Team 14

No. 1788-850191

IN THE

Supreme Court of the United States

NOVEMBER TERM, 2022

PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

NICK NADAULD

RESPONDENT,

On Writ of Certiorari to the California Court of Appeals, Fourth Appellate District

BRIEF FOR RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED

I. Whether the California Fourth District Court of Appeal erred in holding that the retrieval of Defendant's information from the automatic license plate recognition database required a warrant under the Fourth Amendment.

II. Whether the California Fourth District Court of Appeal erred in holding that the warrantless entry and search of Defendant's home violated defendant's fourth amendment rights under our precedents.

STATEMENT OF FACTS

On September 14, 2021, a masked shooter opened fire from a rooftop in Balboa Park in San Diego onto the plaza below. R. at 2. The shooter was able to escape the scene without being identified. R. at 2. A "Manifesto" suggesting that the shooter had accomplices and threatening more shootings was found on the rooftop. R. 2, 36. The "Manifesto" also expressed said the shooter was Twenty-seven years old, it made reference to the Jora Guru religion, and detailed the shooter's motive. R. at 2, 36. Rifle rounds of a caliber commonly used in a wide variety of assault rifles were also found at the scene. R. at 2.

On September 21, there was substantial public pressure to find the shooter. R. at 21, 31. Law enforcement conducted a large-scale investigation with more than one hundred law enforcement officers. Police analyzed surveillance footage from security cameras near Balboa Park. R. 3. Of the hundreds fleeing the scene, about forty unidentified individuals on foot and fifty vehicles were recorded at scene. R. 3, 29. Police checked criminal records associated with the fifty vehicles but found no evidence of prior violent crimes, and none were members of the Jora Guru religion. R. 3. Thirty-three-year-old Frank McKennery ("McKennery") was the owner of one of the vehicles seen leaving the scene. R. 3.

Police cross-referenced the list of fifty vehicle owners with a list of fifty registered automatic assault rifle owners in the area. R. 3, 19. Law enforcement and semi-automatic rifle owners were excluded from the list. R. 19. Thirty-nine-year-old Nick Nadauld was on the list.

Mr. Nadauld legally acquired an M16 by inheritance from his father, a former member of the military who had died five years earlier. R. at 2. Ballistics analysis showed that his M16 was used by the shooter. R. 2, 33. Mr. Nadauld loaned the rifle to Mr. McKennery to take to Arizona for target shooting. R. at 2, 24.

Police also retrieved information from the Automatic License Plate Recognition ("ALPR") database on the movements of the vehicle owners and assault rifle owners. R. 3. The data on these one hundred individuals was compared, and overlap was found in certain pairings of individuals, including Mr. Nadauld and McKennery. R. at 4. Mr. Nadauld and McKennery were found to be at the same locations at similar times. R. 4. They were also found to be co-workers at a construction company for about a year prior to the shooting. R. 2.

Ten residences corresponding to the most driving location data were covertly investigated. R. 4. On September 24, police placed cameras on utility poles facing the ten residences to monitor suspicious activity. R. 4. On September 25, law enforcement mailed letters to the ten residences giving notice that in thirty days, their assault rifles would be inspected to verify that they had been rendered inoperable as required by Cal. Penal Code § 30915. R. 4. Mr. Nadauld received the letter on September 27.

On September 28, at 10:37 a.m., police received an anonymous call from a telephone booth. The caller said, "This is the Balboa Park shooter. This time, it's gonna be a school." R. 4.

On September 29, at 5:23 p.m., the camera placed near Mr. Nadauld's residence captured McKennery pulling into the driveway, giving Mr. Nadauld a large duffel bag, and then leaving. R. 4. Two FBI officers were immediately dispatched to investigate. R. 4. They arrived thirty minutes after McKennery left. R. 4. They did not call for backup before knocking on Mr. Nadauld's door. R. 23. Mr. Nadauld answered, and Officer Hawkins said, "Good afternoon, sir. Are you Nick Nadauld?" Nadauld responded, "Yes. Did I do something wrong?" R. 23. Officer Hawkins then said, "Maybe. Do you still have that M16 your old man left you?" Mr. Nadauld responded, "Um... I thought you guys were coming in like a month to talk about that." R. 23. Officer Hawkins then said, "Well, we thought we'd get a head start. It shouldn't matter though. You were required to render it inoperable within ninety days of receiving it. Didn't your father pass away, what, five

years ago? You should have nothing to worry about then." Mr. Nadauld responded, "I suppose." R. 23. Officer Hawkins said, "Well, do you have nothing to worry about?" Mr. Nadauld stared at the officers for five seconds, and then responded, "No, there's nothing to worry about." R. 23.

Officer Hawkins then said, "Well then, we'd like to see the gun." Mr. Nadauld responded, "I don't want to show you that now, you said you'd come in a month." R. 23. Officer Hawkins then said, "Maybe you've heard of what happened in Balboa Park a couple weeks ago? We want to make sure all assault weapons are accounted for." Mr. Nadauld responded, "Well, I didn't have anything to do with that." R. 23. Officer Hawkins then said, "We want to get all our bases covered." Mr. Nadauld responded, "Fine. Why don't you wait here while I go get it?" R. 23. Officer Hawkins then said, "Sir, I think we need to come into the house to verify that the weapon has already been rendered inoperable." Mr. Nadauld then said, "Well, my house is kind of messy. I'd prefer that you wait out here." R. 24. At that time, Officer Hawkins then said, "I don't think so, Nick," and walked into Mr. Nadauld's residence. Mr. Nadauld stepped aside, and then said, "Hey, I didn't say you could come into my house. Aren't you not allowed if I don't say so?" R. 24.

