Team 22

No. 1788-850191

In the
SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

NICK NADAULD,

Respondent.

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

BRIEF OF RESPONDENT,
NICK NADAULD

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The California Fourth District Court of Appeal correctly held that the retrieval of Mr. Nadauld's personal information from the automatic license plate recognition database (ALPR) required a warrant under the Fourth Amendment. The mosaic theory of the Fourth Amendment, as applied with the *Katz* test, is the idea that when a vast quantity of individual pieces of information are collected and compiled together, it can amount to personal information that violates one's reasonable expectation of privacy. The data that the ALPR database accumulated over time, coupled with the footage from the pole mount camera, revealed a damaging picture of Mr. Nadauld's life that violated his expectation of privacy - an expectation that society would recognize as reasonable.

II. The California Fourth District Court of Appeal correctly held that the warrantless entry and search of Mr. Nadauld's home violated Mr. Nadauld's Fourth Amendment rights under this Court's precedent. For the circumstances of this case to qualify as "exigent," the government bears the burden of showing that through the totality of the circumstances (1) there was an imminent risk of death or serious injury, (2) danger that evidence, in this case the assault rifle, would have been immediately destroyed, or (3) that Mr. Nadauld would have escaped.

STATEMENT OF FACTS

Mr. Nick Nadauld is thirty-nine years old and lost his father five years ago. R. 33, R. 2. His father was a former member of the military, and he legally bequeathed his M16 assault rifle to Mr. Nadauld. R. 2. Mr. Nadauld works at a construction company with Frank McKennery in San Diego. R. 2. Mr. Nadauld and McKennery worked together for around a year. R. 2. McKennery expressed an interest in borrowing Mr. Nadauld's rifle for an outdoor target shooting excursion. R. 2. McKennery told Mr. Nadauld that he was a shooting enthusiast and craved to try out an automatic assault rifle, so Mr. Nadauld agreed to his request. R. 2. Unbeknownst to Mr. Nadauld, McKennery plotted to murder a woman named Jane Bezel and her fiancé in Balboa Park. R. 2-3. In an effort to conceal his true motive, McKennery also planned to murder innocent bystanders. R. 3.

On September 14, 2021, McKennery fired the rifle into an open crowd from a rooftop of Balboa Park, killing nine people and injuring six others. R. 2. McKennery escaped the scene undetected, but he left a "Manifesto," stating that he and his friends "are going to do this again." R. 36. However, his intention was to send "the cops on a wild goose chase." R. 2, 37. On the same day of the shooting, Mr. Nadauld asked McKennery where he was and if he heard what happened in Balboa Park. R. 26. McKennery told Mr. Nadauld that he was in Arizona, "trying out that sweet rifle" and sent Mr. Nadauld a picture of himself holding the rifle in the desert with a target in the background. R. 26. Mr. Nadauld told McKennery that there was a mass shooting, and McKennery told Mr. Nadauld that he did not know about the shooting. R. 26. McKennery asked if the suspect was caught, and Mr. Nadauld informed him that the police did not find anything yet. R. 26.

Law enforcement used "numerous investigative methods" to find the shooter. R. 3. They analyzed the surveillance footage from security cameras located in and around Balboa Park. R. 3.

The footage captured about forty unidentified individuals who fled on foot. R. 3. In addition, the footage recorded fifty vehicles leaving the scene before the police arrived to secure the area. R. 3. After checking the criminal records of the owners of those fifty cars, the police found no evidence of prior violent crimes. R. 3. However, McKennery was identified as one of the owners of the fifty cars at Balboa Park. R. 3. Police then cross-referenced the list of fifty vehicle owners with a list of registered assault rifle owners in the area, which revealed no matches. R. 3. However, Mr. Nadauld was one of the individuals found on the list of assault rifle owners list. R. 3.

Law enforcement then retrieved information from the Automatic License Plate Recognition ("ALPR") database to track the movements of the fifty vehicles, including McKennery's vehicle. R. 3. According to the Northern California Regional Intelligence Center (NCRIC) California ALPR, "ALPR databases function to automatically capture an image of a vehicle and the vehicle's license plate, transform the plate image into alphanumeric characters using optical character recognition, compare the plate number acquired to one or more databases . . . of vehicles of interest to law enforcement, and then alert law enforcement officers when a vehicle of interest has been observed." R. 38. Furthermore, "ALPR units are attached to law enforcement vehicles or deployed at fixed locations, where the units collect license plate information from vehicles on public roadways, public property and vehicles that are within public view." R. 39. The location of these ALPR devices are unknown to the public. *See* R. 39. In California, most ALPR records are maintained for a set period "that ranges by jurisdiction from sixty days to five years with records purged unless the data has become, or it is reasonable to be believed that it will become, evidence in a criminal or civil action or is subject to a lawful action to produce records." R. 40.

