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No. 1788-850191

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NICK NADAULD

Respondent.

On Writ of Certiorari to the
Court of Appeal of the State of California
Fourth Appellate District

BRIEF FOR PETITIONER

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CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the U.S. Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

ISSUES PRESENTED FOR REVIEW

I. Did the California Fourth District Court of Appeal Err in holding that the retrieval of Defendant's information from the Automatic License Plate Recognition Database (ALPR) required a warrant under the Fourth Amendment to the United States Constitution?

II. Did the California Fourth District Court of Appeal Err in holding that the warrantless entry and search of Defendant's home violated Defendant's Fourth Amendment rights under standing Supreme Court precedent?

STATEMENT OF FACTS

I. Background

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). After a two-week long investigation, law enforcement identified 33-year-old San Diego resident Frank McKennery ("Mr. McKennery") as the "Balboa Park shooter." *Id.* At the end of its investigation, law enforcement discovered Mr. McKennery deceased in his home and determined Mr. McKennery likely committed suicide. *Id.*

During its investigation, law enforcement discovered that Nick Nadauld ("Mr. Nadauld"), the Defendant, owned an M16 assault rifle, the same type of weapon used by the Balboa Park

shooter. (R. at 2). Additionally, at some point prior to September 14, 2021, Mr. Nadauld loaned his M16 to Mr. McKennery with whom he worked at a construction company in San Diego for about a year prior to the incident. *Id.* Law enforcement confirmed that Mr. Nadauld legally acquired the assault rifle via last will and testament when his father, a former military veteran, died five years prior. *Id.* Further, approximately one week before the shooting, Mr. McKennery told Mr. Nadauld that he was a shooting enthusiast and expressed an interest in borrowing Mr. Nadauld's M16 for an outdoor target shooting excursion to which Mr. Nadauld agreed and loaned the rifle. *Id.*

II. Investigation Of The Shooting

On September 14, 2021, Mr. McKennery arrived in Balboa Park wearing a mask and non-descript clothing, climbed to the top of a rooftop, discharged an M16 automatic assault rifle killing nine and wounding six others, before escaping the scene without being identified. *Id.* The rounds used in the shooting were identified as 5.56x45mm NATO cartridges, a caliber commonly used in a wide variety of assault rifles. *Id.* Only one piece of evidence was discovered on the rooftop: a "Manifesto," which threatened future shootings. *Id.* The story and motive provided in the "Manifesto" turned out to be a fabrication. (R. at 2-3). Allegedly, due to a personal vendetta against a woman named Jane Bezel, Mr. McKennery plotted to murder Bezel and her fiancé in Balboa Park. *Id.* In an effort to conceal his true motive, Mr. McKennery also planned to murder seven innocent bystanders in addition to his true targets. *Id.*

Due to the heinous nature of the crime and lack of leads, law enforcement used numerous investigative methods to find the shooter. *Id.* They analyzed surveillance footage from security cameras in and around Balboa Park that captured approximately forty people who fled on foot; however, it was impossible to match the faces of the forty unidentified subjects with faces in the

government's databases and no one came forward later to identify themselves. (R. at 3). Additionally, fifty vehicles were recorded leaving the scene before the police arrived to secure the area, including Mr. McKennery. *Id.* The police also checked the criminal records of the fifty car owners that fled the scene, but found no evidence of prior violent crimes. *Id.*

The fifty vehicle owners were cross-referenced with a list of registered assault rifle owners in the area. *Id.* None were law enforcement officers, military or were of the fifty vehicle owners that left the scene; however, one of the individuals identified was Mr. Nadauld. *Id.* Next, police retrieved information from the ALPR database about the movements of the fifty vehicles, including Mr. McKennery's vehicle. *Id.* Police typically use ALPR to check if a vehicle is legally registered or licensed via a special camera mounted on police vehicles or poles at intersections, that scans passing cars for their license plate information. *Id.* The time and location information for each license plate scan is stored in a database. *Id.* Police accessed the database to investigate the movements of all fifty vehicles that were recorded leaving Balboa Park after the time of the shooting as well as the movements of vehicles owned by individuals on the assault rifle list, including Mr. Nadauld's and found, along with other pairings, considerable overlap between Mr. Nadauld's vehicle and Mr. McKennery's vehicle. (R. at 3-4). In total, there were 10 residences, including Mr. Nadauld's, that had the most overlap of vehicle movement and thus were covertly investigated by police. (R. at 4).