Once inside Mr. Naduald's home, Officer Hawkins said, "Where's the gun, Nick?" Mr. Nadauld replied, "Didn't you hear what I said?" R. 24. Officer Hawkins then instructed Officer Maldonado to start checking the rooms of Mr. Nadauld's residence. Mr. Nadauld then said, "Hey, what's going on here? I don't want you in my house!" R. 24. Officer Hawkins then said, "Why? You got something to hide? Nine people turn up dead, gunned down by an automatic assault rifle, 5.56mm rounds left at the scene, you think we wouldn't put the pieces together?" Mr. Nadauld responded, "That wasn't me!" R. 24. Officer Hawkins then said, "You want to help us catch the guy, then? Then tell me where the gun is!" Mr. Nadauld responded, "It wasn't my gun!" R. 24.

Officer Maldonado retrieved the M16 with plastic gloves from the bedroom and said, "Found it, Hawkins. Still looks operable." R. 24. Officer Hawkins said "Well, well, well. Looks

like you're the prime suspect for the Balboa shooting, Nick. How does that sound?" Mr. Nadauld responded, "It wasn't me! I didn't even have the gun then!" R. 24. Officer Hawkins said, "Who'd you give it to?! Frank McKennery?" Mr. Nadauld responded, "Yes! How'd you know that? But I swear he didn't do it! I got worried on the day of the shooting and texted him where he was. He sent a picture of himself in the Arizona desert just target shooting!" R. 24. Officer Hawkins then said, "Well, we'll soon have him in custody too to ask him. Hands on your head, we're putting you under arrest." R. 25.

When police arrived at McKennery's residence, they heard a gunshot inside the house, and found McKennery dead inside. R. at 4. A letter was also found with a confession to the shooting and an explanation that the "Manifesto" was designed to conceal his true motive for his crime, to kill Jane Bezel and her fiancé. R. 4, 37. The letter also said, "I got the rifle from another guy, but I'm not going to say who. He didn't have anything to do with this. He didn't know anything. But I got the gun, I made my plans, and the rest is history." R. 37.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the California Court of Appeals. Police violated Mr. Nadauld's Fourth Amendment rights against unreasonable searches and seizures by its use of the ALPR location data. The historical location information contained in the ALPR data revealed intimate details found in the whole of Mr. Nadauld movements. Mr. Nadauld had a reasonable expectation of privacy in these intimate details of his life.

Mr. Nadauld's Fourth Amendment right to be secure in his house against unreasonable searches and seizures was also violated by the officers who entered and searched his home without probable cause or exigent circumstances. Police acted without substantial basis for concluding that there was a fair probability Mr. Nadauld's rifle was used in the commission of any crime. The officers also entered and searched Mr. Nadauld's in the absence of exigent circumstances, because

Mr. Nadauld posed no immediate threat to the public, the officers' safety was not threatened, and any risk of evidence destruction did not merit warrantless entry. Furthermore, any perceived exigency was manufactured by the officers through threatened and actual violations of Mr. Nadauld's Fourth Amendment rights.

STANDARD OF REVIEW

The Superior Court of California's denial of a motion to suppress is to be reviewed *de novo*, and a deferential, clear-error standard of review will be applied to the Superior Court of California's findings of fact. *Ornelas v. U.S.*, 517 U.S. 690, 700 (1996).

ARGUMENT

I. THE CALIFORNIA COURT OF APPEAL WAS CORRECT THAT THE USE OF ALPR IN THIS CASE CONSTITUTED A 4TH AMENDMENT VIOLATION OF NADAULD'S REASONABLE EXPECTATION OF PRIVACY

The Fourth Amendment of the United States Constitution grants the right to be secure in one's person, house, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. Police conduct amounts to a search, thereby implicating the Fourth Amendment, when "a person [exhibits] an actual (subjective) expectation of privacy, and [when] the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz v. U.S.*, 389 U.S. 347, 361 (1967). A violation occurs when the government violates a person's "reasonable expectation of privacy." *U.S. v. Jones*, 565 U.S. 400, 406 (2012).

The expectation of privacy in data collected through the use of surveillance technology, like ALPR, is best analyzed by addressing whether the whole of the individual's movements reveals private information. See, *e.g.*, *Jones*, 565 U.S.; *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018). Other considerations include: whether there is a diminished expectation of privacy resulting from the voluntary disclosure of movements in plain view or voluntarily given to third parties, and the

extent to which public use or awareness of technology affects the expectation of privacy. *See, e.g.*, *Jones*, 565 U.S.; *Carpenter*, 138 S. Ct.; *U.S. v. Knotts*, 460 U.S. 276 (1983). This Court must also consider whether safeguards are necessary to preserve the degree of privacy against government that existed when the Fourth Amendment was adopted. *See, e.g.*, *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001); *Riley v. California*, 573 U.S. 373, 402 (2014); *California v. Ciraolo*, 476 U.S. 207 (1986).

A. The whole of Mr. Nadauld's movements shown by the ALPR data revealed intimate details about Mr. Nadauld's life in which he had a reasonable expectation of privacy

In *Carpenter v. U.S.*, this Court addressed government surveillance by the collection of cell phone site location information (CSLI). *Carpenter*, 138 S. Ct. In its analysis, this Court discussed the importance and applicability of the concurring opinions of Justice Sotomayor and Justice Alito in *U.S. v. Jones*. *Carpenter*, 138 S. Ct. at 2215. The Court pointed out that, in *Jones*, five Justices agreed that GPS tracking raised significant privacy concerns independent of whether there had been a physical trespass by the government. *Id*. It was recognized that individuals have a reasonable expectation of privacy in information revealed by the whole of their physical movements. *Carpenter*, 138 S. Ct. at 2217; *see also*, *Jones*, 565 U.S. at 415, 430. (Sotomayor, S., concurring)(Alito, S., concurring).

