Team #29

No. 1788-850191

IN THE

# Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,
*Petitioner*,

v.

NICK NADAULD,
*Respondent.*

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

**BRIEF FOR THE PETITIONER**

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## QUESTION PRESENTED

I. DID THE FOURTH DISTRICT COURT OF APPEAL ERR IN HOLDING THAT THE RETRIEVAL OF DEFENDANT'S INFORMATION FROM THE AUTOMATIC LICENSE PLATE RECOGNITION DATABASE REQUIRED A WARRANT UNDER THE FOURTH AMENDMENT?

II. DID THE 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 OUR PRECEDENTS?

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## STATEMENT OF THE CASE

### A. Statement of the Facts

On September 14, 2021, Frank McKennery fired an automatic assault rifle on an open crowd from a rooftop in Balboa Park, San Diego, and killed nine people and injured six others. Record ("R.") at 2. Police found a "Manifesto" at the scene of the rooftop of where the shooting had taken place which details McKennery's hatred of the world and frustrations in life. R. at 36. When police investigated, they found McKennery dead in his home and his death was ruled a suicide. R. at 2. At McKennery's home, police found a death note which detailed his true intentions of the shooting actually stemmed from his obsession over a woman and the anger he felt over her engagement to another man. R. at 37. According to the death note, McKennery plotted to murder the woman and man due to his personal vendetta against them. R. at 3. Additionally, McKennery also killed seven other bystanders in Balboa Park in order to hide his true intentions and mislead police on the possible motive. *Id*.

During the subsequent police investigation, it was revealed through text messages that McKennery had borrowed an automatic assault rifle from Nick Nadauld ("Respondent"). R. at 26. McKennery knew Respondent because both had been coworkers at the same construction company in San Diego for the past year prior to the shooting at Balboa Park. R. at 2. McKennery had expressed an interest in Respondent's assault rifle because he allegedly wanted to practice shooting the weapon for outdoor target shooting. *Id*. Prior to this, Respondent had legally acquired the weapon when his father, who previously served in the military, bequeathed it to Respondent in the father's last will and testament. *Id*.

During the initial investigation of the Balboa Park shooting, police found gun cartridges that matched an assault rifle at the rooftop where the shooting had taken place. *Id*. In an effort to

try to find the identity of the shooter, the police employed camera footage that recorded approximately forty unidentified individuals who fled and did not return from the scene of the crime. R. at 3. In addition, the camera footage also identified fifty vehicles that were recorded leaving the scene which the police then cross referenced the license plates of those vehicles in a government database. *Id*. Police did not find any of the fifty vehicle owners to be on the list that police had on registered assault rifle owners. *Id*. However, when police used the Automatic License Plate Recognition ("ALPR") database, they were able to find a match between McKennery and Respondent. *Id*. The investigation revealed that of the fifty vehicles that were investigated and cross referenced in the ALPR database to track vehicle movements, that McKennery's vehicle and Respondent's vehicle had considerable overlap in being at the same locations and time. R. at 4.

From this information, police did a covert investigation on ten residences on the list with the most driving location data of those fifty vehicles, of which Respondent's residence was one of those ten. *Id*. Police placed cameras on public utility poles near the ten residences and directed the camera towards those residences in order to monitor for suspicious activity. *Id*. Police then sent a letter to those ten residences which stated that police would arrive in order to verify that their registered assault rifles were rendered inoperable. California Penal Code 30915 requires that such registered assault rifles be permanently inoperable. R. at 35. Respondent was one of the persons who received such a letter from the police. R. at 4.

On September 29, 2021, a camera which had been mounted to the public utility pole recorded McKennery pulling into Respondent's residence giving Respondent a large duffel bag before leaving. *Id*. The day before, police had received an anonymous call which stated that another similar shooting would take place at a school. *Id*. On the day that McKennery was recorded by the camara arriving at Respondent's residence, two officers were dispatched to that location. *Id*.

Officers arrived at Respondent's residence and while outside the front door, they asked Respondent if he had the assault rifle and whether they may inspect the rifle to check if it was rendered inoperable as required by law. R. at 23. When the Respondent was asked if he had anything to worry about (*concerning the rifle*) he stared at police for a lengthy five seconds before responding that the police had nothing to worry about. *Id*. Police asked permission from Respondent to enter the residence, but Respondent stated that the place was messy and preferred that police stay outside while he went to retrieve the highly powerful and potentially dangerous automatic assault rifle. *Id*. Before Respondent could retrieve the rifle, the officers entered Respondent's residence and asked where the rifle was located. R. at 24.

