to be searched is not suspected of a crime. *Id*. at 560. Additionally, the court held that based on the facts, the article gave police probable cause to believe evidence of who injured the officers may be found at the newspaper's office. *Id*. at 567.

Nonetheless, probable cause to search requires a nexus between the items to be seized and the places to be searched. *United States v. Feliz*, 182 F.3d 82, 88 (1st Cir. 1999). However, the nexus does not need to be based on direct observation and could be inferred from the facts and circumstances of the case. *Id*. A confidential informant in *Feliz* informed police that he had bought cocaine from the Defendant from 1985-1997. *Id*. at 84. The informant then did two controlled buys at locations that were not at the Defendant's home. *Id*. Police sought a search warrant three months later to search Defendant's home for evidence pertaining to drug trafficking. *Id*. The Defendant moved to suppress the evidence seized from his home claiming that police failed to show a nexus between drug trafficking and his home. *Id*. at 84-85.

The First Circuit held probable cause could be inferred from the facts. *Id*. at 87. The court explained that the police corroborated that the Defendant was a longtime drug trafficker, and no

other headquarters or residence was known for the Defendant. *Id*. at 87-88. Therefore, it would be reasonable that the Defendant would keep records of names and numbers of customers and suppliers as well as records of money paid and collected at his residence. *Id*. at 87. Thus, under the totality of the circumstances, there was probable cause to believe that evidence of drug trafficking would be at the Defendant's residence. *Id*. at 88.

The Seventh Circuit also applied this nexus test to determine that police had probable cause to search a suspected bank robber's apartment. *United States v. Sleet*, 54 F.3d 303, 306-07 (7th Cir. 1995). The police in *Sleet* obtained a search warrant to search the Defendant's apartment after a bank was robbed by a man wearing a mask. *Id*. at 305. The court held there was a sufficient nexus for probable cause to believe evidence of a bank robbery would be found in Defendant's residence because the bank was located less than a mile from the Defendant's residence, the Defendant was the sole occupant of the residence, the witnesses saw the robber flee towards the direction of the residence and the Defendant was charged with another bank robbery that was carried out in a similar manner. *Id*. at 306-07.

Akin to the newspaper staff in *Zurcher*, the police did not need probable cause to believe that the Respondent was involved in criminal activity, only that evidence of criminality would be in his residence. (R. at 3.) Here, police knew that the Respondent was a registered assault rifle owner which was the same type of gun used in the Balboa Park shooting. (R. at 3, 29.) Furthermore, police discovered that McKennery's vehicle was seen fleeing the scene of the shooting and had location data similar to Respondent's. (R. at 3-4). Additionally, McKennery is not a registered assault rifle owner which would cause police to believe that if McKennery was the shooter, he likely obtained it from someone. (R. at 3). Moreover, the gunman's manifesto claimed to have friends that would help with future shootings which indicates he may have

obtained a gun from a friend. (R. at 36.) Finally, McKennery was seen giving the Respondent a bag large enough to fit an assault rifle two days after the Respondent received a letter that police will be visiting him to check his M16. (R. at 4.) When the Police asked the Respondent if he had nothing to worry about in checking the gun, the Respondent acted evasively by not answering for five seconds, then asking the police to return in a month and finally telling the police to wait outside while he retrieved the gun. (R. at 23.) These circumstances would cause a reasonable officer to believe that evidence of the shooting may have been located in the Respondent's residence akin to how a reasonable officer would believe that evidence identifying suspects would be located in a newspaper office when an article indicated it had photos of the incident.