Police then accessed the ALPR database to investigate the movements of all fifty vehicles that were recorded leaving Balboa Park after the shooting. R. 3. They also examined the movements of vehicles owned by individuals on the assault rifle list, including Mr. Nadauld's. R. 3. After cross-referencing the vehicle movements of both groups, the police found that Mr. Nadauld's vehicle and McKennery's vehicle had "considerable overlap of being at the same locations at similar times." R. 3-4. The police then covertly investigated the ten residences on the list, including Mr. Nadauld's residence, that corresponded the most to the driving location data of the fifty vehicles. R. 4.

On September 24, 2021, law enforcement installed cameras on utility poles near the residences facing them. R. 4. Law enforcement then mailed a letter on September 25, 2021, to each of the residences, stating that in one month, they would be arriving at their homes to verify whether their assault rifles had been rendered inoperable pursuant to California law. R. 4. Mr. Nadauld received the letter two days after law enforcement mailed the letter on September 27, 2021. *See* R. 4. On September 28, 2021, at 10:37 am, police received an anonymous call from a telephone booth, in which they heard the caller identify himself as the Balboa Park shooter who threatened a future shooting. *See* R. 4. On September 29, 2021, at 5:23 pm, the pole-mount camera placed near Mr. Nadauld's house recorded McKennery "pulling into the driveway, giving Mr. Nadauld a large duffel bag and then leaving." R. 4. Thirty minutes after McKennery left, FBI Officers Jack Hawkins and Jennifer Maldonado arrived at Mr. Nadauld's house to investigate. R. 4. To Mr. Nadauld's surprise, Officers Hawkins and Maldonado arrived at Mr. Nadauld's home and questioned Mr. Nadauld outside of the front door about his rifle. *See* R. 4. Mr. Nadauld expressed that he did not want to talk to the police until they came at the later time they announced. R. 23.

Ignoring Mr. Nadauld's privacy requests, the officers insisted on seeing his rifle. R. 23. Mr. Nadauld told the officers he would retrieve the rifle. R. 23.

Dissatisfied with Mr. Nadauld's responses, and without Mr. Nadauld's permission, Officers Hawkins and Maldonado entered Mr. Nadauld's home and began searching his home for the rifle. R. 4. Upon finding the M16 rifle in Mr. Nadauld's residence and finding that it had not been rendered inoperable, Officer Hawkins proceeded to question Mr. Nadauld more intensely. R. 4. During this questioning, Mr. Nadauld revealed that McKennery had borrowed the weapon, and insisted that McKennery told him that he had been in the desert on the day of the shooting and had even sent Mr. Nadauld a picture of himself in the desert with the weapon. R. 4. Following the questioning, the officers brought Mr. Nadauld into custody. R. 4.

When law enforcement arrived at McKennery's house to arrest him, they heard a gunshot inside the house and found him dead on the floor inside. R. 2. Police determined that McKennery likely committed suicide. R. 4. There was a letter next to McKennery's body, confessing to the crime of shooting the victims at Balboa Park. R. 4. McKennery also confessed in the letter, "I got the rifle from another guy, but I'm not going to say who. He didn't have anything to do with this." R. 37.

On October 1, 2021, a federal grand jury indicted Mr. Nadauld with several crimes. R. 5. On December 21, 2021, the Superior Court of the State of California denied Mr. Nadauld's motion to suppress evidence, finding him guilty of involuntary manslaughter, guilty of lending an assault weapon, and guilty of violating California Penal Code Section 30915. R. 1. On appeal, the California Supreme Court granted Mr. Nadauld's motion to suppress, and found that the evidence was attained through "unconstitutional practices" and should be excluded. R. 21.

SUMMARY OF THE ARGUMENT

I. There is no reasonable expectation that one's movements would be accumulated and stored in a database for sixty days to five years, in which law enforcement would have access to even before a defendant is suspected of a crime. Current jurisprudence under the Fourth Amendment only protects defendants whose privacy is infringed from a physical trespass. Today's technology, like the ALPR database, is capable of capturing and storing intimate details of one's life without a physical trespass. With the use of the ALPR data collected on public roads and the pole mount camera outside of Mr. Nadauld's residence, the technologies created an invasive mosaic of Mr. Nadauld's life. This Court should apply the mosaic theory under the Fourth Amendment, as applied in the concurrences of this Court's recent case *United States v. Jones*, to protect privacy interests of individuals who have no choice but to expose themselves to the technologies that are installed and hidden in public.

