No. 1788-850191

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Petitioner,

V.

NICK NADAULD
Respondent,

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

A CRIMINAL PROCEEDING

BRIEF FOR PETITIONER

Respectfully Submitted:

Team 5
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ISSUES PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that the retrieval of Defendant's information from the automatic license plate recognition database required a warrant under the Fourth Amendment?
2. Did the Ninth Circuit Court of Appeals err in holding that the warrantless entry and search of Defendant's home violated Defendant's Fourth Amendment rights under our precedents?

<u>**STATEMENT OF THE CASE**</u>

Factual History

Respondent was the owner of an M-16 Rifle who loaned it to his friend despite knowing that he was not supposed to (Ex. B) on September 14, 2021—the same day that the Balboa Park shooting occurred. R. at 2. That friend, Frank McKennery ("McKennery"), was later found dead in his home with a letter next to his body that claimed he was responsible for the shooting (Ex. J) that killed nine people. R. at 2. At the time of the shooting, witnesses indicated a "horrific" scene where there was "a masked man wearing black combat gear and armed with a fully automatic rifle" that "opened fire on a crowd while tourists and residents ran for their lives." Ex. D. The rounds identified were "5.56x45mm NATO cartridges, a caliber commonly used in a wide variety of assault rifles." R. at 2. Once he finished, "McKennery escaped the scene without being identified." R. at 2. McKennery only left "a 'Manifesto,' which threatened future shootings," on the rooftop where he shot from. R. at 2. Though the Manifesto "turned out to be nothing more than a fabrication designed by McKennery to send law enforcement on a false trail," (R. at 3), the note found next to McKennery's body revealed equally disturbing motives; he borrowed the weapon from "another guy"—who had already been identified as Respondent—so that he could kill Jane Bezel as well as her fiancé. Ex. J. He masterminded the shooting because he knew that "if [he] went after her and the fiancé," the police would be able to track him down. Ex. J. McKennery "played it off as a mass murder" because he "knew [Bezel] always went to Balboa Park on Free Tuesdays." Ex. J.

Because of the "heinous nature of the crime," which received attention in three different articles in the San Diego times (*See, e.g.*, Ex. E; *See also*, Ex's. F, G), the police deployed "numerous investigative methods to find the shooter." R. at 3. The surveillance footage from the Balboa Park security cameras revealed forty individuals who did not come forward to identify

themselves. R. at 3. However, the cameras did record fifty vehicles leaving the scene; one of which belonged to McKennery. R. at 3. Police then compared the license plate data to the list of only fifty registered assault rifle owners in the area, which included Respondent. R. at 3. The Police utilized the Automated License Plate Recognition program ("ALPR"), a program that uses cameras attached to police vehicles or poles at intersections to compare the data of passing license plates to a police database, to investigate the movements of both McKennery and Respondent. R. at 3. Law enforcement discovered that "[Respondent's] vehicle and McKennery's vehicle had considerable overlap of being at the same locations at similar times." R. at 4. Officers investigated the top ten residencies that corresponded the most with the driving data of the license plates discovered at the park on the day of the shooting and placed cameras on poles outside of those houses to observe any suspicious activity. R. at 4.

On September 28, 2021, three days after officers sent out letters informing the ten residencies that they will be visiting and one day after Respondent received his letter, officers received a call from an anonymous source at a telephone booth who told them "'This is the Balboa Park shooter. This time, it's gonna be a school.'" R. at 4. The very next day, McKennery gave a large duffel bag to Respondent, an act that was caught on the camera placed outside of Respondent's house. R. at 4. Officers Jim Hawkins ("Hawkins") and Jennifer Maldonado ("Maldonado") were immediately dispatched to the scene. R. at 4. The officers initially questioned Respondent about the M-16 rifle he inherited from his father before entering his home without permission. R. at 4. The officers discovered that the weapon had not been rendered permanently inoperable in violation of Cal. Penal Code § 30915(a), which meant that the weapon was capable of firing during the time that the Balboa Park shooting occurred. R. at 4. Respondent then confessed to allowing McKennery to borrow the weapon in violation of Cal.

Penal Code § 30600. R. at 4. The officers arrested Respondent, and when law enforcement arrived at McKennery's house to investigate, they heard a gunshot and subsequently found him dead. R. at 4. Next to the body, there was that claimed that he was responsible for the shooting. R. at 4.