1. "Intimate" Details of Mr. Nadauld's life were revealed from the ALPR data

In *Carpenter*, the Court reasoned that the CSLI information at issue in that case and the GPS information collected in *Jones* both provided an "intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Carpenter*, 138 S. Ct. at 2217 The Court also pointed out that the CSLI data could reveal whether a person went into a private residence, doctor's officer, political headquarters, and other potentially revealing locales. *Id.* at 2218. "These location records

'hold for many Americans the "privacies of life."'" *Carpenter*, 138 S. Ct. at 2210 (citing Riley, 573 U.S. at 403). In *Riley*, the Court highlighted private interests, medical information, and historical location information as private details about a person's life that would trigger Fourth Amendment protection. *Riley*, 573 U.S. at 395-96.

Here, through the ALPR data alone, police discovered the location of Mr. Nadauld's residence, where he and McKennery worked, that they worked together, and that they had a close association. Since the use of ALPR data in this case revealed that Mr. Nadauld and McKennery worked together, it is reasonable to infer that the data also could have revealed whether they attended any religious establishments, doctor's offices, political headquarters, and any number of other "revealing locales." *Carpenter*, 138 S. Ct. at 2218. For example, if it were to have been discovered that McKennery was a member of the Jora Guru religion, the ALPR location data would have shown that Mr. Nadauld was associating closely with a member of said religion.

"Awareness that the government may be watching chills associational and expressive freedoms." *Jones*, 565 U.S. at 416 (Sotomayor, S., concurring). The use of the historical location data collected by ALPR technology in this case revealed the very types of private information that a majority of this Court expressed concern about in the *Jones* concurrence opinions and that this Court held were entitled to Fourth Amendment protection in *Riley* and *Carpenter*. *See Jones*, 565 U.S. at 415 (Sotomayor, S., concurring); *Riley*, 573 U.S. at 416 *Carpenter*, 138 S. Ct. at 2217-18. The revelation of Mr. Nadauld's private information through the use of ALPR location data constituted a search under the Fourth Amendment.

Assuming *arguendo* that ALPR data alone didn't reveal Mr. Nadauld's private information, it was likely deduced in combination with other collected information. The government's use of ALPR information in combination with Mr. Nadauld's rifle registration and likely searches of other information available to the government led the revelation of even more intimate details

about Mr. Nadauld's life, including his father's military service, when his father died, details of his father's will, and that several personal effects, including the M16, where left to Mr. Nadauld. While some of this information is usually available to the public, the whole of the information is generally not. The whole of one's individual movements can reveal a 'great deal more than the sum of its parts." *U.S. v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010). In *US v. Maynard*, the District of Columbia Circuit Court of Appeals determined that, unlike movement's during a single journey, the likelihood anyone will observe the totality of an individual's movements over the course of a month is "effectively nil." *Id.* at 558. While the holding in *Maynard* is not binding authority on this Court, it is the case from which *US v. Jones* was appealed and is an important holding in the development and application of the "Mosaic Theory" that has sought to address issues with surveillance technology. *Jones*, 565 U.S. The information gathered on Mr. Nadauld revealed many intimate details of Mr. Nadauld's life that are not publicly available in the aggregate. *See Commonwealth v. McCarthy*, 142 N.E.3d 1090 (Mass. 2020).

In recently reported cases from various lower courts, ALPR technology is addressed by applying the holding in *Carpenter*. In each case, the court ultimately determined that the use of ALPR technology in those particular instances did not reveal the same "privacies of life" that were revealed in *Carpenter*. *See, e.g.*, *U.S. v. Rubin*, 556 F. Supp 3d 1123 (N.D. Cal. 2021); *McCarthy*, 142 N.E.3d. at 509. However, most recent rulings from lower courts dealt with significantly less extensive use of the ALPR technology which revealed almost no intimate details about the individuals involved. See, *Rubin*, 556 F. Supp 3d; *but see U.S. v. Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977 (W.D. Pa. Oct. 11, 2021) (full historical inquiry of data over four months, 106 occasions in thirty-three different locations). In addition, each court acknowledged that ALPR technology "might someday rise to the level of a Fourth Amendment violation if enough ALPRs were used to create a comprehensive picture of an individual's movements." *E.g.*,

Bowers, No. 2:18-CR-00292-DWA, 2021 WL 4775977 (emphasis added); *McCarthy*, 142 N.E.3d. at 509.

In *McCarthy*, the Massachusetts Supreme Court provided a detailed explanation of how use of ALPR will likely eventually require Fourth Amendment protection saying that "[w]ith enough cameras in enough locations, the historic location data from an ALPR system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes." *McCarthy*, 142 N.E.3d. at 506. The court in that case point to a one-year retention period which it said was "certainly is long enough to warrant constitutional protection." *Id.* Soon, "one well may be able to make many of the same inferences from ALPR data that implicate expressive and associative rights." *McCarthy*, 142 N.E.3d. at 506-7 (citing *American Civ. Liberties Union Found. of S. Cal. v. Superior Court of Los Angeles County*, 3 Cal. 5th 1032, 1044 (2017)). Finally, like carrying a cellular telephone, driving is an indispensable part of modern life, one we cannot and do not expect residents to forgo in order to avoid government surveillance.