II. The officers did not have probable cause to enter Mr. Nadauld's home and conduct an unconstitutional search. Probable cause alone does not justify a warrantless search and there is insufficient evidence to prove that any exigent circumstances existed at the time the police officers approached Mr. Nadauld. There was no imminent risk of death or serious injury; the police officers had no reason to believe that the evidence would be destroyed; and there was no risk of Mr. Nadauld's immediate escape. The evidence that was illegally obtained are "fruits of the poisonous tree" and should be excluded.

STANDARD OF REVIEW

The ultimate question of whether a search was reasonable under the Fourth Amendment is a question of law that the court reviews de novo. U.S. Const. amend. IV; *see United States v. Musa*, 401 F.3d 1208, 1210 (10th Cir. 2005).

ARGUMENT

A) ALPR Database

I. This Court should affirm the California Fourth District Court of Appeal's holding that the retrieval of Mr. Nadauld's geographical information from the ALPR database search required a warrant under the Fourth Amendment because the information revealed a damaging picture of Mr. Nadauld's life.

In an ever-evolving world of technology, systems like the ALPR database that collects and stores immense personal, geographical information of the driving population infringes on societal expectations of privacy under the Fourth Amendment of the United States Constitution. The Fourth Amendment protects privacy interests where an individual has a reasonable expectation of privacy and protects individuals against "unreasonable searches and seizures" by the government. U.S. Const. amend. IV; *see Smith v. Maryland*, 442 U.S. 735, 740 (1979). "Generally, 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . .'" *United States v. Yang*, 958 F.3d 851, 858 (9th Cir. 2020) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The burden of proof is on the defendant to demonstrate that he has a reasonable expectation of privacy in the subject of the government's warrantless search. *See United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005).

Current jurisprudence provides that the Fourth Amendment protects a citizen's expectation of privacy where: (1) an individual has exhibited a subjective expectation of privacy; and (2) that expectation of privacy is one that "society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361. Information associated with license plates, in conjunction with pole mount cameras, provides law enforcement a "mosaic" of "apparently harmless pieces of information [but] when assembled together could reveal a damaging picture." 32 C.F.R. § 701.31 (2005); *see United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 565 U.S.

400 (2012). The mosaic theory describes the concept that, when a vast quantity of individual pieces of information are collected and compiled together, it can amount to important intelligence information that violates a person's reasonable expectation of privacy. *Id.* As technology continues to advance and oversteps society's expectations of privacy, courts should apply the *Katz* test with the mosaic theory of the Fourth Amendment to protect "the privacies of life" against "arbitrary power" and "to place obstacles in the way of a too permeating police surveillance." *See Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886); *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The retrieval of Mr. Nadauld's information from the ALPR database required a warrant under the Fourth Amendment. Applying the mosaic theory, the ALPR database accumulated personal, geographical information of Mr. Nadauld's movements for an extensive period of time, infringing on his expectations of privacy. Society is prepared to recognize Mr. Nadauld's expectation of privacy to be reasonable as ALPR units infringes on the privacies of the entire driving population. Additionally, the mounting of the camera on the utility pole was discovered using information retrieved from the ALPR database, which should be excluded by the denial of the ALPR practice. Mr. Nadauld expected his disconnected and anonymous movements to be exposed to the public, but he did not expect for his movements to be observed as a whole with the use of hidden cameras and ALPR devices – an expectation that society is also prepared to deem reasonable.

i. As this Court has applied GPS data in *United States v. Jones* concurrences, the mosaic theory of the Fourth Amendment applies to ALPR data and protects individuals from unreasonable searches, which require a warrant.

a) Mr. Nadauld subjectively did not expect for ALPR units to track and accumulate his vehicular movements for an extended period of time.

The accumulation of ALPR data does not only reveal movements exposed to the public, but a mosaic of Mr. Nadauld's movements that paints a bigger picture for law enforcement to make deductions of his life. *See Maynard*, 615 F.3d at 562. Like the use of Global Positioning System (GPS) data to track a suspect's vehicle on public roads, ALPR data that tracks and stores vehicular movements on public roads requires protection under the Fourth Amendment. *See Jones*, 565 U.S. at 413. A subjective expectation of privacy from vehicular surveillance exists when there is a low likelihood that another person or law enforcement could ascertain the information in question. *See Maynard*, 615 F.3d at 560. Mr. Nadauld had a subjective expectation that his personal, geographical information would not be tracked and aggregated to reveal patterns of his life.