On September 24, 2021, law enforcement placed cameras on utility poles near those residences facing them, so that law enforcement could monitor the residences for any suspicious activity. *Id.* On September 25, 2021, law enforcement mailed letters to each of the 10 residences stating that in one month, officers would arrive to verify whether their assault rifles had been

rendered inoperable pursuant to California Penal Code 30915. (R. at 4). Mr. Nadauld received the letter on September 27, 2021. *Id.*

On September 28, 2021, at 10:37 am, police received an anonymous call from a person who identified as "The Balboa Park shooter" and told police, "This time, it's gonna be a school." *Id.* On September 29, 2021, at 5:23 pm, the pole-mounted camera placed near Mr. Nadauld's house recorded Mr. McKennery pulling into the driveway, giving Mr. Nadauld a large duffel bag and then leaving. *Id.* FBI Officers Hawkins and Maldonado were immediately dispatched to Mr. Nadauld's house to investigate. *Id.* Officers arrived at Mr. Nadauld's home thirty minutes after Mr. McKennery left and questioned Mr. Nadauld outside. *Id.*

Mr. Nadauld revealed that Mr. McKennery had borrowed the weapon. *Id.* Without permission, Officers entered Mr. Nadauld's home and searched for the assault rifle. *Id.* Upon finding the M16 rifle in Mr. Nadauld's residence and observing that it had not been rendered inoperable as required by California law, the Officers brought Mr. Nadauld into custody. *Id.*

Law enforcement later went to Mr. McKennery's house to arrest him, heard a gunshot from inside the house, and found Mr. McKennery lying dead on the floor inside. *Id.* Next to his body was a letter confessing to the crime of shooting the victims at Balboa Park. *Id.* Under an interagency agreement, the FBI turned over all their evidence to the San Diego Police Department for prosecution. (R. at 5).

STATEMENT OF THE CASE

On October 1, 2021, a San Diego Grand Jury indicted Mr. Nadauld with nine counts of second-degree murder under California Penal Code § 187, nine counts of involuntary manslaughter under California Penal Code § 192, one count of lending an assault weapon under California Penal Code § 30600, and one count of failing to comply with California Penal Code § 30915. *Id.* Mr.

Nadauld contended that his Fourth Amendment rights were violated and moved to suppress the evidence found on the day of his arrest. *Id.* The motion challenged the constitutionality of the police's warrantless usage of the ALPR database, the warrantless use of pole-mounted cameras to monitor his residence, and the entry and search of his residence by Officers. (R. at 5). On November 21, 2021, the Superior Court of California for the County of San Diego denied Mr. Nadauld's motion to suppress evidence and subsequently convicted on three of the four charges including lending an assault weapon and nine counts of involuntary manslaughter. (R. at 13-14).

On April 5, 2022, Mr. Nadauld appealed his conviction to the Court of Appeal for the State of California, Fourth Appellate District, Division One. (R. at 13). Mr. Nadauld contended the California Superior Court erred in denying his Motion to Suppress. (R. at 14). On June 3, 2022, the Court of Appeals reversed the Superior Court's ruling on the Motion to Suppression and remanded the case. (R. at 13-14, 21). The California Supreme Court denied in the matter. On September 23, 2022, the People petitioned the United States Supreme Court under Writ of Certiorari and were granted review. (R. at 1).

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the U.S. Constitution provides in part that people have, "The right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. However, one cannot simply assert this enumerated right is all encompassing.

Through a collaborative, multiagency effort to track down the shooter who killed nine and wounded six others, law enforcement used what they lawfully had at their disposal to find the ones responsible. During the course the investigation, the Government accessed the Automated License

Plate Reader (ALPR) cameras and databases in an attempt to narrow down an otherwise broad list of leads; and, in doing so retrieved license plate data of approximately 100 individuals.

The privacy interest in the license information stored in the ALPR database did not outweigh the Government's interest in conducting the investigation for three reasons: (1) The ALPR database is not a sense-enhancing technology that was used to intrude on a constitutionally protected area; (2) The Government's use of the ALPR system was not analogous to continuous GPS monitoring; and, (3) There is no justifiable interest in stored license plate information that would reveal the privacies of one's life. On these grounds, the Court of Appeals erred in holding that the retrieval of Mr. Nadauld's information from the ALPR database required a warrant under the Fourth Amendment.

Additionally, the Court of Appeals erred in holding that the warrantless entry and search of Mr. Nadauld's home violated his Fourth Amendment rights for two reasons: (1) There were enough independent circumstances known to the Government at the time of entry into Mr. Nadauld's home to establish probable cause; and (2) Exigent Circumstances were present to permit a warrantless entry and search of Mr. Nadauld's home.

Therefore, the decision of the California Fourth District Court of Appeal should be reversed.

THE STANDARD OF REVIEW

The case is before this Court by virtue of an Order Granting Certiorari to the Court of Appeals of California, Fourth Appellate District, Division One. The Order granting Certiorari set forth the questions presented for review as stated elsewhere herein and this Court has jurisdiction under 28 U.S.C. §1257(a).

ARGUMENT

I. THE PRIVACY INTEREST IN MR. NADAULD'S LICENSE PLATE INFORMATION DID NOT OUTWEIGH THE GOVERNMENT'S INTEREST IN CONDUCTING THE INVESTIGATION AND DID NOT REQUIRE A WARRANT UNDER THE FOURTH AMENDMENT

"Because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Even when a warrant is not required, government conduct is subject to scrutiny, "for it must be reasonable in its scope and manner of execution." *Maryland v. King,* 569 U.S. 435, 448 (2013). Therefore, when considering whether a search is reasonable, courts must assess the balance between the government's interest in investigating criminal activity and the degree to which government conduct intrudes upon an individual's privacy. *Samson v. California*, 547 U.S. 843 (2006).