Here, the ALPR data may be retained for up to five years, which is longer than the one-year retention period that the Massachusetts Supreme Court reasoned was long enough to warrant constitutional protection. R. at 38. Also, unlike the circumstances in *McCarthy* where there were only four cameras at two fixed locations on two bridges, here, cameras are located on police vehicles and fixed locations. *McCarthy*, 142 N.E.3d. at 509. Accordingly, it is highly likely that substantially more data is being collected in San Diego than the court dealt with in *McCarthy*.

ALPR data here was accessed for one hundred different plates which corresponded to at least one hundred individuals. The scope, and consequently the intrusiveness, of the data search was further amplified by the data of each vehicle being compared to each other for overlaps. By comparing the data, much more information about each individual was likely to have been revealed by the data, most evident by the association revealed between Mr. Nadauld and Mr. McKennery.

The use of ALPR in this case proves that the technology has advanced to be capable of revealing intimate details of individuals' private lives, especially when used, as it was here, to compare the locations of numerous vehicles in an effort to reveal a lead in a case as opposed to having a specific target of the search.

2. The private nature of the information revealed, not the duration of surveillance or quantity of information collected, should be the test for Fourth Amendment protection

Justice Alito, in his concurring opinion in *Jones*, said that the duration of the search was the appropriate test for determining whether the data collected would constitute a search. *Jones*, 565 U.S. at 425 (Alito, S., concurring). However, the Supreme Court has not addressed surveillance duration since *Jones*. Many lower courts won't extend Fourth Amendment protection to shorter duration searches regardless of the type of data obtained. *See, e.g.*, *US v. Skinner*, 690 F.3d 772 (6th Cir 2012); *Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977. Their reasoning is that for the analysis of CSLI data in *Carpenter* to apply to ALPR data, it also must reach a level of "near-perfect" surveillance. *See Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977, see also, *U.S. v. Graham*, Crim. No. 21-645 (WJM), 2022 WL 4132488, (D.N.J. Sept. 12, 2022). However, the holding in *Carpenter* should not be interpreted as setting the test for whether the Fourth Amendment has been violated at the maximum level of "near-perfect" surveillance. *Carpenter*, 138 S. Ct. at 2218. In *Jones*, a majority of Justices indicated that GPS attached only to the car, which undoubtedly provided less record of movement than the cell site data in *Carpenter*, raised Fourth Amendment privacy concerns independent of any trespass to personal property. *Jones*, 565 U.S. at 416 (Sotomayor, S., concurring).

As in the *Jones* concurring opinions and *Carpenter*, the ALPR data at issue here should be analyzed primarily in terms of the private information it has and is capable of revealing rather than the duration of the surveillance or quantity of data collected.

B. The plain view doctrine as applied to vehicles on public roads should not be a significant factor in determining whether the use ALPR data requires Fourth Amendment protection

An individual has a diminished expectation of privacy when traveling on public roads in plain view. *See Jones*, 565 U.S. at 403; *Carpenter*, 138 S. Ct. at 2215, *U.S. v. Knotts*, 460 U.S. 281. When dealing with license plates specifically, the expectation of privacy is further diminished. *See United States v. Miranda- Sotolongo*, 827 F.3d 663, 667-68 (7th Cir. 2016); *New York v. Class*, 475 U.S. 106, 113 (1986). However, the consistent application of this concept to modern surveillance fails to adequately address of the sophistication of this technology and the sheer volume of this "sweeping mode[] of surveillance." *See Kyllo*, 533 U.S. at 36; *Carpenter*, 138 S. Ct. at 2215. The capability of technology in general to collect and store vast amounts of information far exceeds anything that was considered or anticipated in past decisions. *See U.S. v. Knotts*, 460 U.S. at 283. Under such circumstances, this Court should not apply rules designed to address problems not at issue. *See U.S. v. De Ri*, 332 U.S. 581, 587 (1947)(would not expand the ruling in Carrol… to justify a search as incident to the search of a car, reasoning that a person, by mere presence in a suspected car, loses Fourth Amendment protection).

"A person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Carpenter*, 138 S. Ct. at 2217 (citing Katz, 389 U.S., at 351-52.) "Longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" regardless of whether those movements were in plain view of the public. *See Jones*, 565 U.S. at 415, 422. (Sotomayor, S., concurring)(Alito, S., concurring) By ALPR technology focusing solely on the exterior of the vehicle and in particular on the license plate, the rules laid down in cases like *Knotts* and *Class* apply to a much greater degree rendering the technology almost immune from the exceptions set forth in *Carpenter*, at least so far. *See U.S. v. Knotts*, 460 U.S. at 281; *Miranda-*

Sotolongo, 827 F.3d at 667–68; *Class*, 475 U.S.; see, e.g., *Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977, *McCarthy*, 142 N.E.3d.

In *Carpenter*, the Court highlighted that location data from CSLI extended beyond the vehicle, but the attention given to the extended range of cell phone tracking outside of the vehicle served primarily to surmount precedent in cases like *Knotts* and to bolster the holding that an individual maintains a legitimate expectation of privacy the record of their physical movements. *Carpenter*, 138 S. Ct. at 2217. The *Carpenter* holding was "a narrow one" not intended to be extended to other technologies, but nothing in the opinion suggests that the test for whether surveillance technology is worthy of Fourth Amendment protection is that it must be "near-perfect" and follow a person outside of a vehicle. *Carpenter*, 138 S. Ct. at 2218, 2220.