The attachment of a GPS tracking device to a defendant's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets is a search within the meaning of the Fourth Amendment. *Jones*, 565 U.S. at 412-13. In *Jones*, officers installed a GPS device on defendant's vehicle to continuously track his location for four weeks. *Id.* at 403. The D.C. Circuit Court of Appeals incorporated the mosaic theory into its Fourth Amendment analysis and found that the government violated the defendant's expectations of privacy based on the long-term accumulation of GPS data. *Maynard*, 615 F.3d at 564. The court stated that a person who knows all of another's travels can make deductions of a person's routine, habits, and even associations of individuals or groups. *Id.* at 562.

Under the subjective prong of the *Katz* test, the D.C. Circuit Court of Appeals relied on the fact that a person could not realistically record and track all movements of an individual -- information that a GPS device could provide. *See id.* at 560. The court held that the likelihood that another would observe all movements captured by the GPS device was "essentially nil." *Id.* This Court in *Jones* stated that a case of purely technological surveillance would "remain subject to the

Katz analysis," ultimately avoiding the modern issue of technological surveillance without physical contact. *Jones*, 565 U.S. at 411.[1] The *Jones* concurrences also relied on the mosaic theory to find that the government's compilation of information over a four-week period invaded the defendant's reasonable expectation of privacy. *Id.* at 427.

The accumulation of ALPR data does not only reveal Mr. Nadauld's movements in public, but a mosaic of Mr. Nadauld's movements that paints a bigger picture for law enforcement to make deductions of his life. GPS devices and ALPR devices differ in a way that every single movement of a single vehicle is tracked by GPS devices whereas ALPR devices, which are covertly installed at multiple spots, track the movement of every single vehicle traveling on a certain road, at a certain time, and in a certain location. Although the California ALPR device in question tracks movements of individuals who already expose themselves to the public, a person could not realistically perform the automatic, instantaneous function that an ALPR database can do at every public vantage point. *See* R. 40.

A mosaic of geographical data from an ALPR database that accumulates data even before Mr. Nadauld was suspected of a crime infringes on Mr. Nadauld's expectation of privacy. The defendant in *Jones* was observed by a GPS device installed to his vehicle for four weeks, while ALPR units stored and accumulated Mr. Nadauld's movements for the past sixty days to five years. *See* R. 40. Mr. Nadauld would not expect for his every vehicular movement to be tracked, especially for such an extended period of time. Like the court in *Jones* found four weeks of

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[1] The concurring opinions by Justices Sotomayor and Alito chastised this Court for relying on old property law, rather than examining the modern issue of technological surveillance without physical contact. *Jones*, 565 U.S. at 413. (Sotomayor, J., concurring); *id.* at 418 (Alito, J., concurring). Quite notably, Justices Ginsburg, Breyer, and Kagan also joined Justice Alito's concurrence, resulting in five Supreme Court justices criticizing the court for not answering the critical question that the constant technological surveillance over a four-week period without a physical trespass "may be…an unconstitutional invasion of privacy." *Jones*, 132 S. Ct. at 416.

surveillance to infringe on the defendant's expectation of privacy, the storage of ALPR data for sixty days to five years infringes on Mr. Nadauld's expectation of privacy. Furthermore, the timeframe is well beyond the time that Mr. Nadauld was suspected of a crime, providing law enforcement an overbroad look into the privacies of his life.

There was a low likelihood for Mr. Nadauld to expect that law enforcement could make inferences of his traveling patterns by accessing an ALPR database that accumulates his movements in public. Based on the ALPR data, law enforcement inferred that two co-workers, Mr. Nadauld and the shooter, had considerable overlap of being at the same location at similar times. *See* R. 4. It is common knowledge that co-workers would be found being at the same location at similar times. However, the FBI is crossing the privacy threshold by creating a spectrum of data that is unlikely observable by a stranger or even law enforcement that may be conducting 24-hour surveillance in a single area at a time. Mr. Nadauld who travels on public roads subjectively would not expect a hidden ALPR unit to track and accumulate such data for months and years at a time, making it easy for law enforcement to draw deductions of his life.

b) Society is prepared to recognize Mr. Nadauld's expectation of privacy to be reasonable as ALPR units capture and store personal, geographical information of the entire driving population.

The automatic, instantaneous function of the ALPR database poses privacy issues because the individual pieces of information that the database collects when compiled together can reveal a damaging picture of one's life. Under the objective prong of the *Katz* test, society must be prepared to recognize the expectation of privacy to be reasonable. *Katz*, 389 U.S. at 361. This Court's jurisprudence suggests that technology surveillance is used only to enhance police officers' natural surveillance capabilities and does not provide extrasensory abilities. *See United States v. Caceres*, 440 U.S. 741, 751 (1979); *Dow Chem. Co. v. United States*, 476 U.S. 227, 231

(1986). However, ALPR systems provide extrasensory abilities as they can store and accumulate information of every individual that travels on public roads every day. *See* R. 39. To overcome the presumption of a mere ability enhancing technology, a defendant would need to show that the personal information would not otherwise be obtainable without technology. *See Dow Chem. Co.*, 476 U.S. at 232; *Smith v. Maryland*, 442 U.S. at 744.

