In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.

NICK NADAULD.
Respondent.

RESPONDENT'S BRIEF

No. 1788-850191

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

I. 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?

II. 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?

STATEMENT OF FACTS

On September 14, 2021, a masked man in black combat gear armed with a fully automatic rifle killed nine people and injured six more in Balboa Park in San Diego. R. at 2. He fired from a rooftop down into a crowd of tourists and residents. *Id.* When police arrived, the gun and the gunman were no longer on the scene. *Id.* All that was left was a note left behind by the gunman. *Id.* Police were unable to identify the gunman and immediately launched a city-wide manhunt. R. at 3. Through their investigation, the police narrowed in on Frank McKennery as their main suspect. R. at 8. After further investigation, police discovered that Nick Nadauld ("Respondent") owned the same type of firearm used in the shooting. *Id.*

Respondent legally acquired his firearm from his father when he died five years earlier. *Id.* A few days prior to the Balboa Park Shooting, McKennery requested to borrow Respondent's firearm for a target shooting exercise. *Id.* Respondent assented believing the firearm was going to be used for target practice. *Id.* However, that was not the case as McKennery had concealed his true intentions for the firearm. R at 8. McKennery ultimately used the firearm to execute the Balboa Park shooting. *Id.* McKennery escaped after the shooting, leaving behind only a "Manifesto." *Id.* This manifesto was designed to mislead law enforcement officials. R. at 9. After further investigation, law enforcement concluded the rounds fired 5.56x45mm NATO cartridges, a common caliber used with assault rifles. R at 8.

Given the severity of the crime, law enforcement employed various investigation techniques to locate the shooter. R at 9. First, they analyzed security camera footage from the area around Balboa Park. *Id.* This footage revealed forty unidentified individuals who fled on foot and fifty vehicles who were captured leaving the scene. *Id.* Law enforcement cross-

referenced the fifty vehicle owners with registered assault rifle owners. *Id.* No matches were found. *Id.* However, Respondent's name appeared on the list. *Id.*

Next, law enforcement accessed the Automatic Licence Plate Regonitition ("ALPR") database to follow each vehicle, including McKennery's. R. at 9. Automatic License Plate Recognition technology automatically captures an image of a vehicle's license plate, along with the geospatial location data of the vehicle, and stores such information in a government database. R. at 38-39. ALPR cameras are located on all law enforcement vehicles, as well as deployed at fixed locations. *Id.* ALPR technology can capture up to 1,800 license plates and unique geospatial locations per minute. Brief of Amici Curiae Electronic Frontier Foundation, et al in Support of Appellant at 8, *United States v. Yang*, 958 F.3d 851 (2020) (No. 18-10341).

In the course of their investigation, law enforcement inspected the movements of the vehicles at the park after the shooting and those belonging to owners of assault rifles. R. at 3. From this search, law enforcement discovered instances of overlap between Respondent and McKennery's vehicles at certain times and locations. R at 10. Police then began investigating the residence of ten individuals from the firearm list who were most frequently overlapped with owners of one of the fifty vehicles leaving the scene. *Id.*

On September 24, 2021, law enforcement attached a pole-mounted camera facing these ten residences, including Respondent. R. at 10. They were also informed that their firearms would be checked to ensure that they had been rendered inoperable pursuant to California Penal Code 30915 in one month. *Id.* Respondent received his letter on September 27, 2021. *Id.*

On September 28, 2021, an anonymous caller contacted police and stated "This is the Balboa Park shooter. This time, it's gonna be a school." R. at 10. The following day, the pole-mounted camera outside of Respondent's house captured McKennery giving Respondent a large

duffle bag and then leaving. *Id.* Thirty minutes later, Officers Hawkins and Maldonado ("Officers") arrived at Respondent's residence and questioned him outside of his home. *Id.* They first inquired if Respondent had the firearm despite the previous letters indicating they would be coming to verify the rifle had been made inoperable in a month. R. at 29. Without Respondent's permission, Officers entered his residence and began to search. R. at 10. The Officers located the firearm and discovered that it had not been rendered inoperable. *Id.* After finding the firearm, the Officers further questioned Respondent, who informed the officers that he lent McKennery his firearm, but that he was under the impression he used the rifle for target practice in the desert. *Id.* Officers then took Respondent into custody. *Id.* Next, Officers went to arrest McKennery. *Id.* When they arrived, they found him deceased with a note confessing his involvement in the Balboa Park shooting. *Id.*

SUMMARY OF THE ARGUMENT

The Court should affirm the judgment of the Ninth Circuit Court of Appeals and preserve Respondent's reasonable expectation of privacy, guaranteed by the Fourth Amendment. Holding otherwise may dilute that "degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter v. United States,* 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo v. United States,* 533 U.S. 27, 34 (2001))

I. THE NINTH CIRCUIT CORRECTLY HELD THAT ALPR TECHNOLOGY BREACHED RESPONDENT'S OBEJCTIVE EXPECTATIONS OF PRIVACY

Searching the ALPR database requires a warrant because it breached Respondent's intimate association with McKennery. The Fourth Amendment protects people from

governmental intrusions upon "familial, political, professional, religious, and sexual associations." *Carpenter,* 138 S. Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). The ALPR technology revealed that Respondent and McKennery were coworkers. R. at 2. Respondent's professional associations are protected under the Fourth Amendment.

