Team 23

No. 1788-850191

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

NICK NADAULD,

Respondent.

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

BRIEF FOR THE PETITIONER

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II. Whether the warrantless entry and search of Respondent's home violated his Fourth Amendment rights when, considering the gravity of the underlying offense, law enforcement had probable cause and there were exigent circumstances.

STATEMENT OF THE CASE

Factual History

On September 14, 2021, nine individuals were murdered and six more wounded when a masked shooter opened fire on a crowd in Balboa Park. R. at 2. The shooter, perched on a rooftop, used an M16A1 (hereinafter "M16") automatic assault rifle to wreak carnage on the unsuspecting individuals below. *Id.*

The shooter initially escaped without being identified by blending in with non-descript clothing. *Id.* However, the shooter did leave a note on the roof of the San Diego Museum of Art, from where he fired the assault rifle. *Id.* The note, which the shooter labeled a "Manifesto," threatened future shootings soon thereafter. *Id.*; Exhibit 1. The shooter wrote that he and his friends were going to "show the world that there's nothing … but despair." Exhibit 1.

In the following two weeks, law enforcement used numerous investigative methods to identify the shooter. R. at 3. Police officers first analyzed the surveillance footage from security cameras in and around Balboa Park. *Id.* The camera footage revealed approximately forty individuals and fifty vehicles fled the scene of the shooting before the police arrived to secure the area. *Id*. The forty individuals did not come forward and their faces could not be compared to information in the government's databases because the imaging was blurry. *Id*.

Officers then obtained a list of registered assault rifle owners in the area. *Id*. Using information from the Automatic License Plate Recognition (hereinafter "ALPR") database, law enforcement then compared movements between the fifty Balboa Park vehicles and the fifty identified assault rifle owners. *Id*. Officers found there was a considerable time and location overlap between Respondent, an assault rifle owner, and Frank McKennery, the owner of one of the fifty vehicles. *Id*. at 3-4. Law enforcement then began investigating the ten residences that

corresponded the most to the driving location data of the fifty vehicles. *Id*. at 4. On September 24, cameras were placed on utility poles near those residences, one of which was owned by Respondent. *Id*.

On September 28, law enforcement received an anonymous call from a telephone booth in which someone claiming to be the Balboa Park shooter said, "This time, it's gonna be a school." *Id*. The next day, cameras surveilling Respondent's house recorded McKennery pulling into the driveway of Respondent's house, handing Respondent a large duffel bag, and then leaving. *Id*. FBI Officers Jack Hawkins and Jennifer Maldonado were at Respondent's house within minutes. *Id*. The officers questioned Respondent about his assault rifle and were dissatisfied with his suspicious answers. *Id*. They entered the home, conducted a search, and subsequently found Respondent's M16 rifle in plain view. *Id*. Respondent legally acquired the rifle through devise when his father passed away over five years before. *Id*. at 2. However, the rifle had not been made inoperable, as was required by California statute. *Id*. at 4.

During further questioning at his home, Respondent admitted to loaning the assault rifle to McKennery, a former co-worker, around September 14. *Id*. at 2. Respondent said McKennery was a self-proclaimed shooting enthusiast and wanted to use the weapon for an outdoor target shooting excursion. *Id*. Respondent did not think McKennery had been in Balboa Park at the time of the shooting, as McKennery sent Respondent a photo the day of the shooting that showed McKennery in the desert. *Id*. at 3.

However, after two weeks of investigation, law enforcement identified McKennery as the Balboa Park shooter. *Id*. at 2. Officers discovered the "Manifesto" was a fabrication McKennery manufactured to conceal the true motive of the shooting, and thus, his identity. *Id*. at 2-3; Exhibit J. Officers also found out Respondent told McKennery to hide the image of him with Respondent's

M16, for fear of being caught loaning it illegally. Exhibit B. When law enforcement arrived at McKennery's house to arrest him, they heard a gunshot and found McKennery lying dead on the floor inside. R. at 4. It was determined McKennery died from suicide. *Id*. at 2. Next to McKennery's body was a letter confessing to the crime of shooting the victims at Balboa Park. Exhibit J.

Procedural History

Respondent was indicted on October 1, 2021, for nine counts of second-degree murder, nine counts of involuntary manslaughter, one count of lending an assault weapon, and one count of failing to render an assault weapon inoperable. R. at 5. Respondent subsequently filed a motion in the Superior Court of the State of California for the County of San Diego, asking to suppress information collected by law enforcement on the date of his arrest. *Id*. at 1. The Superior Court denied the motion to suppress on November 21, 2021. *Id*. Respondent was found guilty of involuntary manslaughter, lending of an assault weapon, and failure to render an assault weapon inoperable. *Id*. at 14. Respondent properly preserved his right to appeal the Superior Court's decision on the motion to suppress. *Id.* The Court of Appeals of the State of California, Fourth Appellate District, Division One granted Respondent's appeal. *Id*. at 13. The Court of Appeals granted Respondent's motion to suppress and remanded the case to the Superior Court for further proceedings. *Id*. at 21. The Supreme Court of California denied certiorari of the case. The People of the State of California then requested review from the United States Supreme Court and review was granted on September 23, 2022.