After police located the rifle and noticed that the rifle was not rendered inoperable, Respondent was questioned more intensely. R. at 4. Police were suspicious of the Respondent and told him that he was the prime suspect for the Balboa Park shooting. R. at 24. Upon further questioning, Respondent admitted to letting McKennery borrow his rifle but stated that McKennery was in Arizona during the same day as the Balboa Park shooting. *Id*. Respondent argued that a picture taken by McKennery showed that he was in Arizona, but an FBI forensics investigator testified that the picture was actually taken three days prior to the Balboa Park shooting. R. at 28. Police then arrested the Respondent. R. at 25. After Respondent was taken into custody, police then went to McKennery's residence but found him dead of an apparent suicide. R. at 5.

## B. Procedural History

Respondent, Nick Nadauld, was arrested on September 29, 2021, and was indicted with nine counts of second-degree murder under California Penal Code Section 187, nine counts of involuntary manslaughter under California Penal Code Section 192, one count of lending an assault weapon under California Penal Code Section 30600, and one count for failure to comply with the assault rifle requirements under California Penal Code Section 30915. R. at 7. Respondent filed a motion to suppress evidence. *Id*.

The Superior Court of the State of California for the County of San Diego concluded that the retrieval of Respondent's information from the ALPR database did not require a warrant under the Fourth Amendment because the tracking of a car's public movements does not constitute a search and a person does not have a reasonable expectation of privacy in pole-mount cameras. R. at 13. Further, the court found that the search of the Respondent's home did not violate his Fourth Amendment rights because the police officers had probable cause to enter the home and there were exigent circumstances. R at 15.

The Court of Appeal of the State of California for the Fourth Appellate District remanded the Superior Court's order, finding that the retrieval of Respondent's information from the ALPR database required a warrant under the Fourth Amendment and the warrantless entry and search of Respondent's home violated Respondent's Fourth Amendment rights. The California Supreme Court denied a writ of certiorari for appellate review. On September 23, 2022, this Court granted Petitioner, the People of the State of California, petition for a writ of certiorari.

## STANDARD OF REVIEW

This is an appeal from the California Court of Appeal of the Fourth Appellate District's grant of Respondent's Motion to suppress. At issue is the California Fourth District Court of Appeal decision that the retrieval of the Respondent's information from the automatic license plate recognition database required a warrant under the Fourth Amendment. Further at issue is the California Fourth District Court of Appeal decision that the warrantless entry and search of the Respondent's home violated the Respondent's Fourth Amendment rights.

Constitutional interpretation is a question of law and therefore this Court reviews the application of law to fact *de novo*. *See Ornelas v. United States*, 517 U.S. 690 (1996).

## SUMMARY OF THE ARGUMENT

Petitioner argues a reversal of the California Fourth District Court of Appeal decision which held a Fourth Amendment violation when: (1) law enforcement retrieved Respondent's information from the ALPR scans and (2) information retrieved from the pole mounted camera directed at Respondent's residence. The Fourth Amendment protects persons from *unreasonable* searches or seizures. The retrieval of the information from the ALPR scanner was a reasonable search because Respondent did not have a reasonable expectation of privacy in the information obtained by ALPR system. *See Katz v. United States*, 389 U.S. 347 (1967); *See also United States v. Jacobsen*, 466 U.S. 109 (1984). All the information obtained from the ALPR scanner or from the pole mounted camera was information that was readily observable to members of the public. Therefore, Petitioner did not need a warrant to conduct a search of the ALPR scans or videos from pole mounted camera and all evidence thereof was admissible.

This Court should further reverse the California Fourth District Court of Appeal decision that law enforcement did not have probable cause to enter and search Respondent's home. The

California Fourth District Court of Appeal incorrectly found that there was no probable cause, because all of the events leading up to the entry of Respondent's home was sufficient to establish that the police believed that he was involved in the Balboa shooting. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Police officers conducted a proper investigation given the severity of the crime which led to suspicious activity observed from the Respondent's home. When the officers spoke to the Respondent, based on his evasive and nervous conduct, they had a reasonable basis to believe that the Respondent was in violation of California Penal Code section 30600 and 30915. *District of Columbia v. Wesby*, 138 U.S. 577, 580 (2018); *Ryburn v. Huff*, 565 U.S. 469, 471 (2012).

This Court should also reverse the California Fourth District Court of Appeal finding that there were no exigent circumstances. Entry was necessary to prevent physical harm to the officers, the public, and to prevent the destruction of evidence. Prior to entry, McKennery and the Respondent were being investigated for weeks. A day before the police entered the Respondent's residence there was an anonymous call threatening a school shooting. After the call, officers observed McKennery give the Respondent a duffle bag large enough to hold an assault rifle. Further, the fact that officers had probable cause that the Respondent was in violation of California Penal Code section 30600 and 30915, Respondent telling officers to wait outside his house while he searched for the automatic assault rifle, made the warrantless entry justified given that the officers had an objectively reasonable belief of a threat to themselves and public.