Furthermore, ALPR software stores geolocation data prior to and in anticipation of officers suspecting one of a crime. Chief Justice Roberts expressed concern against the government appropriating cell-site location information ("CSLI") from cell-providers because "police need not even know in advance whether they want to follow a particular individual, or when." *Carpenter,* 138 S. Ct. at 2218. Respondent was not suspected of being involved in a crime prior to September 14. Officers used ALPR data during a period where Respondent was not suspected of being involved in a crime in order to establish a "considerable overlap" between Respondent and McKennery's geolocation data. R. at 3-4. Officers retroactively arrogated ALPR data from a period of Respondent's life where he was not suspected of a crime. Officers required a search warrant to search the ALPR database because it stores information prior to and in anticipation of an officer suspecting one of a crime.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT THE WARRANTLESS SEARCH OF DEFENDANT'S HOME VIOLATED THE FOURTH AMENDMENT

Officers required probable cause prior to entering Respondent's private residence. U.S. Const. Amend. IV. Officers did not have probable cause to enter Respondent's private residence because they had no reason to believe that the shooter was a San Diego resident. Anyone from

around the country could have been the Balboa Park shooter. Officers only searched the ALPR data of assault rifle registrants in the San Diego area. R. at 3. Officers could have expanded their search to include ALPR data of assault rifle registrants outside the San Diego area. Finally, officers had no reason to believe that the duffel bag McKennery delivered to Respondent contained the weapon used in the Balboa Park shooting. Police were observing nine residences contemporaneously with McKennery's residence. R. at 3-4. Allowing officers to infer that a bag that could contain a firearm did in fact contain a firearm dilutes the probable cause standard, especially considering the extent of the surveillance, as well as the initial ALPR search.

No exigent circumstance existed to obviate the warrant requirement. Exigent circumstances obviate the need to acquire a warrant. *Kentucky v. King*, 564 U.S. 452, 460 (2011). Preventing the destruction of evidence is a sufficient reason to circumvent the warrant requirement. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). Respondent was unlikely to destroy the firearm. He had no knowledge that McKennery misused the firearm. The firearm also held sentimental value for Respondent, and the officers knew it did. When Officer Hawkins accosted Respondent at his private residence, Hawkins asked Respondent whether he still owns "that M16 your old man left you." R. at 23. Officers knew that Respondent had sentimental value for the firearm, yet still attempted to justify their warrantless search using the exigency requirement.

STANDARD OF REVIEW

"When reviewing the denial of a motion to suppress, [the court] will set aside the district court's factual findings only if they are clearly erroneous, but will review de novo the court's

conclusions of law." *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015) (citing *United States v. Lyons,* 687 F.3d 754, 762 (6th Cir.2012)).

ARGUMENT

Respondents respectfully request the Court to exclude four discrete pieces of evidence and affirm the Ninth Circuit's findings. Respondents ask that the Court exclude: 1) the ALPR search associating Respondent with McKennery; 2) video footage of McKennery delivering a duffel bag to Respondent, 3) the warrantless search for the firearm; and 4) the confession thereafter. The ALPR search associating Respondent with McKennery must be excluded because a search warrant was required to search the database, and no exigent circumstances obviate the warrant requirement. The video footage of McKennery and the warrantless search of the firearm must be excluded because Officers lacked probable cause to search Respondent's private residence, and no exigent circumstances obviate the warrant requirement. Finally, the confession elicited during the warrantless search must be excluded as derivative evidence of an unlawful search.

In *Katz v. United States,* 389 U.S. 347 (1967), the Court articulated a standard to determine standing for a Fourth Amendment violation: not only are physical intrusions upon personal property protected, but so will intrusions upon certain expectations of privacy that society is prepared to recognize as reasonable. *Katz,* 389 U.S. at 361 (Harlan, J., concurring). "An individual has a reasonable expectation of privacy where (i) the individual has manifested a subjective expectation of privacy in the object of the search, and (ii) society is willing to recognize that expectation as reasonable." *Id.* Expectations of privacy that society recognizes as reasonable will be entitled to Fourth Amendment protection.