ALPR Background

ALPR is a technology surveillance system that is generally attached to a light pole (stationary) or fixed to a law enforcement officer's car (mobile). R. at 39. The system scans and

records license plate numbers. *Id*. at 38-39. Each scan produces an image of the vehicle, as well as the time, date, and location of the scan. *Id*. The recorded license plate number is then transmitted to a database where it is held for a set period of time. *Id*. at 39. Depending on the jurisdiction, ALPR data may be kept in a database from sixty days to five years. *Id*. at 40.

Only authorized individuals may access ALPR data, and such access must be for a lawful purpose. *Id*. at 39. The data is generally used to identify vehicles on hot lists associated with missing persons, stolen vehicles, or stolen license plates. *Id*. at 38. ALPR data can also help identify those located near or around a crime scene. *Id*. For this reason, specific locations of ALPRs are not disclosed, as individuals engaged in suspicious activity could readily avoid the scanners. *Id*. at 39-40.

ALPR data does not include any personal identifying information and does not disclose information relating to the vehicle's registration or ownership. *Id*. at 38-39. ALPR scanners do not use facial recognition, nor do they reveal the occupants of a vehicle. *Id*. Thus, the limited information from ALPR data only points law enforcement in the direction of further investigation. *Id*. Additionally, ALPR translations may be incorrect. *Id*. at 39. Therefore, "[l]aw enforcement users of ALPR data must, to the fullest extent possible, visually confirm that the plate characters generated by the ALPR readers correspond with the digital image of the license plate in question." *Id*.

SUMMARY OF THE ARGUMENT

The use of ALPR data is not a search and its use does not require a warrant. Respondent could not have a subjective expectation of privacy in the ALPR data. Respondent drove on a public road, knowingly exposing the exterior of his vehicle to the public, and California law required his license plates to be visible and legible. Further, Respondent's belief of privacy would not be

supported by society. Society has recognized a lesser expectation of privacy in vehicles and Respondent assumed that lesser expectation when he ventured onto public roads. Additionally, unlike technology that tracks the whole of an individual's movements, ALPR data only augments law enforcement's surveillance capability. ALPRs reveal minimal information about an individual, and therefore, society would not recognize an expectation of privacy in the data as reasonable. Thus, Respondent fails both prongs of the reasonable expectation of privacy test. Accordingly, there was not a search and no warrant was required.

The warrantless entry and search of Respondent's home did not violate his constitutional rights. The Fourth Amendment allows exceptions to the warrant requirement when there is probable cause and exigent circumstances. Here, law enforcement had both. Respondent was one of only fifty people in the area who possessed an automatic assault rifle and his movements showed considerable overlap with one of only fifty vehicles that fled the crime scene. Considering the totality of the circumstances, officers had reason to believe Respondent was connected to the shooting. Additionally, law enforcement correctly weighed the gravity of the underlying offense in determining that exigent circumstances existed. Mass shootings are apocalyptic crimes that cause many deaths, and the shooter in this case threatened to attack again. With probable cause and a need to protect the public from more violence, law enforcement's entry and search of Respondent's home fell easily within the exception to the Fourth Amendment warrant requirement.

STANDARD OF REVIEW

Constitutional questions are reviewed de novo. *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001). Review of a motion to suppress is bifurcated; questions of law are reviewed de novo and the trial court's factual findings are reviewed for clear error. *Ornelas v. U.S.*, 517 U.S. 690, 691 (1996).

ARGUMENT

I. The Use of ALPR Data is Constitutional and is Not a Search Under the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects people "in their persons, houses, papers, and effects" from unreasonable searches and seizures. U.S. Const. amend. IV. Fourth Amendment search protections were originally tied to common law trespass (property rights), and "focused on whether the Government 'obtain[ed] information by physically intruding on a constitutionally protected area.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). However, the Fourth Amendment has evolved and since been held to "protect[] people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). The Fourth Amendment now protects physical intrusions to property and "certain expectations of privacy," and such intrusions generally require warrants supported by probable cause. *Carpenter*, 138 S. Ct. at 2213. Fourth Amendment protections arise when the government's actions amount to a search. *See New York v. Class*, 475 U.S. 106, 112 (1986). The government in this case did not search the inside of the vehicle and Respondent has not alleged a physical intrusion. This case solely regards the exterior of Respondent's vehicle and whether he had a reasonable expectation of privacy in the information recorded by the ALPRs.

While this Court has consistently held that mere visual surveillance of a public area is not a search, *see e.g.*, *United States v. Jones*, 565 U.S. 400, 412 (2012), it has not specifically considered ALPR data use within the Fourth Amendment context. *United States v. Rubin*, 556 F. Supp. 3d 1123, 1129 (N.D. Cal. 2021). ALPR is a relatively new phenomenon and most lower courts have also not considered the issue. *See e.g.*, *United States v. Yang*, 958 F.3d 851, 861 (9th Cir. 2020); *State v. Lelyukh*, 2021 WL 5872306 (Minn. Ct. App. 2021); *Hernandez-Lopez v. State*, 738 S.E.2d 116, 119 (Ga. Ct. App. 2013) (not considering whether ALPR constituted a search but

finding the system "merely aided the officer by augmenting his sensory faculties"); *but see Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1106 (Mass. 2020) (holding the use of ALPR data was not a search but could amount to a search with enough ALPRs in place).