## ARGUMENT

### I. THE CALIORNIA FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT LAW ENFORCEMENT USE OF THE AUTOMATIC LICENSE PLATE RECOGNITION ("ALPR") DATABASE TO TRACK RESPONDENT'S VEHICLE VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHTS BECAUSE THERE WAS NO REASONABLE EXPECTATION OF PRIVACY

Nick Nedauld ("Respondent") argues that his Fourth Amendment rights were violated when law enforcement retrieved information in the automatic license plate recognition ("ALPR") database without a warrant. Petitioner argues that Respondent did not violate his Fourth Amendment rights because the search was reasonable and could be done so without a warrant. The Fourth Amendment protects "against unreasonable searches and seizures." U.S. CONST. amend. IV. The United States Supreme Court has held that a violation of the Fourth Amendment happens in a situation when "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. [Whereas a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property. This Court has also consistently construed this protection as proscribing only governmental action." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 536-537 (1967). To determine "[w]hat is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). In this case, Petitioner implemented a reasonable search of the ALPR database because: (1) Respondent did not have a subjective expectation of privacy with the public display of license plate information on public roadways, and (2) society does not recognize the privacy interest in the ALPR database as reasonable.

### A. Petitioner Did Not Need a Warrant to Access Information Obtained from the ALPR Scanner Because Respondent Did Not Have a Subjective Expectation of Privacy That Society Views as Reasonable Because the Information Could Have Been Publicly Observed and Recorded

"[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. 347, 353 (1967). Although here there was no physical intrusion when the ALPR scanner was used to track Respondent's vehicle, Respondent argues that Petitioner needed a warrant to conduct a search using the information of the ALPR scanner. However, Respondent could not have had an expectation of privacy that society views as reasonable because all the information that the ALPR scanner accessed was information that could have been collected by the public. Respondent may raise the point that the information obtained by the ALPR scanner was technology that is not of general public use and constitutes a Fourth Amendment violation. "In various areas of the law affecting traditional conceptions of physical presence, the courts have been called upon to interpret longstanding precedent in light of new technologies." *Ko v. Maxim Healthcare Servs., Inc.*, 272 Cal. Rptr. 3d 906, 918 (Cal. Ct. App. 2020). One technology that the Court has grabbled with that Respondent points to is the *Kyllo v. United States* thermal imaging device that the California Fourth District Court of Appeal used in support of finding a Fourth Amendment violation.

#### 1. Although *Kyllo* held that there is a reasonable expectation of privacy against law enforcement gaining information by using technology that is generally not available for the public, the information collected by an ALPR scanner is publicly available to members of the public

In the case, *Kyllo v. United States*, 533 U.S. 27 (2001), the United States Supreme Court decided on whether a Fourth Amendment "search" occurred when law enforcement, without a

warrant, used a thermal-imaging device directed at a person's residence on a public street to retrieve thermal images from inside the residence. *Id.* The Court in reviewing whether there was a reasonable expectation of privacy found "that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . constitutes a search—at least where (as here) the technology in question is not in general public use." *Kyllo v. United States,* 533 U.S. 27, 34 (2001) citing *Silverman v. United States,* 365 U.S. 505, 512 (1961). Petitioner concedes that the ALPR scanner is a technology that is not of general use but what makes the ALPR scanner different than the thermal-imaging device in *Kyllo* is that all of the information obtained from the ALPR scanner could have readily obtained by the public.

The thermal-imaging device in *Kyllo* was used "explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search and is presumptively unreasonable without a warrant." *Kyllo v. United States,* 533 U.S. 27, 40 (2001). But in this case the ALPR merely captures images of a vehicle, license plate, and collects that aggregate information which can be cross-referenced to a law enforcement database. R. at 38. Petitioner argues that what is determinative is not the device used (*ALPR scanner*) but instead what information was collected from that search (*images of the vehicle, license plate, etc.*) and whether members of the general public could have collected the same information. There is nothing which members of the public could not have observed that the ALPR scanner recorded. There is no reasonable expectation of privacy that Respondent can argue in terms of what the ALPR scanner recorded. Indeed, all of this information is readily available for any member of the public to be able to see at any given time.

Instead, the Court should analogize the public display of the license plate information, etc. as in the case of *California v. Ciraolo*, 476 U.S. 207 (1986). The Court decided on whether there was a Fourth Amendment violation when law enforcement who were unable to observe Ciraolo's backyard instead used a plane to fly over his residence and discovered that he was growing marijuana. *Id.*

> The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *Id.* at 213.