The holding in *Knotts* makes clear that different constitutional principles may apply to "dragnet type law enforcement practices." *U.S. v. Knotts*, 460 U.S. at 284. "Dragnet" law enforcement practices is not defined in *Knotts*, but it is regularly inferred from the context of the opinion that "twenty-four-hour surveillance of any citizen" falls into the category of a "dragnet" practice. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2231 (Kennedy, A., dissenting). However, contrary to the Superior Court's assertion, nothing in the *Knotts* opinion suggests that twenty-four-hour surveillance was a minimum requirement to establish a "dragnet" practice. R. at 6; *U.S. v. Knotts*, 460 U.S. at 284. The only qualifier attached to whether different constitutional principles may be applicable was that twenty-four-hour surveillance be *possible*. *Id.* Today, twenty-four-hour surveillance is possible by way of countless technologies.

The Court of Appeals accurately defined a dragnet as "any system of coordinated measures for apprehending criminals or suspects." R. 16. The Court of Appeals characterized ALPR as a "dragnet" type practice, because it is a coordinated measure of tracking location data to apprehend criminals. R. at 16. Many federal courts have interpreted the Supreme Court's use of the term

"dragnet" to represent some type of "mass" or "wholesale" surveillance." See, e.g., *US v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010); *US v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007). In the case, *Davis v. Mississippi*, this Court held that the dragnet collecting of fingerprints from at least twenty-four juveniles without probable cause violated the Fourth Amendment. *Davis v. Mississippi*, 394 U.S. 721 (1969). Although the fingerprinting in *Davis* involved "none of the probing into an individual's private life and thoughts that marks an interrogation or search," this Court still held the dragnet practice to be violative of the Fourth Amendment. *Davis*, 394 U.S. at 727.

Here, police conducted a large-scale investigation with hundreds of officers. Police looked at ALPR data for one hundred drivers. Police then installed cameras directed at ten residences for twenty-four-hour surveillance. Similar to the circumstances of *Davis*, one hundred individuals were subjected to a coordinated scheme designed to create suspicion where none existed, and only two were found to have any involvement in the shooting. Therefore, the government's use of ALPR surveillance was part of dragnet law enforcement practice which under this Court's holding in *Knotts*, is subject to different constitutional principles than the plain view doctrine.

C. The third-party doctrine is inapplicable where there is a legitimate expectation of privacy in the information stored

"A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" "even if the information is revealed on the assumption that it will be used for a limited purpose." *Smith v. Maryland*, 442 U.S 735, 743-744 (1979); *US v. Miller*, 425 U.S. 435, 443 (1976). The "Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2216. However, the existence of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 573 U.S. at 392.

In *Carpenter*, the Court indicated that third-party doctrine as relied upon in *Miller* and *Smith* was inapplicable to CSLI data, because there was "a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today." *Carpenter*, 138 S. Ct. at 2219. In addition, in *Carpenter* this Court pointed out that the holdings in *Smith* and *Miller* were not based solely on the act of voluntarily sharing information, "the nature of the particular documents sought" was also considered in determining whether "there is a legitimate 'expectation of privacy' concerning their contents." *Id.* at 2219. Given that cell records reveal the whole of one's movements, the fact that information is voluntarily given up to a third party does not by itself negate an anticipation of privacy in one's physical location or a claim to Fourth Amendment protection. *Id.* at 2217-18. The third-party doctrine is similarly inapplicable to the use of ALPR here, because, as established above, the data revealed intimate details in the whole of Mr. Nadauld's movements in which he has a legitimate expectation of privacy.

In *Carpenter*, this Court also determined that "cell phone location information is not truly 'shared' as one normally understands the term," because carrying one is "indispensable to participation in modern society." *Id.* at 2220. Driving a car is also an indispensable part of modern life, and one that "we cannot and do not expect people to forgo in order to avoid government surveillance" *See McCarthy*, 142 N.E.3d. at 507. Here, the history of locations driven to by Mr. Nadauld should likewise not be considered to have been voluntarily disclosed.

D. Mr. Nadauld, and the public generally, are less likely to expect ALPR data to be used to track their movements, because the data is not available to the public

It can be reasonably inferred from this Court's reasoning in *Kyllo v. U.S.* that the use of technology not in general public use weighs in favor of a reasonable expectation of privacy, because members of the public are less likely to know what types of information are available and

how that information might be used. *Kyllo*, 533 U.S. at 24. In *California v. Ciraolo*, the observations by the police took place within a publicly navigable airspace in 1981. *Ciraolo*, 476 U.S. at 213. As the Court of Appeals in this case correctly reasoned, the fact that air travel was used by the public weighed against a reasonable expectation of privacy from aerial observation, even in one of the most constitutionally protected spaces, one's own home. R. ?. Here, unlike *Ciraolo*, ALPR data, even one's own data, is not available to anyone except law enforcement personnel.

Similarly, in *Jones*, Justice Alito reasoned in his concurring opinion that a person's expectation of privacy was limited to what they would expect police would or could do. *Jones*, 565 U.S. at 430. (Alito, S., concurring). A recent California civil case speaking to public knowledge of ALPR technology and the use of the data collected is *American Civil Liberties Union Foundation of Southern California v. The Superior Court of Los Angeles County*. *ACLU,* 3 Cal. 5th.

In *ACLU*, the petitioners sought disclosure of ALPR data "so that the legal and policy implications of the government's use of ALPRs to collect vast amounts of information on almost exclusively law-abiding [citizens of Los Angeles] may be fully and fairly debated." *ACLU,* 3 Cal. 5th at 1036. The petitioners also sought police policies and guidelines on the use of ALPR technology and the retention of ALPR data. *Id.* at 1038. The ACLU case demonstrates that as recently as 2017, the extent to which ALPR information was being collected and used, at least in Los Angeles County, was not widely known and not available to the public. *Id.* at 1043. Furthermore, there is no Supreme Court case on this subject. The use of ALPR data is relatively new, and the expectation of privacy in the data being collected is likely high given the general lack of awareness that it is being collected.