The ALPR system provides extrasensory abilities for law enforcement to assemble data that reveal private aspects of identity – an unrestrained power that is susceptible to abuse. *See Jones*, 565 U.S. at 416. For example, in *Carpenter v. United States*, this Court held that the defendant maintained a legitimate expectation of privacy under the Fourth Amendment in the record of his physical movements as captured through cell site location information (CSLI). *Carpenter*, 138 S. Ct. at 2223. The government in *Carpenter* conducted a search by accessing, through a wireless carrier, 127 days of the defendant's historical CSLI. *Id.* at 2212. However, the Court specifically stated that this decision did not "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 2220. This case focused on the signals that created a "detailed chronicle of a person's physical presence compiled every day, every movement, over several years." *Id.*

Additionally, pictures and data associated with each license plate number are personal information that holds a societal expectation of privacy. *See Neal v. Fairfax Cnty. Police Dep't.*, 295 Va. 334, 345 (2018). In *Neal*, the Virginia Supreme Court distinguished license plate numbers from the actual personal information that is associated with the license plate data collected by an ALPR device. *Id.* at 346-47. The court in *Neal* held that the pictures and data associated with each license plate were personal information. *Id.* at 347. The court explained that the "images of the vehicle, its license plate, and the vehicle's immediate surroundings, along with the GPS location,

time, and date when the image was captured," allows for law enforcement to make inferences about the owner of the vehicle regarding their daily activities, routes, or any other information that may be gleaned from having access to those types of records. *Id.*

Like the accumulation of CSLI, the accumulation of ALPR data creates a mosaic of intimate details of Mr. Nadauld's life. The CSLI at issue in *Carpenter* are distinct from the data generated by an ALPR device because a cell phone "faithfully follows its owner beyond phone thoroughfares" while individuals "regularly leave their vehicles." *Carpenter,* 138 S. Ct. at 2218. However, the court in *Carpenter* narrowly applied its decision to CSLI and emphasized "the progress of science" has allowed law enforcement to use a "powerful new tool" to carry out law enforcement duties, but at the same time, these new tools create risks that the Fourth Amendment was designed to prevent. *Id.* at 2223. While CSLI may be more invasive, ALPR data collectively provides a vivid depiction of one's life, and the data can be stored for months and years that likely pre-dated law enforcement's interest in someone as a potential criminal. As a person does not expect their movements to be tracked via CSLI, a person does not expect their vehicular movements to be tracked and stored over time by an ALPR database.

In the present case, law enforcement conducted their investigation for two weeks, but the accumulation of ALPR data provided law enforcement information of Mr. Nadauld's traveling habits from the past sixty days to five years. *See* R. 40. Despite the public nature inherent in driving on public roads, a person does not reasonably expect each of their movements to be tracked from place to place and be accumulated over weeks and years. Like the court in *Neal* has noted, license plates are exposed to the public, but the personal information associated with the license plate data collected by an ALPR device allows for law enforcement to make inferences about the owner's daily activities, routes, and other patterns of one's life. From the ALPR data, law enforcement

made inferences of where Mr. Nadauld's vehicle typically would be and the vehicles that would typically be in the same location as his at similar times. *See* R. 4. Law enforcement used numerous investigative methods to find the shooter due to the nature of the crime and lack of leads; *see* R. 3, however, law enforcement should have tread carefully when accessing a database that provides such wealth of information of drivers in public roads. ALPR units capture data of the entire driving population and store this information for an extensive period. ALPR technology does not distinguish criminals from non-criminals, indiscriminately photographing and recording every license plate that it encounters. Thus, this type of technology provides extrasensory abilities and provides personal information that would not otherwise be obtainable without it.

II. As this Court has applied CSLI in *Carpenter v. United States*, the mosaic theory of the Fourth Amendment applies to pole-mount camera information and protects individuals from unreasonable searches, which require a warrant.