There is no doubt that the public display of license plate information, images of the respondent's vehicle, and the location of the vehicle during which the ALPR scanner was operated could have all been acquired by a member of public taking pen and paper and recording all the information while on public lands. Even though *Ciraolo* dealt with law enforcement using an airplane to gather the information, which is arguably a technology that is generally not available for public use since the public does not have access to casual flight over residences, the same reasoning should still apply. "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 215. Here, the vehicle information all recorded by an ALPR scanner could have all been easily recorded by the same naked eye of members of the public. "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). Therefore, it would not be a reasonable expectation of privacy for Respondent to argue that the vehicle information obtained from the ALPR scanner was protected because such information was on public display that anyone could have recorded.

### 2. Legal reasoning of *Knotts* is more applicable than the progeny of beeper cases of *Karo* and *Jones*

The Court in *United States v. Knotts*, 460 U.S. 276 (1983) decided on the issue of whether there was a Fourth Amendment violation when law enforcement placed a hidden beeper in a drug container in order to monitor the location of the container that eventually was used to search respondent's premises. *Id.* The Court reasoned that "[t]he governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. . . . A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. Ultimately the Court in *Knotts* found that there was no Fourth Amendment violation as "there [was] no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." *Id.* at 285.

Although Respondent could state that he held a subjective expectation of privacy, from the legal reasoning of *Knotts* it is clear that society nonetheless would not consider it to be reasonable since all the information was readily available to the public. Although both the *Kyllo* thermal imaging device and the ALPR scanner are forms of technology that is generally not available to the public, the *Kyllo* device revealed unknown information that the public would not acquire otherwise unless law enforcement committed an "intrusion into a constitutionally protected area." *Silverman v. United States*, 365 U.S. 505, 512 (1961). The ALPR scanner does not reveal information that the public could not otherwise obtain. Although it does give realize ease to all law enforcement scanning vehicles on a continuous basis, the information which is the source of the search is nonetheless publicly accessible and not like the thermal images in *Kyllo*.

After *Knotts,* the United States Supreme Court decided on another beeper case where the Court found a Fourth Amendment violation in *United States v. Karo*, 468 U.S. 705 (1984). The facts of *Karo* had law enforcement install a beeper in a can of chemicals where law enforcement followed the vehicle and kept track of the can even inside respondent's residence. *Id.* The Court in contrasting from the *Knotts* case stated that "[t]he case is thus not like Knotts, for there the beeper told the authorities nothing about the interior of Knotts' cabin. . . . [H]ere, as we have said, the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified." *United States v. Karo*, 468 U.S. 705, 715 (1984). Although the *Karo* Court found an illegal search, the difference in the facts from *Knotts* is what is controlling. *Knotts* did not have a beeper that revealed any information which was not available to the public. Indeed, the tracking of the beeper in the can in *Karo* of respondent's residence could have only been done if law enforcement had effectuated a search as respondent in that case had a reasonable expectation of privacy. Here, the legal reasoning of a diminished expectation of privacy in *Knotts* is more applicable to the case in chief.

Another beeper case where the Court found there to be a Fourth Amendment violation was in *United States v. Jones*, 565 U.S. 400 (2012). Here, law enforcement agents had installed a global positioning system ("GPS") on respondent's vehicle outside the terms of an original warrant which was used the GPS information to track respondent's movements. *Id.* However, the *Jones* case is different in that the GPS device was installed on respondent's vehicle without his knowledge thereby becoming a physical intrusion. "But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue." *Id.* at 409. There is no reason for the Court to do a common-law trespassory test for a Fourth Amendment analysis in *Knotts*

because the beeper was placed with *consent of the owner* whereas in *Jones* it was placed without the authority of a valid warrant and without the owner's knowledge where it physically trespassed the owner's property. The Court in *Jones* ultimately found that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitute[d] a 'search.'" *Id.* at 404. Here, there is nothing to analogize a GPS device physically trespassing a vehicle in the same manner as ALPR scanner that scans vehicles for license plate information, etc. The ALPR scanner is not physically trespassing on the vehicle and thus the common-law trespassory test would not be applicable and the *Katz* reasonable expectation of privacy test would instead apply.

### 3. Respondent does not have a reasonable expectation of privacy because the alphanumeric license plate information was required by law to be publicly displayed on the vehicle

Respondent cannot have a reasonable expectation of privacy regarding the license plate information because this was mandated by law to be publicly visible. Cal. Veh. Code § 5202(a) states in part that "[a] license plate issued by this state or any other jurisdiction within or without the United States shall be attached upon receipt and remain attached during the period of its validity to the vehicle." Respondent was mandated to keep the license plate alphanumeric information affixed to the vehicle during the period of validity. It cannot be expected that society views a privacy interest in this regard. For example, in the case of *New York v. Class*, 475 U.S. 106 (1986) the Court decided whether there was Fourth Amendment violation when a law enforcement officer reached into respondent's vehicle to move some papers obscuring the vehicle identification number ("VIN"). *Id.* A reasonable expectation of privacy does not exist when the information being displayed is required by law to be placed for public view. For example, in regard to a VIN, the Court in *Class* stated that:

> The factors that generally diminish the reasonable expectation of privacy in automobiles are applicable a *fortiori* to the VIN. As we have discussed above, the VIN plays an important part in the pervasive regulation by the government of the automobile. A motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished. . . . In addition, it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. *Id.* at 113-114.