E. The Fourth Amendment is intended to place limits on too permeating police surveillance

The Fourth Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States*, 116 U.S. 616, 630 (1886). The goal of the Fourth Amendment is to place limits on "too permeating police surveillance." *Di Re,* 332 U.S. at 595. When applying the Fourth Amendment to innovations in surveillance tools, this Court should continue to keep attention to these Founding-era understandings. *Carpenter*, 138 S. Ct. at 2214. Furthermore, the limits imposed on police surveillance must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," while at the same time taking "account of more sophisticated systems that are already in use or in development," *Kyllo*, 533 U.S. at 34, 36.

In addition to privacy concerns, ALPR exemplifies technology created likely intentionally to "tip-toe" through a "no-mans' land" of constitutional principles, and this Court must weigh privacy concerns of the Fourth Amendment against the need for law enforcement to have resources necessary to prevent crime. Even the analysis of lower courts that have ruled firmly in favor of the constitutionality of ALPR data have acknowledged the sophistication of the technology and concerns associated with it. *See, e.g. Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977, *McCarthy*, 142 N.E.3d.

Surveillance technology has advanced well beyond what the framers contemplated when the constitution was ratified. The primary concern of this Court when applying constitutional principles to modern surveillance technology, such as ALPR, must be primarily whether the technology has revealed or is capable of revealing the "privacies of life." *Carpenter*, 138 S. Ct. at 2210 (citation omitted). This Court must reject mechanical interpretations of the Fourth Amendment in considering whether long-standing principles remain applicable to vastly more advanced technologies. *Kyllo*, 533 U.S. at 35.

II. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT NEITHER PROBABLE CAUSE NOR EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE POLICE CONDUCTING A WARRANTLESS ENTRY AND SEARCH OF NADAULD'S HOME

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984)(citation omitted). Warrantless searches and seizures inside a home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). Police must demonstrate both probable cause to arrest or search a home and exigent circumstances that justify a nonconsensual warrantless intrusion into private premises. *Kirk v. Louisiana*, 536 U.S. 635, 637 (2002).

A. The police did not have probable cause to believe that Mr. Naduald had contraband or evidence of a crime in his home

The duty of reviewing court is to determine whether law enforcement had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 214 (1983). Warrantless entry is reviewed based on the "totality of the circumstances" as known by the officers when they entered the residence as to whether there was a "fair probability that contraband or evidence of a crime" would be found inside. *Gates*, 462 U.S. at 238 "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*, 517 U.S. at 696. "[P]robable cause is a fluid concept [that turns] on the assessment of probabilities in particular factual contexts[, and cannot be] reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. There must be a nexus between the item to be seized and criminal behavior. *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

Here, the events leading up to the warrantless entry and search of Mr. Nadauld's residence did not provide sufficient basis to establish a fair probability that the M16 used in the shooting was in Mr. Nadauld's residence. Prior to knocking on Mr. Nadauld's door, the officers knew that Mr. McKennery's vehicle was one of fifty to leave the scene of the shooting and that Mr. Nadauld had a registered M16 assault rifle. The officers also knew that Mr. Nadauld and McKennery had a close association and worked together. Finally, the officers knew that McKennery visited Mr. Nadauld thirty minutes prior and gave him a duffel bag large enough to fit an M16. Prior to questioning Mr. Nadauld, the only information the officers knew that may have suggested the duffel bag contained Mr. Nadauld's M16 was the assumption that Mr. Nadauld asked Mr. McKennery to return the rifle after receiving the inspection notice in the mail.

1. The innocuously large duffel bag delivered by McKennery to Mr. Nadauld provided no substantial basis for probable cause

The size of the duffel bag is not trustworthy evidence sufficient to form a basis for probable cause. "A warrantless seizure of an item in plain view requires… that its incriminating character...be immediately apparent." *U.S. v. Donnes*, 947 F.2d 1430, 1438 (10th Cir. 1991) (internal quotations omitted). "The incriminating character of the contents of a closed, opaque, innocuously shaped container…is not "immediately apparent." *Id*. Here, nothing about the innocuously large size of the bag indicated that it held a rifle. No inference based on the agents' knowledge and experience could reasonably lead to the conclusion that large duffel bags, which could carry any number of items, usually contain guns. *See, e.g.*, *U.S. v. Ortiz*, 422 U.S. 891, 897 (1975).

"Probable cause is lacking if the circumstances relied on are susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities." *Gasho v. U.S.*, 39 F.3d 1420, 1432 (1994). The delivery of a large bag from McKennery to Mr. Nadauld was fully

explicable in terms of noncriminal conduct. *U.S. v. Chadwick*, 393 F. Supp. 763, 768 (1975). Given that Mr. Nadauld and McKennery worked together in construction, it is just as likely that the bag contained tools as was that it contained a rifle. R. 2.

Officers were also watching nine other residences presumably looking for similar activity that may be triggered by the receipt of the inspection notices. Had the agents seen a large bag transferred to or from the other residences under surveillance, it can be inferred that they would have responded in the same manner. Therefore, there was not a fair probability that the innocuous duffel bag delivered to Mr. Nadauld contained a rifle, and less of a probability that it contained the rifle used in the shooting.