This Court considers two elements when determining whether a search has taken place: 1) an individual's subjective expectation of privacy and 2) society's endorsement of that expectation as reasonable. *See e.g., United States v. Knotts*, 460 U.S. 276, 280-81 (1983) ("whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy' … that society is prepared to recognize as 'reasonable'") (parens in original); *Maryland v. Macon*, 472 U.S. 463, 469 (1985) ("A search occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed.'"); *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (same). This two-prong test was first introduced by Justice Harlan in a concurring opinion. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

This Court has consistently reaffirmed the validity of both the subjective and objective elements of the *Katz* test. *See e.g., Carpenter* 138 S. Ct. at 2213; *Jones*, 565 U.S. at 406; *Smith v. Maryland*, 442 U.S. 735, 740 (1979). However, a Fourth Amendment search analysis generally turns on the second prong of the reasonable expectation test. *See* Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi. L. Rev. 113, 114 (2015) ("Subjective expectations are irrelevant. A majority of courts that apply *Katz* do not even mention the subjective inquiry; when it is mentioned, it is usually not applied; and when it is applied, it makes no difference to the outcomes."). The subjective prong is a question of fact, whereas the reasonableness, or objective, prong of the test is a question of law. *State v. Payne*, 996 A.2d 302, 305, n. 3 (Conn. App. Ct. 2010). Respondent fails to satisfy both prongs of the test.

A. Individuals Do Not Have a Subjective Expectation of Privacy in ALPR Data.

An individual must demonstrate an intent for a personal expectation of privacy. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *see also California v. Ciraolo*, 476 U.S. 207, 211 (1986) (reasoning the placement of a ten-foot fence showed a desire for privacy). "[T]he subjective test focuses on whether the individual took steps that 'exhibited' an expectation of privacy—that is, whether the individual took objective measures to block the public or government from observing the information at issue." Kerr, *Irrelevance*, *supra*, at 126. Similarly, this Court has held an individual is not subject to Fourth Amendment protections when "he knowingly exposes himself to the public." *Katz*, 389 U.S. at 351.

Here, Respondent's subjective expectation of privacy is defeated for two reasons: 1) he drove his vehicle on public roads and 2) California law requires license plates on vehicles to be clearly visible. By driving onto a public road, Respondent knowingly exposed the exterior of his vehicle (including his license plates) to any individual he passed along the journey. Driving on any public road defeats Respondent's subjective expectation of privacy. Consequently, he would be prevented from asserting privacy in license plate scans and data collected through ALPRs.

Further, California law requires that "[l]icense plates … shall at all times be securely fastened to the vehicle for which they are issued … shall be mounted in a position so as to be *clearly visible* … and shall be maintained in a condition so as to be clearly legible." Cal. Veh. Code § 5201 (2022) (emphasis added). Accordingly, Respondent is required to make his license plates visible and legible. "Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Class*, 475 U.S. at 113 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). The purpose of license plates is to communicate information to law enforcement officials and,

therefore, "a motorist can have no reasonable expectation of privacy in the information contained on [a license plate]." *U.S. v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006). Therefore, "a person traveling in a community that utilizes ALPR should reasonably expect that their license plates may be read by advanced technologies and recorded into a database." Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. Ill. J.L. Tech. & Pol'y 281, 312 (2011).

Law enforcement officers, like any other person driving on a road, should be able to clearly read license plates. A claim for privacy in the ALPR database amidst these vehicle regulations is illogical. Respondent can either comply with the law, intentionally allowing anyone to view his license plates, or he can allege a subjective expectation of privacy in his license plates and attempt to keep them private and risk legal issues—he cannot have it both ways.

B. Society Does Not Recognize a Reasonable Expectation of Privacy in ALPR Data.

Respondent's belief of privacy is not supported by society. It is the courts that analyze, through an objective lens, whether society endorses an expectation of privacy in a certain place or object. *See Katz* 389 U.S. at 361 (Harlan, J., concurring). Courts look to the status of the law, including precedential and statutory interpretation, in making the determination. *See generally*, Kerr, *supra*, at 122. Society does not recognize a reasonable expectation of privacy in ALPR data because individuals have a lesser expectation of privacy in vehicles and the data collected by ALPRs does not rise to an unconstitutional level of intrusiveness.

1. This Court has consistently recognized individuals have a lesser expectation of privacy while in a vehicle.

For nearly a century, this Court has recognized a clear difference between the expectation of privacy observed in a home and in a vehicle. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *see generally Carroll v. U.S.*, 267 U.S. 132 (1925). Certainly, an individual does not have a reasonable expectation of privacy in the exterior of a car and viewing the exterior cannot constitute a search.

See Class, 475 U.S. at 114 ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'"). An individual does not lose all privacy rights by entering a vehicle, but their expectation is certainly lessened. *See e.g.*, *id.* at 112; *Knotts*, 460 U.S. at 281. This Court has repeatedly held individuals have a diminished privacy interest in vehicles, therefore, Respondent assumed a lesser expectation of privacy when he entered his vehicle.