The Court of Appeals' opinion regarding ALPR database technology and its applicability to Mr. Nadauld's privacy is misguided. First, the Government's use of the ALPR database was not an intrusion because it is not a "sense-enhancing technology" and the Government's use of the ALPR systems was not analogous to continuous GPS monitoring of Mr. Nadauld's movements. Additionally, because Mr. Nadauld did not have a justifiable privacy interest in his license plate information, the Government's retrieval of this data through the ALPR database was not an intrusion on a constitutionally protected area that would have otherwise revealed the privacies of Mr. Nadauld's life.

Therefore, because any justifiable privacy interest Mr. Nadauld had in his license plate information did not outweigh the Government's interest in discovering the identity of the Balboa Park shooter, the Government's access into the ALPR database was not an intrusion, regardless if ALPR technology was available for public use, and no warrant was required. The Court of

Appeals' hesitant conclusion that, "There *might not be* a reasonable expectation of privacy regarding such collection of data" is due to the court's failure to consider the balance between the invasiveness of the Government's conduct against the legitimate interest it served in conducting its investigation. (R. at 16-17) (emphasis added).

A. The ALPR Database Is Not A Sense-Enhancing Technology That Was Used To Intrude On A Constitutionally Protected Area.

There are limits upon the use of technology to "shrink the realm of guaranteed privacy" and obtaining information through the use of "sense-enhancing technology" about the interior of a constitutionally protected area is a form of government intrusiveness that would constitute a search. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). For example, "obtaining by sense-enhancing technology [like a thermal imaging device] any information regarding the interior of the home that could not have otherwise been seen without *physically intrusion into a constitutionally protected area*" was unlawful. *Kyllo*, at 34, 2043 (emphasis added).

In this case, the Court of Appeals' outlandish comparison between the ALPR database and the thermal imaging device in *Kyllo* cannot be maintained because the two technologies are vastly different in terms of application during a criminal investigation. Instead, compare *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006) where the appellant argued that the Fourth Amendment prohibited the government from storing his DNA in the Combined DNA Index System (CODIS) database could be accessed at a later date for identification purposes.

If the privacy interest in accessing the data is relatively small, and the government has an interest in keeping the data for "law enforcement identification purposes," then accessing the stored DNA records was not a search under the Fourth Amendment and instead was "quite justified." *Johnson*, at 175, 497. Although there is arguably a justifiable privacy interest in one's DNA, the D.C. Circuit nonetheless considered the balance of interests between the government

maintaining these records and the intrusive nature of accessing a person's DNA profile. *Johnson*, at 171, 493.

Like the Court of Appeal here, the appellant in *Johnson* also argued the government's access to the CODIS database was technology not in public use. *Johnson,* at 178, 500. The D.C Circuit distinguished *Kyllo* and held, "A search is completed upon the drawing of the blood: Any future test on a stored blood sample will not discern any human activity nor will it constitute a physical intrusion." *Id.* Merely accessing a database to retrieve the information contained therein is not a "search" because,

> [A] DNA fingerprint is . . . akin to a snapshot: it reveals identifying information based on a blood test conducted at a single point in time . . . if a snapshot is taken in conformance with the Fourth Amendment, ***the government's storage and use of it does not give rise to an independent Fourth Amendment claim*** . . . consequences of the contrary conclusion would be staggering. Police departments across the country could face an intolerable burden if every "search" of an ordinary fingerprint database were subject to Fourth Amendment challenges.

Johnson v. Quander 440 F.3d 489, 499 (D.C. Cir. 2006) (emphasis added).

Comparatively, the ALPR database contains *literal snapshots* of license plates captured throughout San Diego and the State of California; therefore, a search would have been, "completed upon the [photograph the license plate and] any future [access] on a stored [license plate] will not discern any human activity nor will constitute a physical intrusion." *Johnson*, at 178, 500. Therefore, the Government's storage and use of the license plate information in the ALPR database "should not give rise to an independent Fourth Amendment claim". *Johnson,* at 176, 498 (R. at 38).

Additionally, like in *Johnson* the Government here accessed records stored in the ALPR database specifically to retrieve information regarding the ongoing investigation. (R. at 38). The individual license plate records that the Government accessed pertained only to the vehicles that

were present at the park at the time of the incident and that were registered by a person who owned the same weapon used to murder the nine victims. (R. at 3). Although the ALPR database here is a technology not available for public use and contains information one could consider private, the "privacy interest in accessing the data is relatively small" and the government had an interest in keeping it for "law enforcement identification purposes." *Johnson,* at 175, 497.

Because the snapshots of Mr. Nadauld's license plate was taken lawfully within police department policy, the Government's storage and use of the data to aid in an investigation surely cannot give rise to a Fourth Amendment claim; otherwise, the Government, "could face an intolerable burden if every search of an ordinary [license plate] database were subject to Fourth Amendment challenges." *Johnson* at 176, 498.

B. The Government's Use Of The ALPR Systems Was Not Analogous To Continuous GPS Monitoring.

The government's use of ALPR systems was not analogous to that of a GPS tracking device. "The use of longer-term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *United States v. Jones,* 565 U.S. 400, 430 (2012). "Society's expectation has been that law enforcement would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 430, 964.