Procedural History

On October 1, 2021, Respondent was indicted by a federal grand jury for nine counts of second-degree murder under Cal. Penal Code § 187, nine counts of involuntary manslaughter under Cal. Penal Code § 192, one count of lending an assault weapon under Cal. Penal Code § 30600, and one count for failing to comply with Cal. Penal Code § 30915. R. at 5. Respondent filed the motion to suppress the evidence recovered on the day of the arrest, arguing that his 4th Amendment rights were violated. R. at 5. He first challenged "warrantless usage of the ALPR database to retrieve geographical information, and the warrantless mounting of pole-mount cameras to monitor residences." R. at 5. Next, he argued that Hawkins and Maldonado violated his 4th Amendment rights when "they entered and his house without a warrant." R. at 5. The United States District Court for the Southern District of California denied his motion in its entirety (R. at 12), and Respondent was subsequently convicted by a jury of involuntary manslaughter, lending of an assault weapon, and failure to render an assault weapon inoperable. R. at 14. The United States Court of Appeals for the Ninth Circuit reversed the decision, holding primarily that the warrantless usage of the ALPR database to determine an individual's movements is unconstitutional and that Hawkins and Maldonado had neither probable cause nor exigent circumstances which rendered the search of Respondent's home unconstitutional.

SUMMARY OF THE ARGUMENT

This court should reverse the Court of Appeals for the Ninth Circuit's decision to overturn Respondent's conviction, because the retrieval of the Defendant's information from the ALPR database did not constitute a search under the 4th amendment(and therefore did not require a warrant), and because the officers had probable cause to suspect criminal activity and the exigent circumstances requirement was satisfied.

The retrieval of information from the ALPR database did not constitute a search because the cameras only intermittently observed the exterior(public view) of the defendant's vehicle on public streets. Defendant, and citizens in general, have no reasonable expectation of privacy in their periodic movements on public roads, since this information can easily be viewed by any observer who happens to be standing in the general vicinity of the vehicle. Additionally, the ALPR technology uses the defendant's license plate information as a basis for tracking it, and one has little reasonable expectation of privacy in license plate information, since it is common knowledge(and therefore reasonable for one to expect) that vehicles are subject to pervasive regulation, and the license plate is a key medium for such regulation.

Additionally, the officers had probable cause to suspect criminal activity and the exigent circumstances requirement was satisfied. Under the totality of the circumstances, a reasonable police officer would have suspected that respondent was involved in criminal activity. The only reason that the Ninth Circuit held otherwise is because the court erred by placing undue attention on the isolated fact that someone could have used a modified semi-automatic weapon in the shooting or brought an automatic weapon from out of state. As such, the police officers had probable cause.

Furthermore, exigent circumstances existed because the officers had a need to prevent Respondent from destroying any evidence that he was actively committing a felony. Simply owning an operable M-16 would be a felony in itself. Respondent had to simply make it permanently inoperable—an act that could be done very quickly—to hide evidence that he had committed this crime. Finally, the confession should be admitted because the exclusionary rule depends on whether its application would deter similar behavior in the future. Because an officer in the same circumstances would be preoccupied with public safety, no deterrent effect will be produced, and the exclusionary rule should not be applied.

For these reasons, this court should affirm the District Court's decision and reverse the Court of Appeal's decision that overturned Respondent's conviction on the erroneous holding that his Fourth Amendment rights were violated.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews the Ninth Circuit's reversal of the District Court's dismissal of Respondent's motion to suppress evidence. This court "reviews findings of historical fact only for clear error," and "general matter determinations of reasonable suspicion and probable cause […] *de novo* on appeal." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). "The facts of this case are not in dispute," (R. at 14), so this court should review the case under the *de novo* standard.

II. THE ALPR USAGE WAS NOT A SEARCH BECAUSE NADAULD HAD NO REASONABLE EXPECTATION OF PRIVACY AS TO THE PUBLIC MOVEMENTS OF HIS VEHICLE, SO NO WARRANT WAS REQUIRED.