Here, license plate or VIN information, as required by law to be publicly posted, does not implicate a strong privacy interest. In fact, as *Class* points out that in fact there is no reasonable expectation of privacy in publicly displaying VIN. By extension license plate alphanumeric information would also be within the same category. The use of the ALPR scanner to record and cross reference this legally required publicly viewable information does not lead to the conclusion that there is a reasonable expectation of privacy in this regard.

### B. Respondent Did Not Have a Reasonable Expectation of Privacy When Petitioner Used Video Surveillance on a Pole-Mounted Camera Located on a Public Street

Respondent could not have a reasonable expectation of privacy because Petitioner placed a camera mounted to a pole on a *public* street. Petitioner argues that the Court should follow the line of the reasoning in the First Circuit which found there to be no violation of Fourth Amendment in government agents using cameras affixed to public fixtures, instead of a contrary holding such as in the Fifth Circuit.

For example, the Fifth Circuit in *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) decided on whether there was a Fourth Amendment violation when a camera was fixed to a pole that recorded information. In that case, law enforcement obtained a warrant through misrepresentations that authorized them to get video surveillance of the exterior of Cuevas' property. *Id.* The camera was placed on a power pole and directed at Cuevas' backyard where video

surveillance was collected within a two-month span. *Id.* The Fifth Circuit stated in applying the two-part *Katz* test, found that:

> We do not doubt that Cuevas manifested the subjective expectation of privacy in his backyard necessary to satisfy the first part of the inquiry: he erected fences around his backyard, screening the activity within from views of casual observers. . . . Here, unlike in *Ciraolo*, the government's intrusion is not minimal. It is not a one-time overhead flight or a glance over the fence by a passer-by. Here the government placed a video camera that allowed them to record all activity in Cuevas's backyard. *Id.* at 251.

However, here, Petitioner did not place the cameras that were directed on Respondent's backyard but on utility poles near Respondent's residence and merely directed at the residence. R. at 4. Although cameras being placed on poles directed at the backyard of a person of interest is arguably something that society expects to be somewhat private, as evidenced through fencing, it cannot be said that privacy interest is reasonable when cameras are directed at the residence generally. It would open the floodgates to countless Fourth Amendment violations if citizens could bring a cause of action against the government if cameras were incidentally pointed at their residences. The same information that the naked eye could observe is the same information that the pole mounted cameras recorded in this case. The Fifth Circuit's reasoning is likely not applicable. Instead, the Court should adopt the reasoning in the First Circuit.

The First Circuit in *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009) decided on one of the issues of whether there was a Fourth Amendment violation when law enforcement used video surveillance on Bucci's home. Law enforcement placed a camera on a utility pole and directed the camera to the front of the residence. *Id.* These facts are more in line with the case in chief because Petitioner placed the camera on utility poles directed at Respondent's residence. The First Circuit stated that:

> Bucci has failed to establish either a subjective or an objective expectation of privacy in the front of his home, as viewed by the camera. We focus here only on

> the lack of a reasonable objective expectation of privacy because this failure is so clear. . . . 'There are no fences, gates or shrubbery located in front of [Bucci's residence] that obstruct the view of the driveway or the garage from the street. Both [are] plainly visible.' An individual does not have an expectation of privacy in items or places he exposes to the public. *Id.* at 116-117.

In this case, the cameras were placed in the same manner as in *Bucci*. This leads to the same conclusion that Respondent could not have had a reasonable expectation of privacy because the front of the residence is readily observable to members of the public. The pole-mounted camera provides the same information as if law enforcement were inside a police cruiser watching the residence with binoculars. Petitioner argues that the Court should adopt the *Bucci* reasoning and consider the placement of the pole-mounted cameras and how those cameras were directed and what it captures. Here, it is clear that all the information was readily observable and thus Respondent could not have a reasonable expectation of privacy in this regard and Petitioner's use of pole-mounted cameras does not violate the Fourth Amendment.

## II. THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE WARRANTLESS ENTRY AND SEARCH OF RESPONDENT'S HOME VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHTS BECAUSE THE POLICE OFFICERS HAD PROBABLE CAUSE TO ENTER THE RESPONDENT'S HOME AND THERE WERE EXIGENT CIRCUMSTANCES

The Fourth Amendment of the United States Constitution provides that individuals are entitled "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Although the Fourth Amendment restricts only the federal Government, the right of privacy also extends to protect against state action through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Warrantless searches and seizures are per se unreasonable, absent any exception. *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979). Under the Fourth Amendment, police officers need either a warrant, or probable cause and exigent circumstances, in order to make a lawful entry into a

person's home. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002). Here, although the officers did not have a warrant, the officers had probable cause that Respondent was involved in the Balboa shooting and in violation of California Penal Code Section 30600 and 30915, and there were exigent circumstances that permitted the officers entry in Respondent's home, thereby making the entrance and search constitutional.