In *Jones*, the government's use of a GPS device, "to monitor the Jeep's movements over the course of four weeks" became unreasonable because "law enforcement agents tracked every movement that [Jones] made in the vehicle he was driving." *Jones,* at 430, 964. Continued surveillance to this degree impinges on a person's expectation of privacy because, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about [his] familial, political, professional, religious, and sexual associations." *Id.*

In this case however, the Government's use of Mr. Nadauld's vehicle movements was limited to a two-week period to cross reference his vehicle with fifty others that were recorded leaving Balboa Park immediately after the shooting. (R. at 3). Unlike the use of the GPS device in *Jones,* the use of the ALPR database was not unreasonable because, "law enforcement agents [did not] track every movement that [Mr. Nadauld] made in the vehicle he was driving." *Jones,* at 430, 964.

Additionally, because *Jones* "was made the target of an investigation," the GPS device could "secretly monitor or catalogue every single movement of [Jones'] car." *Jones,* at 430, 964. The government's use of the GPS device established Jones' vehicle location within 50 to 100 feet of the officers and relayed more than 2,000 pages of data over the four-week period. With such vast and precise dataset, the government may have obtained movements that reflects a wealth of detail about [Jones'] familial, political, professional, religious, and sexual associations" as Jones could not escape the GPS device. *Id.* However, the ALPR system is limited in such capabilities.

The ALPR data accessed could only be based on Mr. Nadauld's discretion to actually drive his vehicle, which was equipped with license plates, his choice of driving on a public roadway within city limits, and in areas where ALPR cameras present; opposed to, "secretly monitor[ing] or catalogue[ing] *every single movement* of [Mr. Nadauld's] car." *Jones,* at 430, 964 (emphasis added). Further, unlike the government's knowledge of Jones, the Balboa Park shooter was unknown at the time Mr. Nadauld's license plate information was accessed. (R. at 2). Mr. Nadauld was 1 of 100 vehicle owners, 50 of which left the Balboa Park at the time of the shooting and 50 vehicles of individuals owning an assault rifle, one of which was Mr. Nadauld. (R. at 3).

Because the ALPR did not have the capability to perform continuous monitoring like a GPS, the Government was limited to mere snapshots of Mr. Nadauld's vehicle movements, none

of which could "reflect a wealth of detail about [his] familial, political, professional, religious, and sexual associations." *Jones*, at 415, 955. Such limited surveillance did not impinge on Mr. Nadauld's expectation of privacy, rather, the "relatively short-term monitoring of [Mr. Nadauld's] movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Id.* at 430, 964. Therefore, the Government's use of ALPR systems did not come within the purview of a GPS device and the Appellate Court should not have based its decision under that premise.

C. The Government's Use of The ALPR Database Did Not Intrude Into A Constitutionally Protected Area Because There Is No Justifiable Privacy Interest In Stored License Plate Information That Would Reveal The Privacies Of Life.

It has been generally held that a "search" occurs when, "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, (1984). On one hand, searching a home without a valid warrant based on probable cause would, "present far too serious a threat to privacy interests . . . to escape . . . Fourth Amendment oversight"; thus, warrantless searches of the home are generally unreasonable. *United States v. Karo*, 468 U.S. 705, 716 (1984).

On the other hand, where there is less of a privacy interest than one's home, such as a vehicle, no warrant is necessary and the vehicle can be searched based on probable cause or reasonable suspicion alone. *California v. Carney*, 471 U.S. 294, 392-94 (1985). Additionally, "individuals have a reasonable expectation of privacy in the whole of their physical movement [and] what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Carpenter v. United States*, 201 L. Ed. 2d 507, 138 S.Ct. 2206, 2217 (2018).

Because the purpose of a license plate is to provide identifying information to the government, there is no justifiable privacy interest in the stored license plate information within the ALPR database. Further, if an investigation does not track the "whole" of a person's physical movements, then the "privacies of life" are likely not exposed. Therefore, the Government's use of the ALPR database here did not intrude into a constitutionally protected area because Mr. Nadauld did not have a justifiable privacy interest in his stored license plate information and the privacies of his life were not revealed.

1. Mr. Nadauld Did Not Have A Justifiable Privacy Interest In His Stored License Plate Information Because Its Purpose Is To Provide Identifying Information To The Government.

The purpose of a license plate was to provide identifying information to the government, a person "has no expectation of privacy in a license plate number"; therefore, accessing and "maintaining law enforcement databases is to make information . . . readily available to officers carrying out legitimate law enforcement duties." *United States v. Ellison*, 462 F.3d. 557, 561 (6th Cir. 2006). In *Ellison*, an officer entered and searched the appellant's license plate number into the Law Enforcement Information Network (LEIN) database which provided him with the vehicle registration information as well as a felony warrant for the appellant's arrest. *Ellison*, at 559.