Like the California Fourth District Court of Appeals held, the search via a pole mount camera was only conducted because of information retrieved from the ALPR database, and such evidence was derivative of the prior ALPR practice and should be excluded by the denial of that ALPR practice here. R. 18. However, if this Court decides to rule on the constitutionality of the pole mount camera, it should be known that federal circuit, federal district, and state courts have splintered on how to treat police use of cameras on public property.[2] On the other hand, state

[2] "In harmony with the Sixth Circuit, the First, Fourth, and Tenth Circuits (and arguably the Ninth Circuit) have similarly approved of governmental use of cameras, but . . . these cases did not squarely address the same factual and legal circumstances presented here." *United States v. Tuggle*, 4 F.4th 505, 521 (7th Cir. 2021). Prior *United States v. Jones*, courts have held that visual observation of areas exposed to the public does not constitute a search. *See, e.g.*, *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009); *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009); *United States v. Gonzalez*, 328 F.3d 543 (9th Cir. 2003); *United States v. Jackson*, 213 F.3d 1269 (10th Cir.). Following *Jones*, several courts have examined whether long-term video surveillance constitutes a search. "The circumstances of the cases vary but can be categorized as cases involving video surveillance of the activities: (1) outside a business, (2) outside a home other than the defendant's, (3) in a public place not including the defendant's home, and (4) outside the

supreme courts and appellate courts have found the use of pole cameras for varying durations violates the Fourth Amendment.[3] Furthermore, the *Katz* analysis must apply when courts approach the issue of whether achieving visual observation through electronic means constitutes a search under the Fourth Amendment "in some future case where a classic trespassory search is not involved . . . ." *Jones*, 565 U.S. at 412. In *Jones*, Justice Sotomayor endorsed the view that "examining the existence of a reasonable expectation of privacy includes considering the method of surveillance, what the method has the potential to produce, and how the method implicates the evolution of privacy expectations under *Katz*." *State v. Jones*, 2017 S.D. 59, ¶21, 903 N.W.2d 101, 109 (citing *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., concurring)). As the concurrences in *Jones* alluded to the use of the mosaic theory under the *Katz* test, the same analysis should apply to technological surveillance by pole mount cameras.

i. Mr. Nadauld subjectively did not expect for pole mount cameras to record his movements outside his home in real time, allowing law enforcement to draw inferences of intimate details of his life when paired with ALPR data.

While law enforcement should be allowed to use developing technology for an efficient investigation, the ALPR data should have, at the least, prompted law enforcement to seek a warrant to further the investigation with the pole camera. *See State v. Jones*, 903 N.W.2d at 112. The first

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defendant's home." *State v. Jones*, 2017 S.D. 59, ¶20, 903 N.W.2d 101, 108. For video surveillance of the activities outside the defendant's home, some courts like *United States v. Houston*, relied on the reasoning in *Katz* to conclude that what one exposes to the public is not protected and that law enforcement can augment their sensory faculties with technology. 813 F.3d 282, 288 (6th Cir. 2016).

[3] *See, e.g.*, *State v. Jones*, 903 N.W.2d at 111–13 (holding that the government had executed a search through the warrantless use of a pole camera to surveil a suspect's activities outside his residence for two months); *People v. Tafoya*, 2021 CO 62, ¶51, 494 P.3d 613, 624 (Colo. 2021) (holding that the continuous, three-month-long use of the pole camera constituted a search under the Fourth Amendment); *Cf. Commonwealth v. Mora*, 150 N.E.3d 297, 302 (Mass. 2020) (concluding that continuous, long-term pole camera surveillance targeted at the residences of the defendants well may have been a search within the meaning of the Fourth Amendment).

prong of the *Katz* test focuses on whether the individual manifested a subjective expectation of privacy in the object of the challenged search. *California v. Ciraolo*, 476 U.S. 207, 211 (1986). People subjectively may lack an expectation of privacy in unshielded areas around their homes, but they do not expect that every action will be observed and preserved for the future. *See Commonwealth v. Mora*, 150 N.E.3d 297, 306 (Mass. 2020). The court noted that requiring defendants to erect physical barriers around their residences to be protected under the Fourth Amendment, "would make those protections too dependent on the defendants' resources . . . [and] would apportion Fourth Amendment protections on grounds that 'correlate with income, race, and ethnicity.'" *Id.*

An individual has a subjective expectation of privacy in the whole of his movements based on the amassed nature of surveillance. *See State v. Jones*, 903 N.W.2d at 111. In *State v. Jones*, the Supreme Court of South Dakota held that a warrantless use of a pole camera mounted on a public streetlight to record activities outside of the defendant's home for two months violated the defendant's subjective expectation of privacy and that his expectation of privacy was reasonable. *Id.* at 113. The court reasoned the expectation of privacy changes when officers can capture something that is not actually exposed to public view – the aggregate of a person's individual actions. *See id.* at 111. The court recognized that the defendant did not attempt to conceal the front of his home from public observation and refused to use "such a constricted analysis" because "[t]he information gathered through the use of targeted, long-term video surveillance will necessarily include a mosaic of intimate details of the person's private life and associations." *Id.* at 110. While a reasonable person may understand that his movements on a single journey are conveyed to the public, he expects that those individual movements will remain disconnected and anonymous. *Maynard*, 615 F.3d at 563.