1. The ALPR usage did not constitute a search because its degree of surveillance was limited to intermittent, nonmoving, photographs of only the outside of the defendant's vehicle

The general standard for determining whether an action constitutes a 'search' under the Fourth Amendment is articulated in *Katz v. United States*, 389 U.S. 347, 360 (1967), which holds that any information or area that one has a subjective and objectively reasonable expectation of privacy, intruding on such area or information is considered a search and violation of that privacy. *Id.* at 361. Surveillance information regarding a motorist's movements on public roads has been repeatedly held not to constitute a search, since such movements are easily observable and inherently public. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). The Supreme Court applied this logic in *Knotts*, where it held that the use of a radio

transmitter that was placed in a defendant's vehicle to track done his location did not constitute a 4th amendment search. *United States v. Knotts*, 460 U.S. 276, 282 (1983). In holding as such, the court noted that the defendant had no reasonable expectation of privacy in his movements on public roads, since such movement could have been detected by officers or bystanders simply observing his vehicle on the street movement on public roadways. *Id.* at 282. The court noted that "Visual surveillance from public places…would have sufficed to reveal all of these facts to the police." *Id.*

The present case presents an even less intrusive situation. Here, the ALPR usage constituted only an intermittent 'pinging' of the defendant's location, taking photographs of the outside of his vehicle only when he happened to drive past ALPR camera. R. at 3. The surveillance information was therefore limited to wherever ALPR cameras were located, which were all in public areas in which Nadauld had no reasonable expectation of privacy. R. at 3, 38-39. Furthermore, by choosing to drive his vehicle on a public road, Nadauld, and any similar defendant, is voluntarily thrusting themselves into the public sphere, giving away not only their present location, but also the direction in which they are travelling and even their final destination, which can be inferred by at what point they exit the public road and enter a private, residential one. *Knotts*, 460 U.S. at 282. Thus, the ALPR cameras are simply collecting information that any collection of bystanders standing in public spaces could have done, since they only collected information of the outside, physical characteristics of his vehicle, such as his license plate info. R. at 28. ALPR usage cannot be considered an unconstitutional search simply because it's more efficient than sending officers to stand out in the street to observe the same information. As the court in *Knotts* observed in its case, law enforcement here could have simply sent out officers to stand out in the same public areas as the ALPR cameras were located, and

told to keep an eye out for certain vehicles, thus tracking Nadauld's car all the same. Here, no technology would be used, and officers would be acting no more intrusively than they normally would be, since they are in public view. Such a practice clearly wouldn't trigger 4th amendment scrutiny-therefore, the ALPR use, which does the same thing, albeit more efficiently, shouldn't trigger any 4th amendment scrutiny either. As the court in *Knotts* observed. "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford." *Id*. at 282. Authorities should not be punished for simply being more efficient with publicly available information.

The holding in *US v Jones* does not cut against this logic. In *Jones*, the Supreme court held that the warrantless placement of a GPS tracking device on a suspect's vehicle constituted a 4th amendment search and was therefore unconstitutional. *United States v. Jones,* 565 U.S. 400, 404–05. However, the holding in Jones focused on the fact that the GPS tracker was physically placed on the suspect's vehicle without his consent- a clear cut trespass. "We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Id.* The holding in *Jones* is inapplicable to the present case because unlike the case in *Jones*, where the main issue was whether a physical trespass occurred, here, there was no physical element to the ALPR usage- the ALPR cameras only took photographs of the outside of Nadauld's car, not even able to see through the window. R. at 28, 40. Furthermore, *Jones* involved the use of a GPS tracker, a device that directly and continuously communicates its exact location. *Jones*, 565 U.S. at 404. The APLR, as discussed above, does not communicate location at all- it simply identifies when vehicles pass by its own, fixed location. R. at 38-39.

Not does the holding in *Carpenter* affect this analysis. In *Carpenter*, law enforcement forced a suspect's phone carrier service to hand over cell-site location information("CSLI"). *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018). The Supreme Court held that the law enforcements' actions constituted a 4th amendment search and required a warrant. *Id.* at 2219. However, the ALPR technology in no way functions similarly to or to the degree of the CSLI surveillance here, limiting *Carpenter*'s applicability to the present case.

The CSLI information in *Carpenter* provides the government with "near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers." *Id.* at 2210.The Court further noted that such surveillance was closely approaching "GPS-level precision," and continuously and repeatedly gave off location to the point where the court characterized the surveillance as uniquely expansive. *Id.* Additionally, the records of this almost "GPS level precision" stretched back 5 years- giving government expansive knowledge of a suspect's past location history *Id.* at 2217. These surveillance methods simply have a degree of sophistication and intrusiveness that ALPR use does not. Unlike CLSI, the ALPR does not 'track' a user at all; rather, it pings when a user passes by a predefined, unmoving, and public location. R. at 38.