### A. The Officers Had Probable Cause That the Respondent Was Involved in the Balboa Shooting and That He Was in Violation of California Penal Code Section 30600 and 30915

Probable cause is a requirement of the Fourth Amendment that must be met before police conduct a search. *Id* at 635. Probable cause exists when there is a reasonable basis for believing that a crime may have been committed or when evidence of the crime is present in the place to be searched. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Probable cause exists when under the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause only requires a fair probability of criminal activity, not a prima facie showing. *Id* at 235. Nor does probable cause require that the police officer's belief "be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

#### 1. Police Officers Had a Reasonable Basis for Believing That the Respondent Was Involved in the Balboa Shooting Because All of the Events Leading Up to the Entry of the Respondent's home Amounted to Probable Cause

In the case at bar, police officers conducted a proper investigation that led to a finding of probable cause. Here, officers conducted a proper investigation that led to probable cause. Under the totality of the circumstances, it was reasonably probable that the Respondent was involved in the Balboa shooting. During the initial investigation of the Balboa Park shooting, officers found gun cartridges that matched an assault rifle at the rooftop where the shooting took place. Based on

this information, officers used the ALPR database, which revealed that fifty vehicles were recorded leaving the scene before officers could secure the area after the shooting. Out of those fifty vehicles, ten residents on the list that corresponded the most to the driving location data, including the Respondent, owned assault rifles similar to the one used in the shooting. These ten residents were investigated, and law enforcement placed cameras near their residences to monitor suspicious activity. While officers were monitoring these ten residents, they only observed suspicious activity from the Respondent's home.

"The principal components of a determination of … probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to … probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The officers had a reasonable basis for believing that Respondent and McKennery were involved in the Balboa Shooting. First, because the Respondent owned an automatic assault rifle like one that was used in the Balboa shooting. Second, both McKennery and Respondent were previously coworkers. Third, McKennery left a "Manifesto" at the scene threatening another mass shooting with his friends. Fourth, the ALPR database flagged the Respondent and McKennery's vehicles at similar locations and times. Fifth, officers received an anonymous call from someone claiming to be the Balboa shooter and threatening a school shooting. Sixth, after that anonymous call, officers also observed McKennery giving a duffel bag large enough to hold an automatic assault rifle to the Respondent. Thus, based on all of these events, there was sufficient probable cause to establish that the Respondent was involved in the Balboa shooting.

Moreover, there were additional circumstances that prompted the officers to believe that Respondent and McKennery's were planning another mass shooting. Indeed, at the end of the

Balboa shooting there was a "Manifesto" indicating that there would be another mass shooting with McKennery's friends; further, there was an anonymous call that made a threat of a school shooting. The legal authority is clear, that an anonymous call or letter standing alone cannot serve as probable cause for a warrantless search or arrest. *Rojas v. State*, 797 S.W.2d 41, 43 (Tex. Crim. App. 1990). However, where there are additional facts or circumstances that support an officer's finding of probable cause, such reliance on an anonymous call or letter is sufficient. *Amores v. State*, 816 S.W.2d 407, 416 (Tex. Crim. App. 1991).

Here, the officers had several facts that they considered when determining that the Respondent was involved in the shooting. In addition to the anonymous call and "Manifesto" the officers did not have a suspect in custody at the time of the shooting, and they were doing anything possible to find the shooter. Further, the ALPR database, which has a low rate of error, noted that Respondent and McKennery were at similar locations at similar times. Thus, these additional facts support a finding that the officer's actions were justified given the severity of this crime and that this information could lead to real danger.

**2. <u>Officers Had Probable Cause That Respondent Was in Violation of California Penal Code Section 30600 And 30915 Because Officers Observed the Respondent's Evasive and Nervous Behavior After McKennery Gave the Respondent a Duffle Bag Large Enough to Hold an Assault Rifle</u>**

California Penal Code Section 30600 states:

> Manufacture, distribution, sale or transport of assault weapon or .50 BMG rifle (a) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for four, six, or eight years. (b) In addition and consecutive to the punishment imposed under subdivision (a), any person who transfers, lends, sells, or gives any assault weapon or any .50 BMG rifle to a minor in violation of subdivision (a) shall

> receive an enhancement of imprisonment pursuant to subdivision (h) of Section 1170 of one year.