Here, the ALPR data revealed that Mr. Nadauld's and the shooter's vehicles had considerable overlap of being at the same locations at similar times, so law enforcement covertly investigated Mr. Nadauld's residence. *See* R. 3-4. Not only do ALPR units instantly capture pictures of vehicles and alert law enforcement when vehicles of interest drive by, but pole mount cameras also provide real-time footage. With the use of the ALPR data and the pole mount camera outside of Mr. Nadauld's residence, the technologies created an even larger mosaic of Mr. Nadauld's life. With both technologies, law enforcement observed Mr. Nadauld's activities outside of his home and his traveling patterns in public. Like the court held in *State v. Jones*, it is irrelevant whether Mr. Nadauld attempted to conceal his home from public observation because the information that law enforcement gathered provided a mosaic of intimate details of Mr. Nadauld's life and associations.

If the ALPR data had not revealed the pattern of Mr. Nadauld's vehicle being in similar locations as the shooter's vehicle, law enforcement would not have suspected the simple exchange of a large duffel bag between Mr. Nadauld and the shooter. *See* R. 4. While Mr. Nadauld's movements on a single journey are conveyed to the public, he would expect that those individual movements will remain disconnected and anonymous. The aggregate of information that the technologies collect provide information to law enforcement that is not actually exposed to public view because the information gathered through the use of targeted video surveillance provides a mosaic of Mr. Nadauld's private life.

ii. Society is prepared to recognize Mr. Nadauld's expectation of privacy to be reasonable as pole mount cameras are more invasive than mere video cameras, and society expects their disconnected and anonymous movements to not be observed as a whole.

Law enforcement infringes on societal expectations when observing a mosaic of one's life that details a person's "physical presence compiled every day, every movement, over several

years." *See Carpenter*, 138 S. Ct. at 2223. The second part of the *Katz* test focuses on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States,* 466 U.S. 170, 182–83 (1984).

The Supreme Court of South Dakota stated that circuit court cases, including *United States v. Houston*, *United States v. Bucci*, and *United States v. Jackson*, did not distinguish "society's expectation of privacy in disconnected and anonymous movements knowingly exposed to the public from society's expectation of privacy in the whole of one's movements exposed to the public" and noted that the decisions did not assess how technology changes privacy expectations. *State v. Jones*, 903 N.W.2d at 111. The Supreme Court of South Dakota also noted that the circuit court cases *United States v. Bucci* and *United States v. Jackson* were decided before *Jones*, which the court states is a relevant case because "both the majority and concurring decisions in *Jones* brought into question the legality of warrantless, long-term video surveillance of an individual's activities or home." *State v. Jones*, 903 N.W.2d at 111.

The Supreme Court of South Dakota distinguished pole cameras from mere video cameras. *Id.* at 112. The court recognized that pole cameras capture activities outside of defendant's home twenty-four hours a day, sends the recording to a distant location, and allows the officer to view it at any time and to replay videos in real time, whereas mere video cameras do not accomplish this. *Id.* The court stated that like the tracking of public movements through GPS monitoring, long-term surveillance of the home will generate "a wealth of detail about [the home occupant's] familial, political, professional, religious, and sexual associations." *Id.*; *see Jones*, 565 U.S. at 415. The court also countered that the advance of technology would not "one-sidedly give criminals the upper hand," recognizing the police should be allowed to use developing technology to ferret out crime. *State v. Jones*, 903 N.W.2d at 112 (quoting *United States v. Houston*, 813 F.3d 282, 290

(6th Cir. 2016)). The court simply noted that when citizens have a reasonable expectation of privacy, law enforcement must first obtain a warrant. *Id.*

While the Sixth Circuit in *United States v. Houston* rejected the claim that the use of a pole camera on a public pole constituted a search, the court only evaluated the isolated use of a pole camera. *Id.* The court distinguished the surveillance via stationary camera from the surveillance via GPS tracking in *Jones*. *Id.*; *see Jones*, 565 U.S. at 402. The Sixth Circuit stated that camera surveillance was "not so comprehensive as to monitor [defendant's] every move; instead, the camera was stationary and only recorded activities outdoors on the [property]." *Houston*, 813 F.3d at 290. The Sixth Circuit also said that the camera did not track the defendant's movements *away* from the property. *Id.*