This Court must acknowledge that Mr. Nadauld had less of a privacy interest in his stored license plate information than that of the appellant in *Ellison*, because unlike the LEIN system in *Ellison*, the ALPR system did not contain any of Mr. Nadauld's personal identifying information – only the "datasets of license plate numbers, photos of the vehicles, and geospatial locations." (R. at 38-9). Additionally, the ALPR database compares license plate data to those in other law enforcement databases which are associated with active investigations and to "assist in the identification of suspects, victims, and witnesses." (R. at 38-9).

Furthermore, because the Government used the ALPR database to cross-reference data between vehicles present at Balboa Park and those who had an M16 rifle registered to them, the Government simply used the ALPR database to access information "readily available to officers carrying out legitimate law enforcement duties." *Ellison*, at 562.

Therefore, accessing the ALPR database was not an intrusion into a constitutionally protected area, because Mr. Nadauld did not have a justifiable expectation of privacy in his license plate information, and any existing privacy interest did not outweigh the Government's interest in discovering the identity of the Balboa Park shooter.

2. Because Mr. Nadauld Maintained A Reasonable Expectation Of Privacy In The Whole Of His Physical Movements, None Of The Privacies Of His Life Were Revealed.

The Court of Appeals erroneously attempts to align *Carpenter's* holding that, ". . . an individual maintains a legitimate expectation of privacy in the record of his physical movements" with the supplemental language ". . . even those in a public place." (R. at 17). "What one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Carpenter v. United States*, 201 L. Ed. 2d 507, 2217. "Individuals have a reasonable expectation of privacy in the whole of their physical movement." *Id.*

In *Carpenter*, the government's record of his physical movements was not limited to those in public places. In compliance with the Stored Communications Act and pursuant to two court orders issued by a judge, Carpenter's wireless carriers—MetroPCS and Sprint—disclosed cell site location information (CSLI) for Carpenter's cell phone for incoming and outgoing calls during the four-month period where the government obtained 12,898 location points of Carpenter's movements—an average of 101 data points per day. *Carpenter*, at 2212. Clearly this kind of "historical cell phone records . . . provide[d] a comprehensive chronicle of the user's past movements," including areas Carpenter sought to preserve as private. *Id.* at 2117.

Similarly, the GPS device in *Jones*, whereby signals from multiple satellites established Jones' vehicle location and provided the government with more than 2,000 pages of data over a four-week period. *Jones*, at 404, 948. The holding that longer-term GPS monitoring of Jones' vehicle traveling on public streets constituted a search, aligns closely with *Carpenter* because like Carpenter, Jones had a reasonable expectation of privacy in the whole of [his] physical movement." *Carpenter,* at 2217.

Here, the record of Mr. Nadauld's physical movements was limited to the public places in which the ALPR systems captured his license plate, none of which were areas he sought to preserve as private. Mr. Nadauld traveled on a public roadway and, "[a] car has little capacity for escaping public scrutiny." *Carpenter*, at 2218. The ALPR systems are located in public places specifically because, "[t]he exterior of a car is thrust into the public eye," exposing the vehicle's license plate, "and thus to examine it does not constitute a search." *Jones*, at 410, 952.

Unlike *Carpenter* and *Jones*, cross referencing images of Mr. Nadauld's license plate against fifty other suspected license plates based on a record of their time and geospatial location does not "achieve near perfect surveillance, as if [the government] had attached an ankle monitor." *Carpenter*, at 2218; (R. at 3). As a metaphorical extension of the officer's eyes, the ALPR systems automatically capture the image of a license plate when it passes the systems' field of view and the only records obtained are the time and location of the vehicle. Unlike the "perpetual surveillance" of a cell phone or GPS device, the ALPR database was incapable of recording data in the private sphere and Mr. Nadauld maintained a "reasonable expectation of privacy in the *whole of [his] physical movement*." *Carpenter*, at 2217 (emphasis added); (R. at 17).

Additionally, the Court misstates that, "access of substantial history of a person's movements contravenes societal expectations of privacy" when referring to ALPR databases. (R.

at 17). The Supreme Court in *Jones* and *Carpenter*, found that some locations containing records "hold for many Americans the "privacies of life." *Carpenter,* at 2217. For example, in *Jones* "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about [his] familial, political, professional, religious, and sexual associations," and in *Carpenter*, "the time-stamped data provid[ing] an intimate window into a person's life, revealing not only his particular movements, but location information as detailed, encyclopedic, and effortlessly compiled." *Jones*, at 415, 955 (see also *Carpenter v. United States*, 201 L. Ed. 2d 507, at 2217). However, that is not the case here.

Here, the access to Mr. Nadauld's movement history was minimal and his location records did not reveal any privacies of [his] life. Unlike the devices in *Jones* and *Carpenter*, ALPR's do not "track nearly exactly the movements of its owner" and they certainly do not distribute location information as "detailed, encyclopedic, and effortlessly compiled as one can ascertain from a cell phone or GPS." *Jones*, at 415, 955. Even if the Government wanted more information about Mr. Nadauld's movements, any records would be limited to where his vehicle was captured in public.