Although there is a lack of direct observation of McKennery doing the shooting, there is a sufficient nexus to believe that evidence of the shooting would be located in the Respondent's residence akin to the nexus in *Feliz*. The Defendant in *Feliz* was a known drug dealer and here the Respondent is a known assault rifle owner. (R. at 3.) That alone would not be enough to satisfy the required nexus. However, the Defendant in *Feliz* had no other known residence and police confirmed through an informant that the Defendant was a longtime drug dealer which satisfied the nexus. Here, McKennery is not a registered assault rifle owner, but the gunman's manifesto claimed to have friends that would assist with future shooting. (R. at 3, 36.) Furthermore, McKennery's vehicle was observed fleeing the scene of the shooting, had location data similar to the Respondent's at similar times and McKennery gave the Respondent a bag large enough to fit an assault rifle just two days after Respondent was informed police would be visiting him to check his M16. (R. at 3-4). This would give police probable cause to believe that McKennery was the shooter and that the gun used in the shooting would be located in the Respondent's residence.

Although the previous cases are distinguishable in that someone directly saw the Defendant commit a crime such as the staff member in *Zurcher* or the confidential informant in *Feliz*, there was sufficient evidence to believe evidence of the shooting would be in the Respondent's residence. Even though no one identified McKennery as the shooter similar to how no one identified Defendant in *Sleet* as the bank robber, there was still probable cause to believe that evidence of the shooting would be in the Respondent's residence. In *Sleet*, there was a sufficient nexus to believe that evidence of a bank robbery would be in the Defendant's property because the masked robber fled towards the direction of the Defendant's apartment located half a mile away from the bank and the Defendant was previously arrested for a bank robbery conducted in a similar manner. Similarly, McKennery's vehicle fled from the shooting, had location data similar to the Respondent, a registered assault rifle owner, and provided the Respondent a bag large enough to fit an assault rifle shortly after the Respondent was informed that his M16 would be checked by police. (R. at 3-4). Therefore, police satisfied the nexus and had probable cause to search the Respondent's residence.

Although fifty vehicles were recorded fleeing the scene of the shooting and ten residences of registered assault rifle owners were being monitored during the investigation, such information does not diminish the probable cause obtained to search the Respondent's residence. (R. at 19-21). The Petitioner agrees that fleeing the crime scene and having similar location data to a registered assault rifle owner is not enough to obtain probable cause in this case. However, this information made McKennery's visit to the Respondent, a registered assault rifle owner, suspicious because he gave the Respondent a bag large enough to fit an assault rifle just two days after the Respondent was informed that police would visit him to check his M16. (R. At 3-4). This suspicion increased when the Respondent acted evasively when police asked to see his M16

that he should have rendered inoperable five years prior. (R. at 23.) As the Supreme Court emphasized, probable cause is a "commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas*, 517 U.S. at 695 (quoting *Illinois v. Gates*, 462 U.S. 213, 231(1983)). Therefore, police were allowed to use their commonsense to conclude that the Respondent's residence contained evidence of the shooting when the Respondent acted evasively shortly after police observed McKennery give the Respondent a bag large enough to fit an assault rifle. Thus, law enforcement had probable cause to search the Respondent's residence.

2. McKennery's Manifesto That Indicated Multiple People May Cause Another Mass Shooting, An Anonymous Call That Warned of Another Shooting By The Balboa Park Shooter and The Respondent's Evasive Behavior Created Exigent Circumstances For Police to Enter Respondent's Residence to Protect Life.

Police were justified in entering and searching the Respondent's residence to preserve life because McKennery's manifesto promised more shootings, an anonymous call warned of another shooting by the Balboa Park Shooter and the Respondent's evasive behavior created exigent circumstances. An important factor to consider whether exigency exists is the gravity of the underlying offense. *Welsh*, 466 U.S. at 753. The more serious the offense, the more likely exigency is found. *Id.* One recognized exigent circumstance is the need to protect or preserve life. *Brigham City*, 547 U.S. at 403.