Carpenter's limited applicability to ALPR cameras is supported by precedent, as well. For example, in *US v. Bowers*, the District Court in the Western district of Pennsylvania found that *Carpenter*'s holding did not apply to ALPR usage because of the stark difference in the level of surveillance. *United States v. Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977, at 3 (W.D. Pa. Oct. 11, 2021). It noted the CLSI's 'all encompassing' and 'near-perfect surveillance nature' could not be remotely compared to the ALPR technology, which only captured pictures of the outside rear frame of the vehicles and lacked the ability to actually track the vehicles. *Id.*

The *Bowers* Court, which dealt with the very same ALPR issue present before the court- applied such reasoning to find that ALPR tracking did not require a warrant, because of (1) The limited intrusiveness of the ALPR camera itself, and (2) the defendant's limited privacy interest in his license plate, which is discussed *infra. Id.* at 4.

2. The ALPR usage did not constitute a search because it relied on license plate information, in which there is little expectation of privacy

i. Respondent has no reasonable expectation of privacy in his license plate because it serves as a medium of government regulation.

As the Supreme Court held in *New York v. Class*, automobiles are subject to a high degree of government regulation, and, as a result, owners of vehicles have a significantly reduced expectation of privacy into identification markers that serve as a medium for such regulation, such as their vehicle VINs. *New York v. Class*, 475 U.S. 106, 114 (1986), There, a police officer on a routine traffic stop reached into the suspect's vehicle and removed papers obstructing the vehicle's VIN. *Id.* at 108. Beneath the papers was the handle of a gun, and the suspect was subsequently charged and convicted with possessing a firearm. *Id.* In finding that the officer's search did not constitute a search under the 4th amendment, and was therefore lawful, the court noted that because the VIN plays such an essential role in the regulation of automobiles, the suspect could 'surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle.' *Id.* at 113. Therefore, the suspect had little reasonable expectation of privacy as to his VIN, and the police officer's actions in searching for the VIN did not require a warrant. *Id.*

The reasoning in *Class* applies *a fortiori* to the present case. License plates, more so than VINS, consistently serve as the principal medium for state regulation into automobile usage. Just as VINS, they are used to identify the vehicle for law enforcement and public safety purposes. The fact that license plates are required to be placed in full view of the public, at all times, is enough to establish the fact that citizens have no legitimate privacy interest in their license plates[1]. As the Class court held: "[I]t 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." *Class*, 475 U.S. at 114.

Circuit courts across the country have upheld such reasoning, finding that motorists have no privacy interest in their license plate numbers given how tied such numbers are to the commonplace and extensive regulation of vehicles generally. *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006) (holding that a motorist had no privacy interest in information contained in his license plate number); *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir.1999). The 6th Circuit in *Ellison*, for example, noted that "No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number ... is to provide identifying information to law enforcement and others." *Ellison*, 462 F. 3d at 561-62.

ii. *Respondent had no reasonable expectation of privacy in his license plate because he voluntarily surrendered his license plate to public officials, and a person has no reasonable expectation of privacy in information voluntarily shared with third parties.*

[1] See Cal. Veh. Code § 5200 (West), requiring license plate information to be shown at all times.

Additionally, Nadauld has a reduced expectation of privacy in his license plate because by owning a vehicle and registering its license plate, he voluntarily handed over his license plate information directly to public officials himself. "A person has no legitimate expectation of privacy in information that the person voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

In *Smith*, the Supreme Court held that police officers could install a pen register (a device used for monitoring call records) into a suspect's home telephone device without a warrant. *Id.* In holding that such an act didn't constitute a 4th amendment search, the court noted that by registering with a telephone company, users of telephones know that the numbers they dial will appear in the respective telephone company's records. *Id.* at 744. Therefore, telephone users have no reasonable expectation of privacy in the numbers they dial, even to police authority.