I. THE NINTH CIRCUIT CORRECTLY HELD THAT ALPR TECHNOLOGY BREACHED RESPONDENT'S OBEJCTIVE EXPECTATIONS OF PRIVACY

Notwithstanding the proliferation of technology – and along with it its increasing capacity to intrude upon the privacy of everyday Americans –, courts since *Katz* have agreed that "the Fourth Amendment seeks to secure the privacies of life against arbitrary power, and that a central aim of the Framers was to place obstacles in the way of a too permeating police surveillance." *United States v. Rubin,* 556 F.Supp.3d 1123, 1127 (2021) (quoting *Boyd v. United States,* 116 U.S. 616, 630 (1886); *United States v. Di Re,* 332 U.S. 581, 595 (1948)). In general, Fourth Amendment protections must be commensurate to the proliferation of technology, so as to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter,* 138 S. Ct. at 2214 (quoting *Kyllo,* 533 U.S. at 34). In *Carpenter,* the Court outlined five characteristics that rendered a warrantless seizure of cell site location information ("CSLI") an intrusion upon defendant's reasonable expectation of privacy: "intimacy, comprehensiveness, expense, retrospectivity, and voluntariness." *Carpenter,* 138 S. Ct. at 2234 (Kennedy, J., dissenting).

A. ALPR Technology Revealed Respondent's Professional Association With McKennery

The Fourth Amendment protects against breaches of a person's intimate associations. In *Carpenter,* CSLI breached the defendant's reasonable expectation of privacy because CSLI not only captured the defendant's movement in public streets, but the breadth of information also revealed the defendant's "familial, political, professional, religious, and sexual associations." *Carpenter,* 138 S. Ct. at 2217 (quoting *Jones,* 565 U.S. at 415 (Sotomayor, J., concurring)). The

sheer volume of information collected by CSLI breached the defendant's reasonable expectation of privacy. *See Commonwealth v. McCarthy,* 484 Mass. 493, 504 (2020) ("Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble.") (quoting *United States v. Maynard,* 615 F.3d 544, 562 (D.C. Cir. 2010) (internal quotation marks omitted).

ALPR technology, like CSLI, has the capacity to breach a person's intimate associations. The California Supreme Court has recognized that "ALPR data showing where a person was at a certain time could potentially reveal where that person lives, works, or frequently visits." *ACLU Found v. Super. Ct.*, 3 Cal. 5th 1032, 1044 (Cal. 2017). "Like CSLI data, ALPRs allow the police to reconstruct people's past movements without knowing in advance who police are looking for, thus granting police access to 'a category of information otherwise [and previously] unknowable.'" *McCarthy,* 484 Mass. at 506 (quoting *Carpenter,* 138 S. Ct. at 2218).

Officers misused the ALPR database to breach Respondent's professional association with McKennery. Without reasonable suspicion – let alone judicial sanction – officers juxtaposed ALPR data of the firearm owners to the ALPR data of the fifty cars leaving the park during the incident. R. at 3. Officers thereby found "considerable overlap between Respondent and McKennery's vehicles being at the same locations at similar times." R. at 3-4. The impermissible search revealed that Respondent and McKennery worked together. It exhibited an otherwise intimate area of Respondent's life, protected by the Fourth Amendment. Respondent and McKennery were coworkers. Not only were they coworkers, but they were also amicable enough to exchange phone numbers. R. at 26. They weren't just colleagues, they were friends. Respondent and McKennery exchanged information about each other that even transcended the professional relationship. A breach of Respondent's professional association with McKennery

was a condition precedent to establish probable cause. The possibility of suspecting Respondent of committing a crime is contaminated by an unlawful breach into a protected area of interest. The use of ALPR data qualifies as an impermissible search because Respondent's professional associations are protected under the Fourth Amendment.

B. ALPR Software Captured And Stored Respondent's Data Prior To And In Anticipation Of Officers Suspecting Respondent Of A Crime

Chief Justice Roberts admonished the government's warrantless use of CSLI in *Carpenter* because CSLI is "continually logged for all of the 400 million devices in the United States – not just those belonging to persons who might happened to come under investigation." *Carpenter,* 138 S. Ct. at 2218. CSLI, used in the context of a criminal investigation, warrants Fourth Amendment protections because "police need not even know in advance whether they want to follow a particular individual, or when." *Id.* Reasonable suspicion is not a condition precedent triggering CSLI collection. Wireless providers capture CSLI independent of whether a person is suspected of committing a crime. *Carpenter* stands for the prohibition against the government from appropriating retrospective information absent a warrant.

The scope of *Carpenter's* ruling has been extended to other sensory-enhancing technology, such as Baltimore Police Department's Aerial Investigative Research ("AIR") program. The Fourth Circuit in *Leaders of a Beautiful Struggle v. Baltimore Police Dep't,* 2 F.4th 330 (4th Cir. 2021) enjoined use of the program because multiple planes orbiting Baltimore tracked every person outside in Baltimore, and "created a detailed, encyclopedic record of where everyone came and went within the city during daylight hours over the prior month-and-a-half." *United States v. Bowers,* No. 2:18-CR-00292-DWA, 2021 WL 4775977, at 5 (W.D. Pa. Oct. 11, 2021) (quoting *A Beautiful Struggle,* 2 F. 4th at 341) (internal quotations omitted). The program,

just like CSLI, tracked a person's movements prior to and in anticipation of an officer suspecting one of any crime.