The picture of Mr. Nadauld's license plate might tell the government if his vehicle was moving or parked; however, the image would not establish when Mr. Nadauld left his vehicle; what store, building, or area he entered; or, how long he stayed in any one location. "Individuals regularly leave their vehicles" and the ALPR's are incapable of tracking a vehicle "owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Carpenter,* at 2206, 2218. Therefore, the only privacies of Mr. Nadauld's life revealed were the public locations of Mr. Nadauld's vehicle, which "accords with expectations of privacy that our society has recognized as reasonable." *Jones*, at 415, 955.

3. ALPR License Plate Information Reduces The Expectation Of Privacy; Thus, The Government Is Free To Obtain Such Information From the Northern California Regional Intelligence Center Without Triggering Fourth Amendment Protections.

The Court of Appeal erroneously warrants the application of third-party doctrine with ALPR database information. (R. at 18). Per *Carpenter,* "Third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another." *Carpenter,* at 2219. "The nature of the particular documents sought determines whether there is a legitimate expectation of privacy concerning their contents." *Id.* As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

Unlike the, "396 million cell phone service accounts in the United States" in "a Nation of 326 million people," an ALPR system is limited only to those who operate a vehicle equipped with a license plate. *Carpenter*, at 2211. The legislature of each state requires the display of a license plate because, "The very purpose of a license plate number . . . is to provide identifying information to law enforcement officials and others." *United States v. Ellison*, at 557-60. It's likely inherent in the laws regarding the display of license plates that the intended location of most vehicles will be observed in public places. In California specifically, "License plates . . . shall at all times be securely fastened to the vehicle for which they are issued . . . so the characters are upright and display from left to right, and shall be maintained in a condition so as to be *clearly legible***.**" California Vehicle Code §5201(a) (emphasis added). Therefore, by remaining compliant with the law a driver already has a reduced expectation of privacy in their identifying information.

Under this analysis, Mr. Nadauld's expectation of privacy was reduced when his vehicle entered a public roadway. "The nature of the documents sought" from Mr. Nadauld's vehicle were limited to the data sets of license plate numbers, photographs of Mr. Nadauld's vehicle, and

geospatial locations from where images were captured. *Carpenter*, at 2216; (R. at 38-39). Unlike the third-party analysis in *Carpenter*, where "in no meaningful sense does the user voluntarily assume the risk of turning over a comprehensive dossier of his physical movements," the ALPR database information stands alone like the interests sought in *Smith* and *Miller,* such as telephone call logs "revealing little in the way of identifying information" and bank checks not being considered "confidential communications but negotiable instruments to be used in commercial transactions." *Carpenter,* at 2216 (*but see Smith v. Maryland*, 442 U.S. 735, 742, 99 S.Ct. 2577 (1979) and *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct.1619 (1976)). This Court therefore appreciated that neither case had "comparable limitations on the revealing nature of [CSLI]" and the government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment." *Carpenter,* at 2220.

Mr. Nadauld's location and images of his license plate provide less identifying information than the telephone call log in *Smith* or the checks seized in *Miller*. Under the Court of Appeals third-party approach, the government would be required to serve a warrant on the Northern California Regional Intelligence Center ("NCRIC"), another government agency. Further, such an approach would require an officer to obtain a warrant on all vehicles captured by the ALPR reader; and yet, no warrant would be required by an officer who observed the same vehicle with their own eyes, either in person, or through other forms of surveillance.

Lastly, such a holding would place a government agency inferior to a bank as in *Smith* or the telephone company in *Miller* where both provided far less identifying information. Therefore, the nature of ALPR information reduces Mr. Nadauld's expectation of privacy and as a result, "the Government is typically free to obtain such information from the [NCRIC] without triggering Fourth Amendment protections." *Carpenter,* at 2216.

On these grounds, the Court of Appeals erred in holding that the retrieval of Mr. Nadauld's information from the ALPR database required a warrant under the Fourth Amendment.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE WARRANTLESS ENTRY AND SEARCH OF MR. NADAULD'S HOME VILOLATED HIS FOURTH AMENDMENT RIGHTS.

A warrantless search requires both probable cause and an exception to the warrant requirement, such as exigent circumstances. *United States v. Ogden*, 485 F.2d 536, 539 (9th Cir. 1973). In the case at bar, the court recognized that probable cause is, "a fluid concept that is not readily, or even usefully reduced to a neat set of legal rules"; and while probable cause depends on the totality of circumstances, it only requires a, "probability or substantial chance of criminal activity, not an actual showing of such activity." (R. at 19) (quoting *Illinois v. Gates*, 462 U.S. 213 232, 243-44 (1983)) (see also *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Yet this particular issue was decided as if probable cause could be boiled down to a specific showing of facts either being "probable or coincidental" without taking the full totality of circumstances into consideration.

Because the court relied on what was concluded to be coincidence and did not consider the totality of the circumstances accurately to establish probable cause, it erred in holding the Government's warrantless entry into Mr. Nadauld's home was unconstitutional.

A. Based On The Totality Of Circumstances, Probable Cause Was Established.

The court opined, Mr. Nadauld's involvement "was far from probable [because Mr. Nadauld] was one of fifty people total who legally owned an automatic assault rifle . . . [and] the tracking of McKennery's vehicle was one of also fifty vehicles that left Balboa Park . . . [therefore] the evidence [of Mr. Nadauld's involvement] was coincidental at best." (R. at 19).