2. ALPR data reveals minimal information about an individual's physical movements.

Courts have recognized that individuals have a Fourth Amendment privacy interest in the whole of their physical movements. *Carpenter*, 138 S. Ct. at 2217; *see also United States v. Hobbs*, 24 F.4th 965, n. 3 (4th Cir. 2022); *Yang*, 958 F.3d at 862; *United States v. Moore-Bush*, 36 F.4th 320, 332 (1st Cir. 2022) (Barron, C.J., concurring). The whole of an individual's physical movements accurately maps out that individual's location history and can reveal their "familial, political, professional, religious, and sexual associations." *Id.* at 2217. ALPR data does not reveal the whole of an individual's physical movements and, therefore, does not constitute a search.

Technology that augments mere surveillance is not a search. *Knotts*, 460 U.S. at 282. In *Knotts*, this Court found the information gathered from a beeper on an object inside a vehicle was comparable to information law enforcement obtained by following said vehicle. *Id.* at 281-82. This Court held the use of the beeper did not constitute a search under the Fourth Amendment. *Id.* at 285. The law enforcement officers could see everything that was happening; the beeper device only made the surveillance more efficient. *Id.* at 282. The Court reasoned, "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Id.* at 281-82.

In contrast, the attachment of a global positioning system (hereinafter "GPS") device on a vehicle is a search. *Jones*, 565 U.S. at 404. In *Jones*, the government used a GPS device on the

defendant's vehicle to track his movements. *Id.* at 403-04. This Court, in holding the GPS tracking constituted a search, noted the physical intrusion of placing the device on the vehicle. *Id.* at 404, 411. In her concurrence, Justice Sotomayor introduced the idea of an aggregation principle, acknowledging that "GPS monitoring generates a *precise, comprehensive record* of a person's public movements." *Id.* at 415 (Sotomayor, J., concurring) (emphasis added).

Adopting Justice Sotomayor's concurrence from *Jones*, this Court held the government's use of cell site location information (hereinafter "CSLI") data to review the whole of an individual's physical movements is a search. *Carpenter*, 138 S. Ct. at 2217. In *Carpenter*, the government "obtained 12,898 location points cataloging [the defendant's] movements—an average of 101 data points per day." *Id.* at 2212. This Court reasoned that cell phones have become "almost a 'feature of human anatomy'" and transmit deeply personal information. *Id.* at 2217-18. This Court acknowledged an individual's reasonable expectation of privacy in the whole of their physical movements. *Id.* at 2217.

The holding in *Carpenter* has become the standard measurement for determining expectation of privacy in advanced surveillance data. ALPR data is different than other forms of advanced surveillance data this Court has scrutinized—mainly because of the minimal information it divulges. In contrast, GPS and CSLI data open the curtains to the most intimate details of an individual's life, including their religious affiliations, political loyalties, sexual encounters, and more. ALPR information does not paint such a picture, and Respondent cannot make such an argument. ALPRs only record location, date, time, and a non-descript image of the vehicle—that is the totality of the information collected.

The quantity of information collected from ALPRs is equally as distinct from other forms of advanced surveillance technology. The presence of ALPRs is intermittent and spasmodic. GPS

and CSLI, however, track an individual's location with incredible accuracy twenty-four hours a day. The intrusiveness of ALPR pales in comparison. In Respondent's case, the city of Carlsbad, not San Diego, deploys the most stationary ALPRs in California.[1] San Diego covers 342.5 square miles, making it significantly larger than Carlsbad.[2] Even if San Diego had the same number of ALPRs as Carlsbad, that would amount to only one ALPR for every six square miles of the city.

This Court has adopted an aggregation principle in its analysis for technology that *permeates* deep into personal information. *See Carpenter*, 138 S. Ct. at 2214 (emphasis added). Aggregation refers to the cumulative record of information obtained by the government about an individual. *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). However, the bulk of cases align with *Knotts*, where technology gives the government virtually no additional information and the aggregation principle would be improper. The mosaic theory is the most prominent aggregation principle that has been applied by lower courts to ALPR cases. *See McCarthy*, 142 N.E.3d at 1103-06. "Under the mosaic theory, searches can be analyzed as a collective sequence of steps … analyzing police actions over time as a collection 'mosaic' of surveillance; the mosaic can count as a collective Fourth Amendment search even though the individual steps taken in isolation do not." Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 313 (2012). Most courts have found ALPRs do not fit properly within an aggregation principle (or mosaic theory) analysis. *See Rubin*, 556 F.Supp.3d at 1128-29; *Traft v. Commonwealth*, 539 S.W.3d 647, 649 (Ky. 2018).

The most notable lower court case considering ALPR data as a search is *Commonwealth v. McCarthy*. 142 N.E.3d 1090. In *McCarthy*, law enforcement used ALPR data obtained from

[1] Electronic Frontier Foundation, *Surveillance Tech in San Diego County* (2019) atlasofsurveillance.org/borderreports/san-diego

[2] San Diego, City Profile (2011) sandiego.gov/sites/default/files/legacy/fm/annual/pdf/fy11/01v1cityprofile.pdf

four scanners stationed on the ends of two bridges. *Id.* at 1106. The court relied heavily on the mosaic theory in determining the use of the ALPR data did not constitute a search. *Id.* However, the court did recognize the potential for constitutional protections if the number of ALPRs became too great. *Id.* at 1095. "We conclude that, while defendant has a constitutionally protected expectation of privacy in the whole of his public movements, an interest which potentially could be implicated by the widespread use of ALPRs, that interest is not invaded by the limited extent and use of ALPR data in this case." *Id.*

The *McCarthy* court improperly applied the mosaic theory because ALPR data does not have the capability to show the whole of an individual's physical movements. This is unlike GPS or CSLI. As this Court pointed out in *Carpenter*, investment and productivity in today's society requires nearly all individuals to have a cell phone—most often within five feet of their person. *Carpenter*, 138 S. Ct. at 2218. Through devices like cell phones, GPS and CSLI accurately place data points and undoubtedly show not just the whole of an individual's physical movements but every personal aspect of their life. Consequently, individuals are rarely able to escape the omnipresence of GPS and CSLI. ALPR data results only from physically *driving* in front of a scanner, making ALPRs easily avoidable. In Respondent's case, the single ALPR found within every six square miles in San Diego is not pervasive and can hardly be deemed intrusive.