Similarly, ALPR captures intimate information about persons prior to any reasonable suspicion of a crime. "ALPR systems function to automatically capture an image of a vehicle and the vehicle's license plate." R. at 38. It captures data sets of "license plate numbers, photos of the vehicle, and geospatial location from where the images were captured." R., at 1-2. ALPR software captured information about Respondent prior to and in anticipation of officers suspecting him of a crime. Officers used ALPR data during a period where Respondent was not suspected of being involved in a crime in order to establish a "considerable overlap" between Respondent and McKennery's geolocation data. R. at 3-4. The "considerable overlap" associating Respondent with McKennery was not wrought from data compiled after officers suspected Respondent's involvement in the crime. Officers retroactively arrogated ALPR data from a period of Respondent's life where he was not suspected of a crime. Officers did not circumscribe the ALPR data search to exclude data collected prior to September 14th. In fact, the unlawful search was the condition of possibility to suspect Respondent in the first place. Respondent would not have been suspected of any crime but for the unlawful search. Officers needed to exhume 365 days of Respondent's geospatial location data in order to engender suspicion. Just like CSLI, or the AIR program in Baltimore, ALPR data amasses information about a person prior to and in anticipation of an officer suspecting one of a crime. Accessing Respondent's retrospective ALPR data requires a warrant because San Diego officers did not suspect Respondent of a crime prior to conducting the search.

C. ALPR Databases Store Information For An Impermissible Duration

In *Commonwealth v. McCarthy,* 484 Mass. 493 (2020), the Massachusetts Supreme Judicial Court ruled that a one year ALPR data retention policy retained data for an impermissible duration. *McCarthy.* 484 Mass, at 507. Retaining ALPR data for a year is a fact tending to prove Fourth Amendment standing. The same court in *Commonwealth v. Augustine,* 464 Mass. 230 (2014) held that "tracking of the defendant's movements [by CSLI] in the urban Boston area for two weeks was more than sufficient to intrude upon the defendant's expectation of privacy safeguarded by art. 14." *Augustine,* 464 Mass. at 254-255. Not only does a year retention policy suffice to establish an objective expectation of privacy, but shorter durations too may suffice.

Similar to the retention policy in *McCarthy,* San Diego Police Department retains ALPR data for a year. San Diego Police Dep't, License Plate Recognition Procedure (2020), https://www.sandiego.gov/sites/default/files/sb34compliance.pdf. ALPR technology compiles vehicle location data indiscriminately, and disposes it after a year. San Diego officers used their stockpile of ALPR data to breach Respondent's protected interests. The one year retention policy by the San Diego Police Department suffices to establish standing for a Fourth Amendment challenge because it indiscriminately stored Respondent's ALPR data for a year.

D. Plain View Doctrine Does Not Apply To ALPR Technology

Petitioners may unsuccessfully argue that searching the ALPR database does not require a warrant because license plates are in plain view. They will cite from *Katz:* "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz,* 389 U.S. at 351. "The exterior of a car, of course, is thrust into

the public eye, and thus to examine it does not constitute a 'search.'" *New York v. Class*, 475 U.S. 106, 114 (1986). License plates are located on the exterior of a vehicle. License plates exist in plain view when driving down a public road. Petitioners may unsuccessfully argue that searching the ALPR database does not require a warrant.

Petitioners, however, fail to mention that ALPR databases aggregate information that in no way resembles traditional human reconnaissance. Fourth Amendment protections must be commensurate to the proliferation of technology, so as to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter,* 138 S. Ct. at 2214 (quoting *Kyllo,* 533 U.S. at 34). Advance technologies that conduct mass surveillance – such as ALPR software and CSLI – differ from traditional human surveillance. "Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken." *United States v. Jones,* 565 U.S. 400, 429 (2012) (Alito, J., concurring). Mass surveillance technologies that are "continuous, tireless, effortless, and absolute … contravenes expectations of privacy that are rooted in these historical and practical limitations." *McCarthy*, 484 Mass. at 500.