A showing of probable cause, based on the totality of circumstances only requires, "probability or substantial chance of criminal activity, not an actual showing of such activity" yet, the court's application in this case is proof of its misunderstanding of the *Gates* opinion. (R. at 19) (quoting *Illinois v. Gates*, 462 U.S. 213 232, 243-44, (1983)). In deciding *Gates*, this Court most notably abandoned the previous "two-pronged test" to determine whether an informant's tip contributes to the establishment of probable cause and instead maintained the totality of the circumstances approach was "far more consistent with . . . prior treatment of probable cause." *Illinois v. Gates*, 462 U.S. 213, 230, 2328.

However, what is most relevant to this case is how the *Gates* opinion illustrated once a relationship between multiple independent circumstances is established, the inference value progresses logarithmically creating the "totality" for the set of circumstances that itself establishes probable cause. Specifically, "Innocent behavior frequently will provide the basis for a showing of probable cause . . . in making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of non-criminal acts." *Gates*, at 243, 2335, n.13.

In *dicta*, the *Gates* Court considered the exponential effect of corroborating "innocent activity", such as providing the police with an anonymous tip, to which "when supplemented by independent police investigation, frequently contribute to the solution of otherwise perfect crimes". *Gates* at 238, 2332 (internal quotations omitted). Furthermore, particularized suspicion requires forming, "certain common-sense conclusions [and] the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, *but as understood by those versed in the field of law enforcement*." *Gates* at 232, 2329 (emphasis added).

Essentially, the degree of suspicion that attaches to each independent circumstance gives rise to the inference of criminality at an exponential rate. Meaning, the more independent circumstances make up the totality, regardless if the "particular conduct is innocent or guilty," the higher the inference value of suspicion that "will provide the basis for a showing of probable cause." *Gates,* at 232, 2329. In this case, The Court of Appeal clearly failed to properly apply the circumstances as such.

Here, "due to the heinous nature of the crime and lack of leads, law enforcement used numerous investigative methods." (R. at 3). These investigative methods yielded the following independent circumstances that formed the totality: (1) The rounds used in the shooting were identified and linked to assault rifles like the M16; (2) The manifesto read in part, "*My friends and I . . . We're* going . . ." which arguably indicated there could be two or more suspects involved in the shooting; (3) Mr. Nadauld was identified as one of fifty people to have an M16 assault rifle registered in their name; (4) Investigators accessed the ALPR database and found, "along with other pairings, that Nadauld's vehicle and McKennery's vehicle had considerable overlap of being at the same locations at similar times." (R. at 2-4, 36) (emphasis added).

Like in *Gates*, the independent circumstances here, legal ownership of the assault rifle and overlapping locations, were "innocent activities" in and of themselves; however, "common-sense conclusions [and] the evidence [was] seen and weighed . . . by those versed in the field of law enforcement" resulted in particularized suspicion of "ten residences . . . that corresponded the most" including Mr. Nadauld's residence. *Gates,* at 232, 2329 (R. at 4).

Because the court suggested that an association between those who were at the park at the time of the incident and assault rifle owners, was "arbitrary" and "coincidental at best," it is evident that it failed to consider each independent circumstance within the totality, and only considered

the "innocent activities" which, contrary to *Gates*, were "seen and weighed . . . in terms of [a] library analysis by scholars" without any consideration of how each circumstance increased the inference of suspicion that "provided the basis for a showing of probable cause" without the need of "an actual showing of [criminal] activity". *Gates,* at 232, 2329-35, n.13 (R. at 19).

B. Because Probable Cause Was Established And Exigent Circumstances Existed, The Entry And Search Of Mr. Nadauld's Home Was Permitted And Any Evidence In Plain View Was Admissible.

There is no dispute that, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Kentucky v. King*, 563 U.S. 452, (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, (2006)). However, it has also been widely recognized that this presumption could be overcome when, "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King* at 460, 1856. The court in this case, again failed in its application of relevant precedent.

Recently, this Court decided *Lange v. California*, 141 S.Ct. 2011, 210 L.Ed.2d 486 (2021) in which officers suspected Lange of driving under the influence; and, after he failed to yield when a traffic stop was attempted, officers followed him into his garage without a warrant arguing the exigency exception of "hot pursuit" applied. On a, "case-by-case basis . . . when the totality of circumstances shows an emergency – the need to act before it is possible to get a warrant – the police may act without waiting." *Lange,* at 2013. Although the Court in *Lange* considered, "the totality of circumstances confronting the officer as he [decided] to make a warrantless entry" the Court ultimately rejected the State's argument on the ground the driver had only been charged with a minor offense because, "the gravity of the underlying offense . . . is an important factor to be considered when determining whether any exigency exists." *Lange*, at 2020.

Additionally, in the months following *Lange*, the Eighth Circuit decided *United States v. Meyer*, 19 F.4th 1028 (8th Cir. 2021), where federal officers spoke with Meyer, who was suspected of distributing child pornography, outside his home before growing suspicious that if let back inside Meyer would destroy evidence. Under the exigency exception to the warrant requirement, warrantless entry and seizure computers and a cell phone were permissible. *Meyer*, at 1031.