As surveillance technology has become more advanced, "courts have also created a formal dichotomy between technologies that merely improve the efficiency of legal investigations, and technologies that increase intrusiveness by giving law enforcement an additional, extrasensory ability." Rushin, *supra*, at 305. Presumably, the technologies that merely increase efficiency do not constitute searches and are constitutional. *See Knotts*, 460 U.S. at 285. Technologies that give

the government elevated sensory capabilities do constitute searches and require warrants. *See Kyllo*, 533 U.S. at 34.

Moreover, in determining that ALPR is too intrusive because of its lack of availability to the general public, the California appellate court relied incorrectly on this Court's decision in *Kyllo*. In *Kyllo*, police officers used a thermal imaging gun to find out whether illegal substances were being grown inside a home. *Kyllo*, 533 U.S. 27 at 29. This Court held the use of the thermal imager constituted a search, reasoning the technology was not available to the public and the information obtained was not available absent a physical intrusion into the home. *Id.* at 40. Here, the lower court was correct in determining both ALPRs and thermal imagers are not available for public use. However, the applicability of *Kyllo* stops there. In making its decision, this Court equally considered the type of information obtained with how it was obtained—importantly, Kyllo's information was not visible to the public. *Id.* at 32. In contrast, vehicles driving on public roads are available for anyone to see, and as this Court reaffirmed in *Kyllo*, visual observation in public "is no 'search' at all." *Id.*

Not only is ALPR data minimally intrusive compared to other forms of advanced surveillance data, but ALPRs also promote efficiency in law enforcement. *See Knotts*, 460 U.S. at 282. "[A] finite number of officers working in shifts could duplicate the work of a finite number of ALPRs in public spaces, whereas no number of officers could produce the comprehensive record of [other advanced surveillance data]." Dan Noffsinger, *The New McCarthyism: How the Massachusetts Supreme Judicial Court Got Automated License Plate Readers and the Mosaic Theory All Wrong*, 26 J. Tech. L. & Pol'y 1, 15 (2021). ALPR aids in the enforcement of laws while simultaneously relieving law enforcement's overly-stretched personnel reserves. Each scan of a license plate only reveals time, date, location, and a non-descript image of the vehicle. Truly,

ALPR data contains less information than what an officer would observe in person, considering their ability to look through the windows of a vehicle at any occupants and items in plain view. ALPRs accomplish all this without infringing on *individual or societal* expectations of privacy.

C. In the Alternative, This Court Should Hold the Warrantless Use of ALPR Database in This Case Was Constitutional, as the Officers Were Working Under Good Faith.

If this Court finds the use of ALPR data does constitute a search, its usage should here nevertheless be held as constitutional under a good faith exception to the warrant requirement.

Throughout Fourth Amendment jurisprudence, this Court has found certain situations permit the warrantless search of people, places, or objects. *See e.g*., *Harris v. U.S.*, 390 U.S. 234, 236 (1968) (plainview); *Lewis v. U.S.*, 385 U.S. 206, 211 (1966) (consent); *California v. Carney*, 471 U.S. 386, 392-93 (vehicle). This Court has also recognized a good faith exception to the warrant requirement when officers reasonably rely on a statute authorizing the search. *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987). California has such a statute. Cal. Veh. Code § 2413(c) (2022). "The [ALPR] data may be used by a law enforcement agency only for purposes of locating vehicles or persons when either are reasonably suspected of being involved in the commission of a public offense." *Id.* In Respondent's case, officers were working within the bounds of the statute and would have no reason to question the statute's validity, as neither this Court nor a California court has held differently.

II. The Warrantless Entry and Search of Respondent's Home was Constitutional Because Officers Had Probable Cause and There Were Exigent Circumstances.

The very core of the Fourth Amendment protects "the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). In this spirit, searches and seizures inside an individual's home without a warrant are presumptively unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011)

(citing *Groh v. Ramirez,* 540 U.S. 551, 559 (2004)). However, that presumption is rebuttable. *Hopkins v. Bonvicino,* 573 F.3d 752, 763 (9th Cir. 2009). This is because "the ultimate touchstone of the Fourth Amendment is reasonableness." *Brigham City, Utah v. Stuart,* 547 U.S. 398, 403 (2006); *see also Michigan v. Fisher,* 558 U.S. 45, 47 (2009).