ALPR technology collects information that is exposed in plain view. But the quantity of information that it aggregates transcends the "degree of privacy that existed when the Fourth Amendment was adopted." *Carpenter* 138 S. Ct. at 2214 (2018) (quoting *Kyllo* 533 U.S. at 34). There is very little chance that a nosy neighbor, a vigilant citizen, or even government agents could imitate the degree of surveillance that ALPR technology conducts. ALPR technology "records the license plate of every passing vehicle." *McCarthy*, 484 Mass. at 508. It gets neither discouraged, fatigued, nor distracted. It conducts surveillance continuously, twenty four hours a day, seven days a week. *Id.* ALPR technology "remembers" the location of millions of license

plates, and unceremoniously "forgets" such information after exactly a year. *Id.* ALPR technology does not just perfect human surveillance: it transcends human observation and memory altogether. No human or collection of humans can observe license plates and record their location with the veracity as ALPR technology. The plain view doctrine cannot apply to technology that in no way simulates traditional human reconnaissance. Respondent is justified in his objective expectation of privacy to be free from technology as pervasive, retrospective, and indefatigable as ALPR. Searching the ALPR database requires a warrant because the information that it collects does not resemble traditional human surveillance.

E. Exigent Circumstances Do Not Justify The Warrantless Search

The exigent circumstances exception permits law enforcement to conduct a warrantless search when the "exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *King*, 564 U.S. at 460 (internal quotation marks omitted). Exigent circumstances can obviate the warrant requirement; otherwise, the delay required to obtain a warrant would bring about "some real immediate and serious consequences – and so the absence of a warrant is excused." *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984) (*quoting McDonald v. United States*, 335 U.S. 451, 460 (1948) (Jackson, J., concurring)). "Whether a 'now or never situation' actually exists – whether the officer has 'no time to secure a warrant' – depends upon facts on the ground." *Lange v. California*, 141 S. Ct. 2011, 2018 (2021) (quoting *Riley v. California*, 573 U.S. 373, 391 (2014)).

In Respondent's case, no exigent circumstances obviate the warrant requirement. The incident occurred on September 14, 2021. R. at 2. On September 24, after unearthing years' worth of vehicle location data, law enforcement placed cameras near the home of Respondent. R.

at 4. Between September 14th and 24th, officers could have written and executed a search warrant to access Respondent's ALPR data. Officers had ten days to obtain a search warrant, but decided otherwise. Exigent circumstances do not justify a warrantless search of Respondent's ALPR data because the officers had ten days to write and execute the warrant.

Petitioner may argue that McKennery's intention to shoot a school was an exigent circumstance obviating the warrant requirement. This argument is untenable because officers only learned of McKennery's purported intention on September 28th – at least four days after the unlawful search occurred. McKennery's empty threat is not an exigent circumstance justifying the ALPR search because the threat occurred four days after the unlawful search.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT THE WARRANTLESS SEARCH OF DEFENDANT'S HOME VIOLATED THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution guarantees protection for all Americans against "unreasonable search and seizures." In *Katz,* the Court articulated a standard to determine standing for a Fourth Amendment violation: not only are physical intrusions upon personal property protected, but so will intrusions upon certain expectations of privacy that society is prepared to recognize as reasonable. *Katz,* 389 U.S. at 361 (Harlan, J., concurring). Further, Justice Harlan elaborates that "a man's home is, for more purposes, a place where he expects privacy." *Id.* Thus, in order for the government to enter and search a citizen's home, they must have a warrant and probable cause. U.S. Const. Amend. IV.

A. Officers Had No Probable Cause To Believe That The Duffel Bag Contained an Assault Rifle

Probable cause is a condition precedent to obtaining a search warrant. U.S. Const. Amend. IV. All warrants must be issued by a neutral and detached magistrate, and contain probable cause. *Johnson v. United States*, 333 U.S. 10, 13 (1948). The test for probable cause is the "totality of the circumstances." Under that test, the magistrate must make a practical decision whether, "given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 233 (1983).

Respondent has standing to assert a Fourth Amendment violation because Officers invaded his personal residence. Invasions upon personal property are protected under the Fourth Amendment. *Jones*, 565 U.S. at 405-407

Officers lacked probable cause to search Respondent's private residence because the officers had no reason to believe that the Balboa Park shooter was a San Diego native; because the ALPR search excluded law-abiding firearm registrants in counties outside San Diego; and because officers had no reason to believe a firearm was contained within the duffel bag delivered to Respondent. Petitioner's argument that the warrantless search was supported by an anonymous informant on September 28 will be outweighed by the fact that the informant gave no indicia of his reliability.