The Supreme Court held that warrantless entry into a home is justified when Police suspect that a person is leaving to retrieve a gun. *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Police in *Ryburn* visited a student's home to investigate rumors of a future school shooting. *Id*. at 471. Police questioned the student and his mother outside of their home. *Id*. at 472. Police asked the mother if any guns were in her home. *Id*. She then immediately turned around and ran into the

house. *Id*. Police then followed her inside her home. *Id*. The Supreme Court held that based on the facts, it was lawful for the police to enter without a warrant because there were exigent circumstances to preserve life because a reasonable officer would believe that violence was imminent. *Id*. at 477.

Furthermore, the Ninth Circuit held that police were justified in making a warrantless entry into a motel room to seize a gun after its occupants were seized outside of the room. *Bailey v. Newland*, 263 F.3d 1022, 1033 (9th Cir. 2001). The police in *Bailey* received a tip that two men were selling drugs from a motel room. *Id*. at 1026. Police ran a record check of the only vehicle parked in front of the room and found it to be stolen. *Id*. Police announced their presence and detained two men that exited the room. *Id*. at 1027. Police then recovered a revolver located underneath a bed inside the room that they observed through the open doorway. *Id*.

The Ninth Circuit found there was exigency of risk of danger to the officers or to other innocent persons. *Id*. at 1033. The court emphasized that presence of a gun alone would not be enough to form exigency. *Id*. However, the police had in custody two suspected car thieves in possession of narcotics. *Id*. Furthermore, police were unable to view the entire room from their vantage point which made police uncertain if any other person involved in the suspected crime was in the room. *Id*. Moreover, the motel was a high crime area. *Id*. Under the circumstances, entry to the room and seizure of the gun was justified under exigent circumstances. *Id*.

Exigent circumstances are applied so long as the police did not create the exigency by engaging or threatening to engage in conduct that would violate the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 462 (2011) The police in *King* observed a suspect from a controlled narcotics buy run into an apartment. *Id*. at 456. Police were unsure of which of two apartment units the suspect ran into. *Id*. The police knocked and announced their presence from a

unit they smelled marijuana from. *Id*. Police then heard movement as if things inside the apartment were being moved. *Id*. Police announced they would enter and subsequently entered. *Id*. The court presumed exigency and stated that policing knocking on a door and announcing their presence to wait for response did not show that police engaged or threatened to engage in conduct that would violate the Fourth Amendment. *Id*. at 472. Furthermore, there was no demand of any sort by the police. *Id*. at 473. The entry declaration was made after the exigency arose. *Id*.

However, a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." Police must obtain a warrant when the exigency ends. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). The police in *Mincey* entered an apartment without a warrant to search for victims of a shooting. *Id*. at 388. Once the premises were secured, officers searched the apartment. *Id*. 389. The Court held that the search was illegal because any exigency ended once the premises were secured. *Id*. at 393. Thus, the police needed a warrant to search. *Id*. at 393.

Similar to the warrantless entry in *Ryburn*, police had exigent circumstances to enter the Respondent's residence without a warrant. The Supreme Court in *Ryburn* held that police were justified in entering a residence when the mother of a suspect ran into the house when asked if there was a gun in the residence. Here, the Respondent confirmed to police he had an automatic assault rifle and was going to retrieve it. (R. at 23.) Furthermore, the manifesto indicated the shooter had friends that would help him with future shootings and someone claiming to be the gunman warned police of a school shooting the day before. (R. at 4, 36.) Moreover, the Respondent's evasiveness during his talk with police was suspicious. When police asked the Respondent if he had nothing to worry about regarding the police checking his M16, the Respondent stared at the officers silently for five seconds. (R. at 23.) The Respondent then asked the police to come back in a month to check his gun. *Id*. When the Respondent finally agreed to

let the police check his gun, he told police to wait outside while he retrieved it. *Id*. Therefore, the inferences for possible danger were stronger in the present case than in *Ryburn*. Furthermore, the gravity of the offense, a mass shooting and another possible shooting is far graver than the rumors of a shooting in *Ryburn*. Thus, police were allowed to enter the residence to preserve their own lives due to the reasonable belief that the Respondent could use his gun on the officers.