There are a number of "well-delineated" exceptions recognized by courts which permit law enforcement officers to conduct warrantless, but still constitutionally valid, searches and seizures. *Murdock v. Stout,* 54 F.3d 1437, 1440 (9th Cir. 1995). When the government relies on an exception to the warrant requirement, it must prove: 1) the officer had probable cause to believe that a crime was or is being committed in the home and 2) an established exception is applicable. *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010). The search of Respondent's home was constitutional because law enforcement had both probable cause and the gravity of the offense falls within the exigent circumstances exception.

A. Considering the Totality of the Circumstances, Including the Gravity of the Underlying Offense, Officers Had Probable Cause to Search Respondent's Home.

All searches (whether accompanied by a warrant or not) must be supported by probable cause. *Groh v. Ramirez,* 540 U.S. at 557. Probable cause requires "only [a] probability, and not prima facie showing, of criminal activity." *Illinois v. Gates,* 462 U.S. 213, 235 (1983). The standard considers objective, factual findings, *Terry v. Ohio,* 392 U.S. 1, 21-22, n. 18 (1968), through the lens of "prudent men, not legal technicians." *Brinegar v. United States,* 338 U.S. 160, 176 (1949); *see Adams v. Williams,* 407 U.S. 143, 149 (1972) ("In dealing with probable cause … as the very name implies, we deal with probabilities."). Thus, to meet the standard of probable cause, an officer does not require overwhelmingly convincing evidence, but only "reasonably trustworthy information" that a crime has been committed. *Beck v. Ohio,* 379 U.S. 89, 91 (1964).

Probable cause determinations are traditionally guided by a totality of the circumstances analysis, taking all the facts available to law enforcement into consideration. *See, e.g.*, *Adams*, 497 U.S. at 146–147; *Harris v. United States*, 403 U.S. 573 (1971). This Court has held that a totality of the circumstances test is the most flexible and best way to "achieve the accommodation of public and private interests that the Fourth Amendment requires." *Gates*, 462 U.S. at 239. A deficiency in one fact may be compensated for by a strong showing as to the other, or by some other indicia of reliability. *Id*. at 233. However, all clues and evidence coming to officers on a scene "may vary greatly in their value and reliability" and so "[r]igid legal rules are ill-suited to an area of such diversity." *Gates* at 231. "One simple rule will not cover every situation." *Adams*, 497 U.S. at 147. Thus, a bright-line rule has been rejected in favor of case-by-case analyses of probable cause.

The Seventh Circuit has found the gravity of the underlying offense relevant in determining probable cause. *Llaguno v. Mingey*, 763 F.2d 1560, 1566 (7th Cir. 1985). In *Llaguno*, law enforcement's very limited information supporting probable cause was outweighed by the gravity of the murders and the possibility of more deaths. *Id*. The court called probable cause a zone rather than an obvious point, "within which the graver the crime the more latitude the police must be allowed." *Id*. at 1565. Hence, "[i]f a multiple murderer is at large, the police must compress their investigation and make the decision to search or arrest on less information than if they could investigate at their leisure." *Id*. at 1566.

Looking at the totality of the circumstances in the case at bar, the police had probable cause to believe Respondent was involved in the Balboa Park shooting. Law enforcement's investigation revealed multiple connections between Respondent and the crime. Officers determined that Respondent, one of only fifty people in the area who possessed an automatic assault rifle, had a close association with McKennery, the owner of one of the fifty vehicles that fled Balboa Park

after the shooting. Additionally, through a camera attached to a utility pole near Respondent's home, officers saw McKennery give Respondent a duffel bag large enough to contain an M16 assault rifle. The lower court did not address this issue, but consistent with the reasoning for finding ALPR data usage constitutional, the video surveillance is also valid. Officers could have obtained the same information as the video surveillance by simply standing at the same location as the camera. *See Knotts*, 460 U.S. at 282. Lower courts have held similar surveillance constitutional. *See e.g.*, *United States v. Tuggle*, 4 F.4th 505, 511 (7th Cir. 2021); *United States v. Houston*, 813 F.3d 282, 288 (6th Cir. 2016); *United States v. Bucci*, 582 F.3d 108, 116 (1st Cir. 2009).

When officers arrived at his home, Respondent acted suspiciously, and initially refused to present the weapon. Respondent also paused apprehensively when the officers asked him if he had anything to worry about in regard to his firearm. Respondent then admitted to the officers that he had loaned the assault rifle to McKennery during the time of the shooting. Furthermore, officers were investigating a heinous crime that concerned the entire community—after all, nine lives were claimed by a shooter a mere two weeks before. Like in *Llaguna*, a multiple murderer was at large in the community. The murderer left a note at the crime scene threatening more loss of life in the near future. Additionally, the day prior to the search of Respondent's home, the police received an anonymous phone call from the alleged shooter, who was threatening to attack a school next.

Considering the totality of the facts known to law enforcement at the time of the search, including the gravity of the underlying offense, officers undoubtedly had probable cause to search Respondent's home.

B. Considering the Gravity of a Mass Shooting, Officers Were Justified in the Search of Respondent's Home Under the Exigent Circumstances Exception.

Exigent circumstances arise when "real immediate and serious consequences" will "certainly occur" if a police officer postpones action to obtain a warrant. *Welsh v. Wisconsin*, 466

U.S. 740, 751 (1984); *see also Brigham City*, 547 U.S. 398. This Court has coined these as "now or never" situations. *Lange v. California*, 141 S. Ct. 2011, 2018 (2021). Like probable cause, a finding of exigent circumstances depends upon the facts on the ground. *Id*.; *see also United States v. Ojeda*, 276 F.3d 486, 488 (9th Cir. 2002).