The reasoning here applies *a fortiori* to the present case. By registering his vehicle and obtaining a valid license plate with the local DMV, Nadauld directly gave local government his license plate information and reneged any expectation of privacy he had in it. Here, there was no third party even involved- Nadauld *directly* gave the government his license plate information by owning and registering his vehicle. Therefore, his privacy interest in license plate information is even less in the present case than it was for the defendants in *Smith,* which involved a more indirect hand-over of information.

a. *Carpenter cannot be used to establish the incorrect premise that citizens retain a privacy interest in information they give away to 3rd parties.*

The Ninth Circuit attempted use *Carpenter* to discredit the argument that one has a reduced expectation of privacy in information he/she hands over to third parties, by suggesting that in *Carpenter*, the suspect voluntarily handed over the CSLI information, despite *Carpenter's* holding that there was still a reasonable expectation of privacy in the information. R. at 17;

Carpenter 138 S. Ct. at 2219. However, the idea that the CSLI information was 'voluntarily' given away is factually incorrect. Indeed, one of the reasons the court found that the suspect's reasonable expectation of privacy was violated was that the suspect *did not* voluntarily hand over the CLSI information. *Carpenter*, 138 S. Ct. at 2220. The Court noted the CSLI information was recorded without any affirmative act on the suspect's part, being triggered by "virtually any activity" on the phone. *Id.* The court held that this was such a continuous and aggressive collection of information that the suspect, despite being a member of a cell phone carrier, did not "assume the risk" of such information being tracked. *Id.* Therefore, though the suspect did technically hand over the CSLI information to the 3rd party (by signing up for his cell phone carrier) there was no reason for him to expect that doing so would mean "turning over a comprehensive dossier of his physical movements." *Id.* Hence, the suspect in *Carpenter* did not 'voluntarily' hand over the surveillance information.

Furthermore, the court's focus on the lack of affirmative action being required to communicate CLSI information further distinguishes the holding from the situation in the present case. Unlike the CLSI, which records the suspect's information regardless any act on his part, the ALPR requires the suspect to (1) drive with a registered license plate on a public road, and (2) happen to drive past an ALPR camera, which is located in a fixed, public location. R. at 39. Such actions are considered a voluntary give away of one's location and travelling information, negating any reasonable expectation of privacy one may have had in such information. *Knotts*, 460 U.S. at 282.

3. The Ninth Circuit erred in finding that the ALPR usage constituted a 'dragnet' enforcement practice

While the court it *Knotts* focused on how limited one's expectation of privacy was within a motor vehicle, it noted that 'different constitutional principles' may apply when the surveillance method is stringent to the point of constituting a 'dragnet type enforcement practice.' *Knotts*, 460 U.S. at 284. The Ninth Circuit held that the ALPR usage in the present case constituted such a practice, and thus triggered heightened 4th amendment scrutiny. R. at 16. However, this was erroneous- the *Knotts* court indicated that the term 'dragnet enforcement practice' referred to 24 hour surveillance of a citizen. *Knotts*, 460 U.S. at 284. As illustrated prior, the ALPR is hardly even a surveillance method, since it doesn't directly track any citizen- the database is only pinged if (1) one is driving a registered license plate on a public road, and (2) the driver happens to drive past an ALPR camera. R. at 38-39. The ALPR usage, therefore, does not nearly come under the definition of a 'dragnet-type enforcement practice' under Supreme Court precedent.

III. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH RESPONDENT WITHOUT A WARRANT AND THE EXIGENT CIRCUMSTANCES REQUIREMENT WAS SATISFIED.

A warrantless search should be upheld if the officers who conducted the search had probable cause to suspect criminal activity and the exigent circumstances requirement is fulfilled. *United States v. Ogden*, 458 F.2d 536, 539 (9th Cir. 1973). Exigent circumstances exist if there is a need to prevent the imminent destruction of evidence (*Kentucky v. King*, 563 U.S. 452, 455 (2011)) or a need to protect individuals from imminent harm. *United States v.*

McConney, 728 F.2d 1195, 1199 (9th Cir. 1984). The officers had probable cause to suspect criminal activity and when the Ninth Circuit held otherwise, it did so by placing an undue emphasis on isolated facts. Furthermore, even if the officers did not have probable cause to suspect Respondent was an accessory to the Balboa Park shooting, they did have probable cause to suspect that he was committing a felony by illegally possessing a machine gun. Finally, an objectively reasonable police officer would have concluded that if the search had not been conducted, Respondent would have had an opportunity to destroy the evidence or would have allowed more people to have been harmed.

1. ***The officers had probable cause to suspect criminal activity because a reasonable police officer could have concluded that a crime had been committed because of the totality of the circumstances surrounding the interaction and Respondent's erratic behavior.***

If the "'historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause," then the probable cause requirement is fulfilled *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). Probable cause "deals with probabilities and depends on the totality of the circumstances," (*Id.*) and is "a fluid concept […] not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). This court should hold that the probable cause requirement was fulfilled because the facts of the situation, including the Respondent's erratic behavior, would cause an objectively reasonable police officer to suspect criminal activity.

i. The officers properly assessed the situation under the totality of the circumstances because Respondent was one of only a handful of people to own an assault rifle in the area and was a coworker of the prime suspect.