California Penal Code Section 30915 states:

> Any person who obtains title to an assault weapon registered under this article or that was possessed pursuant to subdivision (a) of Section 30630 by bequest or intestate succession shall, within 90 days, do one or more of the following: (a) Render the weapon permanently inoperable. (b) Sell the weapon to a licensed gun dealer. (c) Obtain a permit from the Department of Justice in the same manner as specified in Article 3 (commencing with Section 32650) of Chapter 6. (d) Remove the weapon from this state.

The officers had probable cause that Respondent was in violation of California Penal Code Section 30600 and 30915, because of his unusual, nervous, agitated, and evasive behavior. In the context of probable cause, the police can take a suspect's nervous, agitated, evasive, or unusual behavior into account. *District of Columbia v. Wesby,* 138 U.S. 577, 580 (2018); *Ryburn v. Huff,* 565 U.S. 469, 471 (2012). *Devenpeck v. Alford*, 543 U.S. 146, 149 (2004) (noting that the suspect's "untruthful and evasive" answers to police questioning could support probable cause). Here, the Respondent was required to render his assault rifle permanently inoperable. On September 29, 2021, the pole-mount cameras placed near the Respondent's home recorded McKennery giving the Respondent a large duffel bag, large enough to hold an automatic assault rifle. Believing that Respondent was in violation of California Penal Code Section 30600 and 30915, thirty minutes after the officers observed this event, Officer Hawkins and Officer Maldonado arrived at the Respondent's home and asked the Respondent if he still had the automatic assault rifle, his father left him. R at 29.

Rather than directly answering Officer Hawkins' questions, the Respondent responded by stating that "Um... I thought you guys were coming in like a month to talk about that." *Id*. After Officer Hawkins stated that the Respondent was required to render the gun inoperable within 90 days of receiving it and that he had the gun for five years and that he should have nothing to worry

about, the Respondent stared at police for a lengthy five seconds before responding that "there's nothing to worry about." *Id*. The Respondent then stated that he did not want to show the officers the gun now. *Id*. The Respondent's demeanor was very suspicious, these vague and implausible answers to the officers' questions, gave the officers reason to infer that the Respondent was lying and that the assault rifle was operable and was loaned to McKennery, finding probable cause. Further, the fact that they observed suspicious activity at the Respondent's home, McKennery who was a suspect in the Balboa shooting giving Respondent the duffle bag which they believed had the assault rifle, the officers had a reasonable basis for believing that the assault rifle was operable and was loaned to McKennery. Based on this, the officers had a reasonable basis to believe that the Respondent was in violation of California Penal Code Section 30600 and 30915. As such, this information was sufficient for a finding of probable cause to be made.

### B. There Were Exigent Circumstances Permitting the Officers Entry of Respondent's Home Because Officers Had Reason to Believe That Entry Was Necessary to Prevent Harm to the Public, the Officers, and Destruction of Evidence

Exigent circumstances are those circumstances that would cause a reasonable officer to believe that entry is necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, or the escape of the suspect. *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984). Officers may enter a residence without a warrant when they have an objectively reasonable basis for believing that there is an emergency, or imminent threat of violence or safety. *Ryburn v. Huff*, 565 U.S. 469, 474 (2012). The existence of an emergency justifies an officer's failure to comply with the warrant requirement thus rendering his entry reasonable under the Fourth Amendment. *Id*. An exigent circumstance lawfully permits an officer to be in a suspect's home thereby allowing officers to lawfully obtain any evidence of a crime in plain view, regardless

of its relation to the circumstances that warranted the officers' entry. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *United States v. Porter*, 288 F.Supp. 2d 716, 722 (W.D. Va. 2003).

1. **There was a threat to public safety based on the "Manifesto" found at the scene of the Balboa shooting, the anonymous call threating a school shooting, and suspicious activity observed at the Respondent's home**

There were exigent circumstances permitting the officers entry into the Respondents home because the officers had reason to believe that entry was necessary to prevent harm to the public. Officers may enter a residence without a warrant when they have an objectively reasonable basis for believing that there is an imminent threat to the public or threat of violence. *Ker v. California*, 374 U.S. 23, 40 (1963). *Ryburn v. Huff* at 474 (finding the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency). Police had reason to believe that McKennery and Respondent were planning another mass shooting. Here, there was a threat to public safety based on the "Manifesto" and the anonymous call. The "Manifesto" stated that "My friends and I are going to show this world that there's nothing. Nothing but despair. We're going to do this again. Get ready. Soon." R. at 36. Because the "Manifesto" was left at the scene of the Balboa shooting, which killed nine people and wounded six people, and there was an additional threat of a school shooting, the police had reason to believe that Respondent and McKennery would carry out the threat. Further, a day after the threat, police observed two of the suspects of the Balboa shooting, that they had been investigating for weeks, engaged in suspicious activity. If the officers did not enter the Respondent's home, there would have been another mass shooting. Thus, it was constitutional for the police to enter the Respondent's home and obtain the assault rifle to prevent another mass shooting. *Armijo v. Peterson*, 601 F.3d 1065, 1071 (10th Cir. 2010) (finding that exigent circumstances existed because officers reasonably believed occupants of house were threatening a nearby school with a bomb).