Courts have defined some relevant situations that fall under the exigent circumstances exception as: 1) the need to prevent physical harm to the officers or other persons, 2) the need to prevent the imminent destruction of relevant evidence, 3) the hot pursuit of a fleeing suspect, and 4) the need to prevent the escape of a suspect. *See*, *e.g*., *Fisher*, 558 U.S. 45 (safety); *Ojeda*, 276 F.3d at 488 (safety, escape, and evidence); *Johnson v. United States*, 333 U.S. 10 (1948) (hot pursuit). However, there is no exhaustive list of exigent circumstances. *Brigham City*, 547 U.S. at 403.

Emergency situations within the exigent circumstances exception allow for a balance between privacy rights and the interest of public safety. *Mora v. City of Gaithersburg*, 519 F.3d 216, 222 (4th Cir. 2008). In these situations, law enforcement's primary purpose is the prevention of harm and insurance of safety, rather than criminal investigation. *Id*. "If there is a grave public need for the police to take preventive action, the Constitution may impose limits, but it will not bar the way." *Id*. Thus, during extraordinary and dangerous circumstances where police maintain a reasonable belief that a warrantless intrusion is imperative to protecting the public or themselves from the risk of imminent or ongoing harm, such action is not unreasonable under the Fourth Amendment. *See United States v. Beaudoin*, 362 F.3d 60, 66 (1st Cir. 2004). However, the line between law enforcement's investigation of a crime and response to an emergency is often blurred. *See Davis v. Washington*, 547 U.S. 813, 839 (2006) (Thomas, J., concurring). For this reason, courts have applied many different factors in their analyses of whether a situation constitutes an

emergency worthy of the exigent circumstances exception, including the gravity of the underlying offense. *See Welsh*, 466 U.S. at 740.

1. *This Court should continue to consider the gravity of the offense under a balancing test in determining exigent circumstances*.

In 1948, Justice Jackson, in a concurring opinion, stated that "whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress." *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring). The next year, he argued in a dissent that "if we are to make judicial exceptions to the Fourth Amendment ... it seems to me they should depend somewhat upon the gravity of the offense." *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting). More than two decades later, the D.C. Circuit established a case-by-case, balancing approach that considered the gravity and violence of an underlying offense against the circumstances and magnitude of a Fourth Amendment intrusion. *Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970).

The Supreme Court first applied the gravity of the offense factor in *Welsh v. Wisconsin*. 466 U.S. 740. The *Welsh* Court found it was appropriate to hesitate in finding exigent circumstances in cases involving less serious offenses. *Id*. at 750. The underlying premise was that some crimes are simply too minor to justify an exception to the Fourth Amendment warrant requirement. *Id*. Thus, the gravity of the offense is "an important factor to be considered when determining whether any exigency exists." *Id*. at 753.

Welsh and *Dorman* provided a balancing framework for identifying how the gravity of an offense falls within the exigent circumstances exception. This framework has been widely adopted by courts. *See e.g.*, *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987) (bank robbery) (citing *Dorman* factors), cert. denied, 481 U.S. 1072 (1987); *United States v. Salvador*,

740 F.2d 752, 758-59 (9th Cir. 1984) (armed robbery) (citing *Welsh*); *State v. McIntrye*, 691 P.2d 587, 590 (1984) (assault with intent to kill) (citing *Welsh* and *Dorman*).

However, considering the gravity of the offense in balancing tests has also created inconsistent in lower court decisions. William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations-Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 557–58 (1990). For example, some courts apply the gravity of the offense factor on a felony versus misdemeanor basis. *See Tennessee v. Garner*, 471 U.S. 1 (1985). Consequently, the use of a balancing test in this context has been criticized as unrealistic and overly complex. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200, 213-14 (articulating "a single familiar standard ... to guide police officers, who have only limited time and expertise to reflect on … circumstances they confront"). The felony/misdemeanor test is not practical because different jurisdictions categorize crimes differently. *See generally* Schroeder, *supra*. However, a case-by-case analysis of the gravity of the offense is still appropriate and proper.

2. This Court should continue to analyze exigent circumstances on a case-by-case basis under a balancing test.

One standard should not govern all Fourth Amendment analyses. This Court's language in *Welsh* and its references to *Dorman* suggest a sympathy for a balancing test in which the gravity of the offense is only one of many determining factors. *Id*. at 487–88. This case-specific rationale was followed most recently in *Lange v. California*. *Lange*, 141 S. Ct. at 2018. In declining to categorically justify the warrantless entry into a home of a fleeing misdemeanant, this Court showed hesitation in creating "a new permission slip for entering the home without a warrant." *Id*. It reasoned, however, that exigent circumstances exceptions should generally be applied on a "case-by-case basis." *Id*. (quoting *Birchfield v. North Dakota*, 579 U.S. 438 (2016)).