Probable cause exists if a reasonable officer could conclude after "considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 588

(Quoting *Gates*, 462 U.S. at 244 n.13). Additionally, "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Wesby*, 138 S. Ct. at 588. Respondent was one of the relatively few people in the San Diego area who owned an assault weapon, and he was the prime suspect's coworker. Ex. F. The prime suspect's car was identified via surveillance footage of the crime scene. R. at 3. Perhaps most importantly, the officers were reasonably pressed to solve the crime quickly considering the threat to attack a school. R. at 4. Accordingly, it does not matter if Respondent's behavior could have been explained as being surprised or embarrassed at the prospect of the officers seeing his messy house because "this kind of divide-and-conquer approach is improper." *Wesby*, 138 S. Ct. at 589. In this situation, "the totality of the circumstances gave the officers plenty of reason to doubt" Respondents "protestations of innocence." *Id*. As such, probable cause existed.

ii. Respondent's evasive and erratic behavior would cause an objectively reasonable police officer to suspect criminal activity.

Evasive and erratic behavior can support a finding of probable cause. *See US v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975) ("The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion."). Respondents' behavior when the officers arrived at his house can be described as "evasive" or "erratic."

First, Respondent was aware of the Balboa Park shooting (Ex. B), and when asked whether he "had nothing to worry about," respondent simply stared at the officers for 5 seconds. Ex. A. The fact that Respondent did not immediately state that he had "nothing to worry about," could raise suspicion in a reasonable police officer. The idea that an innocent person would act in a certain way is so highly regarded in the legal community that there is an exception to hearsay in the Federal Rules of Evidence based on it. *See* Fed. R. Evid. 801(b)(2). An innocent person in Respondent's position would have, in general, probably realized that he was being investigated

for the Balboa Park shooting as there was ample news coverage of the incident. *See, e.g.*, Ex. D. *See also*, Ex. F. Similarly, an innocent person with this realization would generally immediately affirm that he "had nothing to worry about" without having to stare at the officers for five seconds. Accordingly, this part of the interaction could reasonably raise suspicion of Respondent's involvement in the crime, and thus, support a finding of probable cause.

Second, when the officers wanted to come inside the house to make sure that the automatic weapon was inoperable as required by law (Cal. Penal Code § 30915(a) (West)), Respondent acted evasively. When Officer Hawkins first asked to come inside, Respondent asked the officers to wait while he went to get the weapon. Ex. A. When Officer Hawkins pointed out that they needed to enter the house "to verify that the weapon has already been rendered inoperable," Respondent reaffirmed his preference to have the officers wait outside because his house was "kind of messy." Ex. A. A permanently inoperable firearm is one which is incapable of discharging a shot by means of an explosion and incapable of being readily restored to a firing condition. 27 C.F.R. § 478.11. As such, Respondent could have simply crushed the firearm receiver[2] with a tool he had handy from his job as a construction worker. Ex. F. Accordingly, in the mere seconds that Respondent went to retrieve the weapon, he could have rendered the weapon "inoperable." An innocent person who recognized the gravity of the situation would probably view clearing his name as more important than avoiding embarrassment from a messy house. As such, Respondent's behavior in this situation could be seen as suspicious and supports the finding of probable cause.

Finally, Respondent's confession that he loaned the weapon to Frank McKennery is very likely to be viewed as suspicious by an objectively reasonable officer and support a finding of

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[2] https://www.atf.gov/firearms/how-properly-destroy-firearms

probable cause. One of the first ways that San Diego Police Department investigated the shooting involved utilizing surveillance footage from Balboa Park on the day of the incident, which identified Frank McKennery as an owner of one of the vehicles there. As such, when Respondent admitted that he loaned the weapon to Frank McKennery, it supported the finding of probable cause.

iii. The Ninth Circuit placed undue attention on whether a person could have illegally owned a weapon that could be converted into an automatic weapon or brought an automatic weapon from out of state.