1. Officers Had No Reason To Believe That The Shooter Was a Local San Diego Resident

The District Court claimed that Respondent's lawful ownership and registration of his father's firearm was a fact tending to prove that Respondent had been involved in the Balboa Park shooting. R. at 10. The District Court's logic errs because it is not a crime to own a firearm, and because there is no reason to believe the shooter was a San Diego Resident.

i. Owning a Firearm In This Country Is Not A Crime

The District Court's logic implies that all people who lawfully own and register their assault rifles are suspects to a violent crime. It is not a crime to own an assault rifle in this country. Not everyone who owns an assault rifle in this country will be suspected of a crime anytime someone decides to morbidly misuse these instruments of self-protection. There is no reason to suspect Respondent of a crime because it is not a crime to own a lawfully registered firearm.

ii. Officers Had No Reason to Believe the Shooter Was A San Diego Resident

The District Court also assumes that the Balboa Park shooter was a San Diego resident. R. at 10. There is no reason to believe that the Balboa Park shooter was native to San Diego. Nothing in the manifesto reveals ties to San Diego. The manifesto only vaguely references "being born under siege" and general misanthropic comments. R. at 36. Anyone from around the country could claim to have been "born under siege." Misanthropic sentiments are not excluded to just people living in San Diego. Anyone from around the country could have been the Balboa Park shooter. There was no reason to believe that someone from San Diego committed the act – let alone a law-abiding firearm registrant. Officers lacked probable cause to search Respondent's residence because they circumscribed their search to just San Diego residents.

2. The ALPR Search Wantonly Skewed Towards Suspecting A San Diego Resident

There is no reason to believe that the Balboa Park shooter was a San Diego resident. *See Section, II.A.1, supra.* Thus, Officers capriciously narrowed their ALPR search to lawful firearm registrants in San Diego. Officers could have expanded their search to include ALPR data of assault rifle registrants outside the San Diego area. Officers could have expanded the firearm registry search to include counties which corresponded to the license plates captured at Balboa Park. Assuming that not all of the fifty vehicles departing from Balboa Park were registered in San Diego County, officers could have cross-referenced the firearm registry from the states or counties that the departing vehicles were native to. Vehicles not native to San Diego County were less likely to engender "considerable overlap" with ALPR data of San Diego firearm registrants. The reason why Respondent and McKennery were found to have a "considerable overlap" was because Officers did not include registry information from counties other than San Diego County. The procedure in which the ALPR search was conducted wantonly skewed towards suspecting San Diego residents. San Diego firearm registrants are more likely to have "considerable overlap" with vehicles native to San Diego than out-of-state vehicles. Officers did not have probable cause to believe the duffel bag contained criminal evidence because the ALPR search was wantonly skewed towards finding a San Diego suspect.

3. Officers Had No Reason To Believe That The Duffel Bag Contained A Firearm

Officers did not reserve video surveillance to just Mckennery's residence. Officers placed surveillance cameras on the ten residences that corresponded the most to the driving location

data of the fifty vehicles departing Balboa Park. R. at 4. Officers had no reason to believe that the duffel bag contained an assault rifle. Respondent's actions – receiving a duffel bag from a coworker– were just as consistent with lawful behavior. Officers had no reason at that time to believe that the duffel bag contained an instrumentality of a crime. At that time, McKennery was as much a suspect as the dozens of other associations highlighted by the ALPR search. There were too many suspects for officers to infer that a bag that could contain a firearm did in fact contain a firearm. The associations engendered by the ALPR search, coupled with action that is consistent with lawful behavior, are not strong enough to warrant probable cause. Officers lacked probable cause because Respondent was one of ten suspects, and Respondent's behavior was consistent with lawful behavior.

4. Officers' Informant Does Not Buttress Probable Cause Because The Informant Was Unreliable

Hearsay information given by an informant may be included within the totality of the circumstances. *Gates,* 462 U.S. at 238. The weight of the hearsay information is determined by the informant's reliability, the informant's current basis of knowledge, and police corroboration. *Id*.

In *Spinelli v. United States*, 393 U.S. 410 (1969), FBI officers included a confidential informant in their affidavit who disclosed that Petitioner had been "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones' which had been assigned the specified numbers." *Spinelli,* 393 U.S. at 414 (internal quotations omitted). The Court found that the tip was not sufficient to find that a crime had been committed because the affidavit did not state any basis for proving the confidential informant was reliable. *Id.,* at

416-418. Furthermore, "the tip [did] not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation." *Id.*

Petitioners may argue that the anonymous informant calling the police station on September 28 supported a finding of probable cause to search Respondent's private residence. This argument, however, fails to consider that the statements made by the informant were not reliable. The informant lacked any former reliability whatsoever because the informant was anonymous. Officers at the time did not know who the Balboa Park shooter was. We do not even know whether it was McKennery who made the call. McKennery did not mention calling the police in his death note, even though he confessed to his crime, and dilated his motives. R. at 37. In order for the call to be used as a strong basis for probable cause, the caller should have given some indicia of reliability. At the time of the call, the contents of the manifesto were not available to the public. R. at 32. If the caller revealed some information in the manifesto, such as the Jora Guru religion, the caller would have buttressed his credibility significantly. The caller did not do such a thing. The informant does not support a strong finding of probable cause because the informant was anonymous, and gave no indicia of reliability.