In accordance with *Lange*, the Eighth Circuit first considered all the relevant facts the officers knew prior to entering the home and although Meyer, "had an innocent explanation for *some* of [the] facts . . . the circumstances were suspicious enough that the agents could have reasonably concluded there was a substantial chance that Meyer was involved in criminal activity." *Meyer*, at 1032 (emphasis in original). Further, the agents had, "a sufficient basis to reasonably believe that [Meyer] would imminently destroy evidence" based on his conduct outside his home. *Id.* at 1033. Because the agents had, "substantial latitude to draw inferences from what they know" Meyer's conduct "created the exigency." *Meyer,* at 1033 (see also *United State v. Horne*, 4 F.3d 579, 589 (8th Cir. 1993)). The Eighth Circuit invited contemplation of the following:

> Consider what Meyer said and did. When asked whether he would allow an examination of his computer, he initially said no because he used it "all the time." Then, despite his professed need for it, *he offered to let the agents examine it later*, after he "check[ed] [his] email and stuff." . . . *When the agents suggested that they accompany him inside and look at the devices together, his attention shifted to the tidiness of his house*. His "house [was] a mess," he said, so he would need "a few minutes to clean up" . . . Rather than remaining outside as requested . . . Meyer instead went inside . . . Given Meyer's insistence that he have an opportunity to be alone with his devises first, [the agents] reasonably concluded that he was hiding something. And *if they were to wait to conduct the search, as he had suggested, the something that he did not want them to see would be gone.*

United States v. Meyer, 19 F.4th 1028 (8th Cir. 2021) (emphasis added).

Here, the Government already suspected there was an association between Mr. Nadauld and Mr. McKennery based on the gathered ALPR data and therefore began monitoring Mr.

Nadauld's residence, along with nine others, "for any suspicious activity." (R. at 4). Then, following an anonymous call in which "The Balboa Park Shooter" threatened to attack a school, officers observed Mr. McKennery pull into Mr. Nadauld's driveway and hand Mr. Nadauld, "a large duffle bag" which confirmed the previously suspected association. *Id.* Because the Officers had, "substantial latitude to draw inferences from what they know," it was reasonable to believe the "large duffle bag" could conceal an M16. *Meyer,* at 1033. Additionally, because the interaction took place following the threat to attack a school, "the gravity of the underlying offense . . . [was] an important factor to be considered when determining whether any exigency exists"; and thus, the Officers, "were immediately dispatched to Nadauld's house to investigate." *Lange,* at 2011, (R. at 4).

What transpired next is essentially a play-by-play of the interaction between the officers in *Meyer*. Here, when Officer Hawkins asked if Mr. Nadauld still had the M16, Mr. Nadauld deflected and replied, "Um… I thought you guys were coming in like a month to talk about that." (R. at 23). Officer Hawkins then told Mr. Nadauld, "We'd like to see the gun" to which Mr. Nadauld, like *Meyer*, said no and *offered to let the officers examine it later*. (R. at 23); *Meyer,* at 1033 (emphasis added). When Officer Hawkins pressed further stating, "[we] want to make sure all assault weapons are accounted for" in the wake of the Balboa Park shooting, Mr. Nadauld, again like *Meyer*, suggested the Officers wait outside *so he could go in alone* to retrieve it. (R. at 23); *Meyer,* at 1033 (emphasis added).

Lastly, and nearly identical to *Meyer*, Officer Hawkins suggested he come into the house to verify that the weapon had been rendered inoperable, Mr. Nadauld *"shifted his attention to the tidiness of his house"* and stated, "Well, my house is kind of messy. I'd prefer that you wait out here." (R. at 23); *Meyer,* at 1033 (emphasis added). Here, like in *Meyer*, Mr. Nadauld's "insistence

that he have an opportunity to be alone with [the M16 assault rifle]", Officers Hawkins and Maldonado could have reasonably concluded that if they were to wait to enter the house, "the delay required to obtain a warrant would bring about real immediate and serious consequences" – either the destruction of evidence; or worse, a school could have been attacked. Although Mr. Nadauld could have "had an innocent explanation for *some* of [the] facts . . . the circumstances were suspicious enough that the agents could have reasonably concluded there was a substantial chance that [Mr. Nadauld] was involved in criminal activity." *Meyer*, at 1032; (emphasis in original).

Both probable cause and exigent circumstances existed at the time the Government entered Mr. Nadauld's residence because "the exigencies of the situation [made] the needs of law enforcement so compelling that a warrantless search [was] objectively reasonable under the Fourth Amendment." *Kentucky v. King* at 460, 1856. Therefore, the Court of Appeals erred in holding that the warrantless entry and search of Mr. Nadauld's home was in violation of the Fourth Amendment, and the evidence seized should not have been suppressed.

CONCLUSION

For the foregoing reasons, it is respectfully requested; this Court reverse the judgement of the California Fourth District Court of Appeal.

Date: October 11, 2022

Respectfully submitted,

/s Team 21

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