2. The Association between Mr. Nadauld and McKennery provided no substantial basis for probable cause to search Mr. Nadauld's home

The association between Mr. Nadauld and McKennery provided no basis for the officers' assumption that Mr. Nadauld or his rifle were involved in any criminal activity. To allow probable cause to be established by a showing that Mr. Nadauld and McKennery were closely associated would subject Mr. Nadauld to arrest for prior association with persons who allegedly were engaged in nefarious activities, and there is no support for such a position in federal jurisprudence. *U.S. v. Wynn*, 544 F.2d 786, 790 (5th Cir. 1977).

There also was nothing connecting McKennery or Mr. Nadauld to the shooting. McKennery was seen leaving the scene, but he was only one identified of the hundreds that fleeing as well. Furthermore, the "Manifesto" stated the shooter's age was twenty-seven, but McKennery was thirty-three and Mr. Nadauld was thirty-nine. The "Manifesto" also referenced the Guru Jora religion, but neither of the men were found to be a member. The overlap in location data was only as incriminating as it was for the other nine individuals who were also under twenty-four-hour surveillance based on their location data.

In *Maryland v. Pringle*, this Court found that it was reasonable to infer common enterprise among three men in car, because "[a] car passenger…will often be engaged in a common enterprise with driver and have same interest in concealing fruits or the evidence of their wrongdoing." *Maryland v. Pringle*, 540 U.S. 366, 373 (2003). Here, nothing in the record suggests that Mr. Nadauld and Mr. McKennery's association related in any way to McKennery's involvement in the shooting. The overlap in their location data is not analogous to the "common enterprise" that can be inferred from individuals riding together in a car, because individuals in a car are going to the same place together at the same time. Furthermore, nothing in Mr. Nadauld's responses to the officers' questions, indicated that Mr. Nadauld was concealing the gun for McKennery or based on any involvement in the shooting.

3. The interaction between the agents and Mr. Nadauld did not provide probable cause to enter and search his home

This Court has held that the determination of probable cause may properly involve the responses an individual gives to officers' questions. *U.S. v. Ortiz*, 422 U.S. 891 (1975). Ambiguous or evasive responses to an officer's questions can constitute probable cause. *U.S. v. Brown*, 535 F.2d 424, 428 (8th Cir. 1976); *U.S. v. Sifuentes*, 504 F.2d 845, 847 (4th Cir. 1974). Here, Mr. Nadauld's responses to the officers' questions gave no reason to infer that Mr. Nadauld had committed any crime. Mr. Nadauld corroborated that the rifle referenced in the notice of inspection was in the home, but that information did not corroborate anything suggesting that McKennery had delivered that particular rifle or that McKennery ever barrowed the rifle. The bullet cases recovered were a caliber commonly used in a wide variety of assault rifles, and it was not confirmed that Mr. Nadauld's M16 was used in the shooting until the ballistics analysis. Therefore, nothing suggested that the rifle used in the shooting was Mr. Nadauld's rifle. R. 2. After the officers had already entered, Nadauld revealed that he lent the rifle to McKennery, but any prior

assumption by the officers that Mr. Nadauld lent the rifle to McKennery was likely drawn only from their location data and McKennery's presence at the scene of the shooting. R. 4. Lastly, nothing at that point suggested that Mr. Nadauld's rifle had not been rendered inoperable.

A passive refusal to hand over property should not be grounds for inferring criminal intent. *Gasho v. U.S.*, 39 F.3d 1420, 1431 (1994)(citations omitted). Here, Nadauld's initial passive refusal to allow the agents to inspect the rifle did not give the officers a reasonable basis for probable cause to search his residence. Even after Officer Hawkins referenced the shooting, Mr. Nadauld had no reason to believe they were investigating him for the crime, because Officer Hawkins said they wanted to get their "bases covered."

B. Exigent circumstances justifying warrantless entry into Mr. Nadauld's home did not exist

One exception to the warrant requirement is when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Kentucky v. King*, 563 U.S. 452, 460 (2011) "[P]olice bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 466 U.S. 740, 749–50 (1984) (internal quotations omitted). The exigent circumstances exception is applied on a case-by-case basis, and based on the totality of the circumstances confronting officers when the decision to make a warrantless entry is made. *Lange v. California*, 141 S. Ct. 2011, 2018 (2021). Emergency circumstances such as imminent harm to others, threat to officers, destruction of evidence, or flight of a suspect may justify warrantless entry into a home. *Id.* at 2021-22.

1. Mr. Nadauld posed no threat to the officers

"[A] warrantless intrusion may be justified by … the risk of danger to the police or to other persons inside or outside the dwelling." *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). Here, there

was no risk of danger to police of other persons. A common element in cases where courts have found the possible presence of a gun amounted to exigent circumstances permitting a warrantless arrest or search is the involvement of a known violent offender or suspect wanted for a violent crime. *See, e.g.*, *US v. Hill*, 430 F.3d 939 (2005). In *Minnesota v. Olsen*, this Court found that exigent circumstances did not exist where law enforcement made a warrantless nonconsensual entry to arrest Olsen in connection with a robbery and murder, because he was not believed to be the murder but only the driver for the robbery. *Olson*, 495 U.S. Thus, there was no suggestion of danger to the officers. *Olson*, 495 U.S. at 101.

Here, Mr. Nadauld had no violent criminal history. Similar to *Olsen*, Mr. Nadauld was at most, considered a possible accomplice to the shooting. The only evidence connecting Mr. Nadauld to the shooting was his association with McKennery. At that point, officers could only speculate as to whether McKennery was the shooter, based only on him being identified as one of hundreds of people fleeing the scene, not including the hundreds of others not , and his delivery of an innocuous bag to Mr. Nadauld. The only suggestion that the shooter may have had any accomplices was the "manifesto" found at the scene which referred to "My friends and I" and said "We're going to do this again."