Furthermore, police were justified in recovering the M16 similar to how the police in *Bailey* were justified in recovering a gun. The Ninth Circuit in *Bailey* held that police had the exigency to preserve life when they recovered a gun that they saw from outside a motel room because they were unsure if any other individual involved in a crime would be in the room. Although the police in this case did not see the M16, the Respondent confirmed to police that he had an assault rifle. (R. at 23.) Furthermore, police could not be certain if anyone else was in the residence. Thus, the police were justified in recovering the gun while checking the premises. (Order at 1.)

Moreover, the present case is similar to *King* in that the police did not violate or threaten to violate the Respondent's Fourth Amendment rights when entering. The police in *King* entered an apartment after they heard movement indicating the potential loss of evidence. Similarly, police in this case asked the Respondent if they could see the gun and only entered after the Respondent told police he was going to retrieve it but wanted the police to wait outside which brought the need to preserve life. (R. at 23-24.)

Finally, the circumstances of *Mincey* are distinguishable. The police in *Mincey* searched a residence after the residence was secured. In the present case, police conducted their search as they entered the residence. (R. at 24.) The court in *Mincey* explained that exigency ends once the premises are secured. Here, Officer Maldonado found the M16 in plain view while checking the rooms of the premises. (*Id*., Order at 1.)

In the present case, police were investigating a mass shooting, and were faced with the possibility of another mass shooting. Furthermore, Respondent's evasive behavior indicated to police he may have been involved in the Balboa Park shooting. Thus, under the circumstances, it was lawful for police to enter the Respondent's residence and recover his M16 without a warrant. Holding otherwise would undermine the heart of the exigent circumstance rule and require officers to balance reasonable threats to life with the risk of losing evidence.

3. If The Court Finds No Exigency, The Evidence Would Be Admissible Under The Inevitable Discovery Doctrine Because McKennery's Death Note Revealed He Obtained The Gun From A "Guy" Which Would Have Inevitably Led Police To Lawfully Recover the Respondent's Gun.

If the Court were to find that no exigency existed in the present case, the inevitable discovery doctrine would save the evidence. The Inevitable Discovery doctrine states that if evidence would have been obtained without police misconduct, the evidence is admissible. *Nix v. Williams*, 467 U.S. 431, 443-44 (1984). The reasoning behind this exception to the exclusionary rule is to not put the government in a worse position if no misconduct occurred. *Id*. Furthermore, the burden of proof is on the prosecutor to show by a preponderance of the evidence that the evidence would have been inevitably discovered by lawful means. *Id*. at 444.

The police in *Nix* obtained statements from the Defendant in violation of his Right to Counsel. *Id.* at 437. These statements led police to discovering a murder victim's body. *Id*. at 436. However, before the statements were made, a search party was looking for the body in the area where the body was ultimately found. *Id*. at 449. When the Defendant's statements were made, the search party was stopped. *Id.* Testimony from an agent claimed that if the search party was not stopped, the search would have recovered the body within five hours. *Id*. Based on these

facts, the Supreme Court held that without the Defendant's statements, it was inevitable that the body would have been discovered through lawful means through the search party. *Id*. at 449-50.

If no exigency exists in the present case, the case would be akin to the facts in *Nix*. The evidence in *Nix* was saved because the dead body would have been recovered in five hours. Here, McKennery committed suicide on the same day police visited the Respondent. (R. at 4.) Next to McKennery's body was a death note where he claimed responsibility for the shooting. *Id*. However, McKennery claimed to have obtained the assault rifle he used from "another guy." (R. at 37). The information police have already obtained in their investigation would have allowed police to reasonably believe that the Respondent was the other guy and obtain a search warrant. Thus, it would have been inevitable that police would have lawfully obtained the gun.

Thus, under the preponderance of the evidence, it is likely police would have lawfully recovered the weapon if they did not enter the Respondent's residence on September 29, 2021.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the lower court's ruling.