A balancing test for exigent circumstances that includes the gravity of the offense does not improperly burden courts or law enforcement. While jurisdictions assign different penalties to different offenses, there are still inherent differences between certain types of crime. Schroeder, *supra*, at 498. For example, little analysis would be necessary for any court to determine that murder is a "grave"' or "serious" offense. *Id*. Many lower courts have already followed this logic. *See, e.g., United States v. Killebrew*, 560 F.2d 729, 734 (6th Cir. 1977) (suspect "'was not known to be dangerous and no grave offense or crime of violence was threatened or indicated"'). In determining what constitutes a serious enough crime to fall within a Fourth Amendment exception, this Court can give guidance to law enforcement officers making case-by-case determinations on the ground. Additionally, the successfulness of this has been shown by officers' ability to determine probable cause using a balancing test.

3. *This Court should establish a specific category of grave offenses, which includes mass shootings, in exigent circumstances analyses*.

It follows that some offenses would be considered so grave as to factor in more heavily into a balancing test in determining exigent circumstances. "Apocalyptic" crimes are those types of offenses which fall outside the range of what even a big-city police department would normally encounter. Schroeder, *supra*, at 551. Recognizing apocalyptic crimes—those that are catastrophic and extraordinary—within the exigent circumstances exception responds to modern problems and is a logical outgrowth of the "balancing of conflicting values"' that this Court has stated is "the key principle of the Fourth Amendment." *Garner*, 471 U.S. at 8 (quoting *Michigan v. Summers*, 452 U.S. 692, 700, n.12 (1981)). Weighing these crimes more heavily than others in a balancing test allows for more effective police responses in situations that cause serious harm to large numbers of people or to the structure of government. *See e.g., United States v. U.S. Dist. Ct. for E. Dist. of*

Mich., S. Div., 407 U.S. 297 (1972) (national security); *Llaguno*, 763 F.2d 1560 (multiple murderer); *United States v. Torres*, 751 F.2d 875, 880, 883 (7th Cir. 1984) (bombings).

Considering their prevalence and severity, mass shootings fit well within the definition of apocalyptic crimes. Mass shootings fall under the category of mass murder, which is defined by FBI as "a number of murders (four or more) occurring during the same incident, with no distinctive time period between the different murders."[3] In recent years, mass shootings have occurred more frequently and have become more deadly. Zachary Hofeld, *Studying Abroad: Foreign Legislative Responses to Mass Shootings and Their Viability in the United States*, 28 Minn. J. Int'l L. 485, 486 (2019). The number of mass shootings tripled from 2011 to 2014. *Id*. Between September of 2017 and August of 2019 in Texas alone, there were five mass shootings, resulting in the death of seventy-five citizens. Owen Gonzalez, *German and Texan Approach to Gun Control*, 21 Rutgers J. L. & Religion 146 (2020).

Further, more than half of high-fatality mass shootings from 2010-2019 were committed with "assault weapons," like the one the Balboa Park shooter used and Respondent owned. E. Gregory Wallace, *"Assault Weapon" Lethality*, 88 Tenn. L. Rev. 1, 57–58 (2020). The M16 automatic rifle is a particularly dangerous weapon, as it is designed for military operations and is "a devastating and lethal weapon of war." *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017).

It is hard to imagine a crime more worthy of being considered apocalyptic than a mass shooting. The gravity of such a crime should always weigh heavily in courts' analyses of whether exigent circumstances exist for a warrantless search. In the case at bar, the Balboa Park shooter used an M16 to take the life of nine individuals. The shooter also threatened to next target children at a school. The shooter had already proven their capacity for murder and had used a weapon of

[3] Federal Bureau Of Investigation, *Serial Murder: Multi-Disciplinary Perspectives For Investigators* 8 (2008), fbi.gov/stats-services/publications/serial-murder/serial-murder-july-2008-pdf.

war to do so. Here, law enforcement properly evaluated the gravity of the offense and the imminent threat of more violence, determined an exigent circumstance existed, and executed a warrantless, but constitutional, entry and search of Respondent's home.

C. In the Alternative, This Court Still Should Admit the Confession Obtained in the Warrantless Entry and Search of Respondent's Home.

If this Court finds the entry and search of Respondent's home violated his Fourth Amendment rights, it should nevertheless admit Respondent's statements about lending the assault rifle to McKennery, an action which violated state law. Cal. Penal Code § 30600 (2022).

Under the fruits of the poisonous tree doctrine, "defendants may seek to suppress not only evidence obtained as a direct result of an illegal search but also evidence later discovered as a result of that search." *United States v. Terry*, 909 F.3d 716, 720 (4th Cir. 2018). However, this Court does not hold that all evidence should be excluded simply because it would not have come to light but for the illegal actions of the police. *Wong Sun v. United States*, 371 U.S. 471, 487–88, 83 (1963). Thus, suppression is not justified unless "the challenged evidence is in some sense the product of illegal governmental activity." *United States v. Crews*, 445 U.S. 463, 471 (1980).

Like in *Wong Sun*, Respondent's confession was not coerced. *Wong Sun*, 371 U.S. at 491. There was also not a connection between the search and the confession. Respondent's statement to law enforcement officers was a result of his failure to render his assault rifle inoperable, and not directly due to the search of his home. The statement was not an intervening act on the part of the government, but an independent act of free will on the part of the Respondent. Therefore, Respondent's confession should not be suppressed.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court reverse the California state court of appeals decision, sustain the Superior Court's denial of the motion to

suppress, and hold that the Respondent's Fourth Amendment rights were not violated by the use of ALPR data or the warrantless entry and search of his home.