In *Olsen*, unlike here, the murder weapon had already been found, but the police still acted as though Olson was dangerous. Although police knew that Mr. Nadauld owned a gun, he did not purchase the weapon which, if he had, might evidence a desire to use the weapon. He also legally possessed the weapon for five years, and there is no indication that the officers knew if he had ever used it. Therefore, nothing suggested that Mr. Nadauld was dangerous.

While this Court has held that a police officer's subjective belief is generally irrelevant to whether police complied with the Fourth Amendment, the officers' actions here are evidence, which viewed objectively in light of the totality of the circumstances, show that the situation was

not a dangerous one. *See*, *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006); *Florida v. Jardines*, 569 U.S. 1, 10 (2013). They did not call for backup before knocking on Mr. Nadauld's door, and they did not draw their guns. Officer Maldonado retrieved the M16 from Mr. Nadauld's bedroom and handled it with plastic gloves which suggests that preserving fingerprints, rather than officer safety, was the purpose for the warrantless entry. The officers' actions objectively demonstrate that Mr. Nadauld was no threat to officer safety.

Lastly, the officers' initially made contact under the pretense of a gun inspection rather than a search for a murder weapon. Mr. Nadauld's responses to officers indicated his understanding that the officers were prematurely at his home to inspect his M16 pursuant to the notice, and he was appalled when the agents entered his home and accused him of being involved in the shooting. Based on the totality of the circumstances viewed objectively, exigent circumstances based on a threat to officer safety did not exist.

2. No exigency existed based on destruction of evidence were not present

The prevention of the imminent destruction of evidence is another exigent circumstance that can be an exception to the warrant requirement. *Kentucky v. King*, 563 U.S. 452 (2011). In *US v. Keys*, the 6th Circuit Court of Appeals reversed the denial of a motion to suppress, because the court found no exigency justifying entry into Keys' residence to prevent fingerprints from being removed from a gun. *U.S. v. Keys*, 145 F.App'x 528 (6th Cir. 2005). The court reasoned that unlike blood alcohol, other evidence of guilt likely existed, in particular the gun itself, which was the central piece of evidence for the charge of illegal possession of a gun. *Keys*, 145 F.App'x at 534.

Here, it may have been possible for Mr. Nadauld to destroy evidence by wiping fingerprints from the gun when he went to get the M16 for inspection. Like *Keys*, other evidence exists to connect the gun to the shooting and to McKennery. In particular, the gun had been connected to the shooting through ballistics analysis, and it was connected to McKennery by Mr. Nadauld's

admission that he lent the rifle to him. In addition, the officers were aware of the bullet cases collected at the scene apprised them of the availability of other evidence. Mr. Nadauld may also have tried to render the gun inoperable before he presented to the agents, but there was likely other evidence that the rifle was operable such as the photo of McKennery with the gun on his shooting excursion in Arizona. R. at 26. Thus, no exigency existed to preserve evidence.

C. Even if the exigency of the circumstances justified the warrantless entry and search of Mr. Nadauld's residence, the exigency was created by the officers under pretense of a consensual "knock and talk"

Police may approach a residence and knock on the front door does not have an implied license to physically invade the curtilage of a home to conduct a search. *Jardines*, 569 U.S. at 8. The scope of a license is limited to a particular area and a specific purpose. *Id.* at 9. When the scope of the license is exceeded, there is a physical trespass which results in a search under the Fourth Amendment. *Id.* at 8-9. The behavior of law enforcement can objectively reveal a purpose to conduct a search. *Id.* at 10.

Here, the officers entered the curtilage of Mr. Nadauld's residence with only an implied license to knock on the door. R. at 4, 23. The officers' purpose in approaching Mr. Naduald's residence was to conduct as search. They were immediately dispatched to investigate Mr. Nadauld's residence after McKennery was seen on surveillance camera delivering a duffel bag. The camera was installed as part of the investigation of the Balboa Park shooter and not to monitor an assault rifle owners for a minor infraction. The conversation between the officers and Mr. Nadauld shifted quickly from the topic of inspection to the shooting when Mr. Nadauld passively declined to allow the officers to see the gun. It can also be inferred by Officer Maldonado's use of plastic gloves to handle the rifle, that the officers' purpose was not to inspect the rifle but to seize it for evidence. The officers' actions objectively revealed their purpose was to conduct a search of

Mr. Nadauld's home. The officers exceeded the scope of their license and the resulting invasion of Mr. Nadauld's property constituted a search under the Fourth Amendment before any exigency arose.

In *Kentucky v. King*, this Court determined that officers do not impermissibly create an exigency when they use a forceful tone of voice, knock forcefully or other conduct that would cause a reasonable person to believe that entry is imminent and inevitable. *Kentucky v. King*, 563 U.S. 452, 468-69 (2011). The test is whether police created exigency by actual or threatened violation of the Fourth Amendment. *King*, 563 U.S. at 489. Here, demanded to see Mr. Nadauld's M16 and then demanded entry into his home. R. at 23. Although Mr. Nadauld agreed to get the rifle, his consent was induced by the officers' persistent and coercive questioning. *U.S. v. Spivey*, 861 F.3d 1207, 1213 (2017). Mr. Nadauld continued to notify the officers that he did not consent to the entry and search of his home. R. at 23-5. Any perceived exigency, such as a threat to the officers' safety, was created by the officers as a result of their threats to seize the gun without consent and demands to enter his home without his consent.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeals should be affirmed as to both issues.

Respectfully Submitted

Team 14

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