When considering whether an officer had probable cause, courts should avoid placing "undue attention […] on isolated issues that cannot sensibly be divorced from the other facts […]" *Gates*, 462 U.S. 213, 234 (1983). This is because "[a] factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality." *Wesby*, 138 S. Ct. 577, 589 (2018) (Quoting *U.S. v. Arvizu*, 534 U.S. 266, 274 (2002)). Existing case law out of the Supreme Court "requires courts to consider 'the whole picture'" (*Wesby*, 138 S. Ct. 577, 588 (2018) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417 (1981)) because "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."

Crucial to the Ninth Circuit's holding was the observation that the list of those who owned an automatic assault rifle did not include "all the people in San Diego who may have purchased a semi-automatic assault rifle and illegally converted it into an automatic assault rifle." R. at 19. The court also stated that "nothing [excluded] the possibility that the shooter hailed from elsewhere in California or even from out of state." R. at 19. However, California has some of the most restrictive firearm laws in the country (*see, e.g.*, Cal. Penal Code § 26500 (West)). Logically, this would drastically limit the amount of people who would own a "fully automatic rifle" (Ex. D) or any "semi-automatic assault [rifle capable of being illegally converted] into an automatic assault rifle," (R. at 19), so an objectively reasonable officer would

view one of the relatively few licensed assault weapons owners compared to the general population of San Diego with great suspicion. As such, the Ninth Circuit placed undue attention on the isolated fact that another person could have illegally converted a semi-automatic weapon into the weapon utilized in the shooting, and the totality of the circumstances supports a finding of probable cause.

iv. Regardless of if the officers had probable cause to search for evidence related to the shooting, the officers had probable cause to search the house for an operable M-16 because illegal possession of an automatic weapon is a felony.

The possession of a machine gun alone is a felony in California and respondent practically admitted to violating that law, which would certainly suggest to an objectively reasonable officer that Respondent was involved in some sort of criminal activity and strongly support a finding of probable cause. California Penal Code § 32625(a) states that "Any person […] who within this state possesses or knowingly transports a machinegun […] is guilty of a public offense and upon conviction thereof shall be punished by imprisonment pursuant to subdivision (h) of Section 1170. "Cal. Penal Code § 32625 (West). Cal Penal Code § 1170(h)(1) states that " […] a *felony* punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years." (Emphasis added) Cal. Penal Code § 1170 (West). Respondent already admitted to having an item that could potentially be an illegal machine gun when he told the officers to "let [him] go get it." Ex. A. As such, the officers had probable cause to suspect that Respondent was in the act of committing a felony by possessing the M-16 in violation of Cal. Penal Code § 32625(a).

*2. **Exigent circumstances existed because an objectively reasonable officer could have suspected that Respondent was going to destroy evidence that proved he was in violation of Cal. Penal Code § 30915***

Because "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" (*Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) the presumption that a warrantless search is unconstitutional can be overcome due to exigent circumstances. *See Kentucky v. King*, 563 U.S. 452, 459-60 (2011). "The need 'to prevent the imminent destruction of evidence'" is "a sufficient justification for a warrantless search." *Id.* at 460 (Quoting *Brigham City*, 547 U.S. at 403 (2006)). In *King*, the Supreme Court recognized that the evidence in a possession of narcotics case can essentially be destroyed "by flushing them down a toilet or rinsing them down a drain." *Id*. at 461. In the present case, it would be a crime under Cal. Penal Code § 30915(a) to possess an M-16 assault rifle that had not been rendered permanently inoperable with 90 days of legally acquiring the weapon. Likewise, it is not a crime to possess an M-16 that *is* permanently inoperable. An objectively reasonable officer would likely realize that by simply crushing the receiver (*see supra* argument section III(1)(b)), Respondent could have "destroyed" any evidence that he was in violation of Cal. Penal Code § 30915(a) and Cal. Penal Code § 32625(a), a felony provision (*see supra* argument section III(1)(d)). Accordingly, exigent circumstances existed which permitted the officers to enter the house without a warrant.

Respondent may try to argue that simply rejecting entry would not cause an objectively reasonable police officer to suspect that Respondent was going to immediately destroy the evidence of his violation of § 30915, however, this argument should not prevail when looking at the totality of the circumstances. When the officers asked Respondent if he remembered that he was supposed to render the weapon permanently inoperable, he answered in the affirmative, stating "I suppose." Ex. A. Later, when the officers mentioned that they would need to enter the house to make sure that the weapon was inoperable, Respondent acted in a way that a reasonable

officer could view as evasive. *See Supra* Section III(1)(b). These factors combined could suggest to a reasonably objective officer that Respondent was aware that he was in violation of § 30915 and became nervous when he realized that he might be caught.