B. Exigent Circumstances Do Not Justify The Warrantless Search

The exigent circumstances exception permits law enforcement to conduct a warrantless search when the "exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *King*, 564 U.S. at 460 (internal quotation marks omitted). Exigent circumstances can obviate the warrant requirement; otherwise, the delay required to obtain a warrant would bring about "some real immediate and serious consequences –

and so the absence of a warrant is excused." *Welsh*, 466 U.S. at 751 (*quoting McDonald*, 335 U.S. at 460 (Jackson, J., concurring)). "Whether a 'now or never situation' actually exists – whether the officer has 'no time to secure a warrant' – depends upon facts on the ground." *Lange*, 141 S. Ct. at 2018 (quoting *Riley*, 573 U.S. at 391).

Petitioners may argue that exigent circumstances obviated the need to acquire a warrant to search Respondent's house. Petitioner's argument, however, overlooks the fact that Respondent was not likely to destroy his father's firearm; that Respondent's vehicle location could be intercepted by ALPR technology; and that officer-created exigencies do not qualify for a warrant exception.

1. Respondent Was Not Likely To Destroy The Firearm

Petitioner may argue that exigent circumstances obviated the warrant requirement because Respondent was likely to destroy his father's assault rifle. Preventing the destruction of evidence is a sufficient reason to circumvent the warrant requirement. *See Stuart*, 547 U.S. at 403. Assuming *in arguendo* that Officers knew the duffel bag contained a firearm, the likelihood that Respondent would destroy evidence was low because evidence at the time indicated the Balboa Park shooter would strike again; because Respondent had no knowledge of McKennery's misuse of the firearm; and because Officers should have known the firearm had sentimental value.

i. Evidence At the Time Indicated the Balboa Park Shooter Would Strike Again

McKennery in his manifesto threatened to repeat his acts of violence. R. at 36. On September 28, officers received a call, warning them that the Balboa Shooter was going to strike at a school. R. at 4. If officers truly believed that the shooter was going to strike again, then it would be very unlikely that the shooter would destroy the firearm. It is highly unlikely that the shooter would commit mass murder with his father's firearm, destroy it, then buy another automatic M16 to strike at a school. The same firearm used in the Balboa Park incident was likely to be the same firearm used in another mass murder. According to officers' knowledge at the time, officers had no reason to believe Respondent would destroy the M16. Imminent destruction of evidence cannot obviate the warrant requirement if officers believed that the Balboa Park shooter would strike again.

ii. Respondent Had No Knowledge Of McKennery's Misuse Of Respondent's Firearm

Respondent did not know that McKennery used the firearm to perpetrate a violent crime. When Respondent confronted McKennery about the Balboa Park shooting, McKennery sent Respondent a picture of McKennery holding the rifle. R. at 26. The context of the photo strongly implied that McKennery was presently located in the desert. Respondent had no reason to believe that the gun was used in a violent crime. When McKennery returned the firearm on September 29, Respondent had no reason to destroy the firearm. Respondent believed the gun was being used for recreation, not to commit homicide. Destruction of evidence cannot be used

to justify the exigency exception because it is highly unlikely that Respondent would destroy a gun that he did not know was used in a violent crime.

iii. Police Should Have Known That the Firearm Had Sentimental Value

The firearm held sentimental value for Respondent. The firearm was bequeathed to him by his father who died in 2017. R. at 2. His father was a former military veteran – a patriot – and the gun served as a memento to his father's bravery and sacrifice. This information was not hidden from officers. When Officer Hawkins introduced himself to Respondent, Officer Hawkins asked Respondent whether he still owns "that M16 your old man left you." R. at 23. Officer Hawkins knew that the firearm carried sentimental value for Respondent. Hawkins knew that Respondent's father was a military veteran. Hawkins could easily infer that Respondent would be reluctant to discard his father's combat weapon. Not only did Respondent hold sentimental value for the gun, but his sentiment towards the gun was easily inferable. A search warrant was required to search Respondent's home because the firearm carried sentimental value.

2. ALPR Technology Could Have Tracked Respondent's Vehicle Location

Petitioner may justify their warrantless search in order to prevent Respondent from escaping. Preventing a suspect from escaping is a sufficient reason to obviate the warrant requirement. *See Minnesota v. Olson*, 495 U.S. 91, 100 (1990). This argument by Petitioner, however, fails to consider that ALPR technology can track Respondent's vehicle location. ALPR technology captures license plates, photos of vehicles, and records the geospatial location

whence the picture was taken. R. at 37 – 38. Even if there were any facts to suggest Respondent was preparing to depart from San Diego, Respondent's vehicle location would have been tracked by ALPR technology. Law enforcement agencies cooperate with each other to share ALPR information. Brief of Amici Curiae Electronic Frontier Foundation, et al in Support of Appellant at 10, *United States v. Yang*, 958 F.3d 851 (2020) (No. 18-10341). Officers are likely to access ALPR databases all across the country. Petitioners will be unable to obviate the warrant requirement because there are no facts suggesting that Respondent was preparing to escape, and ALPR technology can track Respondent's vehicle location across the country.