2. **Entry into Respondent's home was necessary to prevent physical harm to the officers because the Respondent told the officers to wait outside while he searched for the assault rifle inside his home**

There were exigent circumstances permitting the officers entry into the Respondent's home because the officers had reason to believe that entry was necessary to prevent physical harm to themselves. Exigent circumstances are those circumstances that would cause a reasonable person to believe that entry is necessary to prevent physical harm to the officers. *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984). When the police arrived at the Respondent's home to ensure that the gun was rendered inoperable, the Respondent told police to wait outside his house, while he searched for the automatic assault rifle. R. at 29. In *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984), the court ruled that a warrantless entry or search is justified if there is an objectively reasonable belief of a threat to an officer's safety. *Id* at 1199. Here, if the officers waited for the Respondent to get the gun which they believed was operable, they could have been shot and killed, given that an assault rifle is a highly powerful and dangerous firearm. Therefore, the entry into the Respondent's home was necessary to prevent physical harm to the officers.

3. **Entry into the Respondent's home was necessary to prevent destruction of evidence given that the Respondent offered to retrieve the assault rifle while the police officers remained outside his home**

There were exigent circumstances permitting the officers entry into the Respondent's home because the officers had reason to believe that entry was necessary to prevent the destruction of evidence. In *Ker v. California*, the court ruled that where entry is necessary to prevent imminent destruction of evidence there are exigent circumstances. *Ker v. California*, 374 U.S. 23, 40 (1963). Here, the requests by the Respondent to wait while he searched for the gun, could have provided an opportunity for the Respondent to escape with the gun, destroy it, or hide it, given that the officers believed the Respondent was in violation of California Penal Code Section 30600 and

30915. As such, entry into the Respondent's home was necessary to prevent destruction of evidence.

4. **Exigent circumstances existed because the police entered Respondent's house thirty minutes after they observed McKennery give a duffle bag large enough to hold the assault rifle to the Respondent**

In *United States. v. Witzlib*, the court held that exigent circumstances did not exist because police waited four hours to search the house after obtaining probable cause that there were explosives in the basement of the Respondent's home. *United States v. Witzlib*, 796 F.3d 799, 802 (7th Cir. 2015). Here, the police only took thirty minutes after they observed McKennery give the duffle bag, which they believed had the assault rifle in it to the Respondent, then they confronted him at his house. As such, exigent circumstances existed, because the police entered Respondent's house, within a reasonable time, thirty minutes after they saw McKennery give the duffle bag to Respondent.

5. **The assault rifle was found in plain view, so it does not constitute a search under the Fourth Amendment**

The assault rifle was found in plain view in the Respondent's bedroom, so it does not constitute a search under the Fourth Amendment. An officer's observation of an item left in plain view generally does not constitute a search under the Fourth Amendment. *Texas v. Brown*, 460 U.S. 730, 740 (1983). *See United States v. Lewis*, 864 F.3d 937, 946 (8th Cir. 2017) ("[A] police officer who discovers a weapon in plain view may at least temporarily seize that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to officer or public safety."). Here, the officers were lawfully in the Respondent's home when they found the assault rifle which was operable in plain view. Because the assault rifle was found in plain view, it does not constitute a search under the Fourth Amendment.

### C. There Was No Infringement of the Respondent's Rights, Therefore, All Evidence Is Admissible

In *Oregon v. Elstad*, this Court established the principle that the Fourth Amendment's exclusionary rule requires an underlying federal constitutional violation. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985). Since there was no actual infringement of the Respondent's constitutional rights, this case is not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963). As such, all evidence is admissible.

## CONCLUSION

The California Fourth District Court of Appeal incorrectly held that there was a Fourth Amendment violation when Petitioner used the ALPR scanner to compile and subsequently track Respondent's vehicle movements. Respondent did not have a reasonable expectation of privacy because all the information obtained by the ALPR was publicly available. Furthermore, by extension the information gained from the pole-mounted camera was all publicly available and thus did not violate Respondent's Fourth Amendment rights. Lastly, the warrantless entry and search of Respondent's home did not violate Respondent's Fourth Amendment rights because, the police had probable cause that Respondent was in violation of California Penal Code section 30600 and 30915, and entry was necessary to prevent physical harm to the officers, the public, and to prevent the destruction of evidence. For the aforementioned reasons, this Court should reverse the decision of the California Fourth District Court of Appeal.

Respectfully submitted,

DATED: October 18, 2022

Counsel for the Petitioner