Respondent may also argue that a reasonable officer would recognize that destroying the evidence, or in this case, destroying the weapon, would create loud noises, so it would be unlikely that a suspect would attempt to do so. The court should reject this argument for multiple reasons. First, if Respondent shut his door and went into his garage to crush the receiver with one of his tools from work (for example, a sledgehammer), there is no guarantee that the noise would have been heard. Second, crushing the receiver is only one way to destroy weapon in a way that would bring it into conformity with § 30915(a). A reasonably objective officer that knew that Respondent was a construction worker could have suspected that Respondent might have the skill to quickly fusion weld the chamber closed.[3] *See* 27 C.F.R. § 478.11 ("An acceptable method of rendering most firearms permanently inoperable is to fusion weld the chamber closed and fusion weld the barrel solidly to the frame."). As such, an objectively reasonable police officer would have suspected that Respondent was going to destroy relevant evidence.

3. ***The confession should not be excluded, even if the search was illegal, because the officers were acting in good faith to prevent further harm and extending the rule in these circumstances would not result in any appreciable deterrence.***

In *United States v. Herring*, an 11th Circuit case that has stood for over 10 years, the court held that the exclusionary rule should only be applied if there is misconduct by a member of law enforcement, applying the rule would result in deterrence of similar misconduct in the future, and the benefits from applying the rule do not outweigh the costs. *United States v. Herring*, 492 F.3d

[3] https://waterwelders.com/what-is-fusion-welding/ (Laser Beam Welding, a type of fusion welding, is "is a fast and automated process that uses light to generate heat.").

1212, 1218 (11th Cir. 2007). The court specifically noted that "[a]pplication of the rule is unwarranted where '[a]ny incremental deterrent effect ... is uncertain at best.'" *Id*. at 1216 (Quoting *United States v. Calandra*, 414 U.S. 338, 351 (1974)). In *Herring*, the Court recognized that applying the exclusionary rule in a case where a records keeper had been negligent would not deter future records keepers from violating the Fourth Amendment because the act was not a conscious decision. *Id*. at 1218. Similarly, the officer's conversations in this case upon arrival to the house suggest a good-faith desire to prevent imminent public danger. *See, e.g.*, Ex. A (Hawkins: "Are you sure you don't want to call for more backup?" Hawkins: "We don't have time for that. And they're backed up as it is."). The back-and-forth suggests that the primary concern was preventing public danger, and the officers were not intending to infringe on the Respondent's 4th Amendment rights. An officer in a similar situation is likely to be far more concerned with the public safety, and thus, applying the exclusionary rule in this case is unlikely to operate as a deterrent to future 4th Amendment violations.

Similarly, "any minimal deterrence that might result from applying the exclusionary rule in these circumstances would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence." *Id*. at 1218. In the present case, excluding the evidence could let off the hook a person who cannot be trusted to follow California's safety laws despite clear knowledge of them. *See, e.g.*, Ex. B (After McKennery texted respondent saying that he was "[t]rying out that sweet rifle[,]" Respondent replied: "I wasn't supposed to loan it, remember?"). This could also cause an officer, who reasonably the public is in danger, to hesitate, despite his good faith, thus exasperating any public danger.

Respondent may argue that by allowing the evidence to be admitted despite a potential 4th Amendment violation, this Court would be setting a precedent that would allow police officers to

infringe on 4th Amendment rights to an alarming degree while pleading "good-faith." However, this court should not accept this reasoning. Any assertion of good faith that the officers may put forth is corroborated by the facts of the situation. The officers were investigating a gruesome mass shooting and believed they had an opportunity to prevent another shooting at a school. The police department had used the pole-mount cameras before based on the reasonable belief that they were not violating a person's reasonable expectation of privacy. Finally, the officers were operating under the information retrieved from the ALPR, and they likely believed that at least one of the two methods would be considered acceptable under the 4th Amendment. As such, this is an incredibly niche case which strongly supports that the officers were operating in good faith. Consequently, officers operating while in this state of mind are unlikely to be deterred by applying the exclusionary rule, so there is no basis for applying the rule, and Respondent's confession should be allowed into evidence.

CONCLUSION

For the foregoing reasons, this court should find that the Court of Appeals for the Ninth Circuit erred in finding that Respondent's Fourth Amendment rights were violated by the government retrieving his information through the automatic license plate recognition database and through the warrantless entry and search of his home.