3. Officer-Created Exigencies Do Not Qualify Under The Exception

"Exigent circumstances do not justify a warrantless search when the exigency was 'created' or 'manufactured' by the conduct of the police." *King*, 563 U.S. at 461. Officers Hawkins and Maldonado manufactured an exigency twice in the course of the events. The officers created an exigency by disseminating an inspection letter to law-abiding firearm registrants. They also created an exigency by asking Respondent to act in a manner which threatened their safety.

i. The Inspection Letter Was An Officer-Created Exigency

Officers manufactured an exigency by informing the lawful firearm registrants that an officer in one month will inspect compliance to Cal. Penal Code § 30915. R. at 4. The District Court opined that the inspection caused Respondent to ask McKennery to return his firearm. R. at 10. The inspection, however, was a ploy by officers to manufacture an exigent circumstance. When Officer Hawkins accosted Respondent at his private residence, Respondent questioned why Hawkins arrived prior to the one month notice. Hawkins jeered, and said "we thought we'd

get a head start." R. at 23. The inspection letter was not an earnest notice to Respondent, warning him of a government inspection. Officers distributed the inspection notice with the design of finding inculpatory evidence against Respondent. Officers sent the letter with the intention of watching Respondent panic. After witnessing McKennery deliver the duffel bag, Officers did not obtain a warrant; rather, they arrogated probable cause from a detached and neutral magistrate and conducted a warrantless search of Respondent's private residence. Officers manufactured an exigency, then justified their warrantless search using the exigency exception. Petitioners may not use the exigency exception because they sent the letter which prompted the exigent circumstance.

ii. Officers Created An Exigency at Respondent's Private Residence

Petitioners may argue that an exigency arose because Officers Hawkins and Maldonado feared for their safety. After being pressured to present the M16, Respondent acceded to their demands, retreated into his home and attempted to retrieve the firearm. R. 23 – 24. Petitioners may argue that when Respondent retreated into his home, Officers Hawkins and Maldonado feared for their safety. They feared that Respondent was going to use the gun against them, and therefore they had to conduct a warrantless search of Respondent's residence. This argument, however, is untenable because Hawkins and Maldonado forced Respondent to act in a way which threatened the officers' safety. Complying with the request of the officers, without more, created an exigency for which the officers used to justify their warrantless search. The request itself compelled Respondent to retreat into his home and "threaten" the officers. There was no way for Respondent to retreat into his home and furnish his firearm without "threatening" the officers. The manner and procedure for which they asked to see the firearm created an exigency

by itself. Any threat Respondent elicited was implicit within the demand itself. The officers created the exigency for which they justify their warrantless search because any threat to their safety was engendered by submitting to their request.

C. Respondent's Confession Must Be Excluded Because It Occurred During The Unlawful Search

The exclusionary rule prohibits introduction of evidence seized and testimony acquired during an unlawful search. *Weeks v. United States,* 232 U.S. 383 (1914); *Silverman v. United States,* 365 U.S. 505 (1961). Derivative evidence acquired from an illegal search and seizure is subject to the fruit of the poisonous tree doctrine. Fruit of the poisonous tree doctrine will suppress derivative evidence that "has been come at by exploitation of that illegality." *Wong Sun v. United States*, 371 U.S. 471 (1963). The Court has identified three considerations to determine whether the taint is sufficient: 1) temporal proximity between the illegal arrest and evidence in question; 2) intervening circumstances between the illegal activity and evidence seized sufficient to attenuate the taint; and 3) the purpose of and flagrancy of police misconduct. *Brown v. Illinois,* 422 U.S. 590, 603–604 (1975).

Officers had no probable cause to enter Respondent's home. *See Section, II.A, supra.* No exception obviates the warrant requirement. *See Section, II.B, supra.* Respondent's confession was directly caused by Officers' warrantless search. As soon as Hawkins entered Respondent's private residence and found Respondent's lawfully registered firearm, Hawkins hounded him, compelling him to admit that he had lent the firearm to McKennery for recreational purposes. R. at 24. Respondent's confession occurred during and immediately after the unlawful search. Immediately after being accosted by Officers, Respondent confessed to loaning his firearm to

McKennery. Little to no time elapsed to attenuate the taint. *See Brown*, 422 U.S. at 603-604. Respondent's confession must be excluded because it occurred during the unlawful search.

CONCLUSION

Respondent respectfully requests the Court to exclude four discrete pieces of evidence and affirm the Ninth Circuit's findings. Respondent asks that the Court exclude: 1) the ALPR search associating Respondent with McKennery; 2) video footage of McKennery delivering a duffel bag to Respondent, 3) the warrantless search for the firearm; and 4) the confession thereafter.