In the present case, the pole mount camera targeted at Mr. Nadauld's home allowed law enforcement to examine at their will and from any location when Mr. Nadauld left his house, how long he was gone, when a guest arrives and their license plates, when the guests left, and the like. A reasonable person may expect for their single travel plans to be observed by the public; however, they would not expect an accumulation of their information to be stored and observed in real time by hidden technology surveillance. Society expects their movements to be disconnected and anonymous. The advance of technology would not one-sidedly give criminals the upper hand. If anything, the advance of technology one-sidedly gives law enforcement the upper hand because it enhances a person's senses. The court in *Houston* analyzed the isolated use of the camera, meanwhile law enforcement in the present case gathered information from the pole mount camera and ALPR data. Mr. Nadauld's information from the ALPR data coupled with real-time footage from the pole camera targeted outside his home revealed patterns of Mr. Nadauld's life that society would recognize this expectation of privacy as reasonable.

B) Entry and Search of Mr. Nadauld's House

Police officers violated Mr. Nadauld's Fourth Amendment privacy rights by conducting an unconstitutional warrantless search of his home. "The ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. 373, 381 (2014). "[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v. New York*, 445 U.S. 573, 585 (1980). "[I]t is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). "The burden is on the People to establish an exception applies." *People v. Macabeo*, 384 P.3d 1189, 1213 (Cal. 2016).

I. The warrantless entry of Mr. Nadauld's home by law enforcement was unconstitutional because there was no probable cause.

The officers did not have probable cause to enter Mr. Nadauld's home and conduct an unconstitutional search. In order to determine whether a police officer has probable cause for a search, the courts, "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.'" *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). "Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be discovered in a particular place. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (quoting *United States v. Hurtado*, 779 F.2d 1467, 1477 (11th Cir. 1985)).

There was insufficient evidence to prove the officers had probable cause for the warrantless entry of Mr. Nadauld's home given the wide range of possible suspects and the lack of evidence regarding the automatic assault rifle. The court in *United States v. Almonte-Báez* held

that the police officers did have probable cause for a warrantless search due to the interception of a phone call between two individuals planning to rob a drug shipment exchange with the defendant. *United States v. Almonte-Báez*, 857 F.3d 27, 29 (1st Cir. 2017). The officers began canvassing the streets searching for the defendant's car. *Id*. They then observed the defendant carrying a large trash bag so heavy that he needed both hands to lift it. *Id*. After the police pulled over the defendant, he was reported to look nervous as well. *Id*.

The case of *Almonte-Báez* is distinguishable from the case involving Mr. Nadauld due to the insufficient evidence the police officers had to suspect Mr. Nadauld of any crime. The events leading up to the search of Mr. Nadauld's home did not give an objectively reasonable officer the probable cause for a search. Given the totality of the circumstances known to Officer Hawkins and Officer Maldonado, a prudent person would not have concluded that Mr. Nadauld committed a crime. There were no specific reports that Mr. Nadauld had committed a crime. Mr. Nadauld was one of a total of fifty people who legally owned an automatic assault rifle. The fifty-person list does not include people who may own an illegal automatic assault rifle or members of law enforcement who own an automatic rifle in connection with their duties. Furthermore, this list only includes automatic assault rifle owners living in San Diego and failed to consider the hundreds of automatic assault rifle owners living outside of San Diego. Law enforcement's reasoning was the tracking of McKennery's vehicle out of fifty vehicles, in addition to the fifty rifle owners, and the alleged association between McKennery and Mr. Nadauld. Mr. Nadauld did not seem nervous upon police arrival and acted accordingly with the police officers.

The case of *United States v. Struckman* demonstrates how an objectively reasonable officer would not have found that probable cause was present even when a specific individual was accused of a crime. *United States v. Struckman*, 603 F.3d 731, 731 (9th Cir. 2010). The police

officers responded to a call that the defendant was jumping a fence, allegedly trespassing. *Id*. After further investigating, the officers determined that the defendant lived at the house in which he had jumped the fence. *Id*. The court held that there was no probable cause because there was no evidence of attempted entry by the defendant even though there was a report that the defendant had committed a crime. *Id*. at 736. The court also held that the defendant's surprised reaction is also not sufficient for probable cause. *Id*. at 744.

Similarly, the court in *Hopkins v. Bonvicino* held that there was no probable cause because the only evidence offered was a brief statement from a witness. *Hopkins v. Bonvicino*, 573 F.3d 752, 766, (9th Cir. 2009). The court considered why there were no additional questions asked to the witness and concluded that the lack of additional investigation was insufficient to establish probable cause. *Id*. at 764.

Here, no additional information was obtained about Mr. Nadauld, and officers chose to search Mr. Nadauld's home based on insufficient evidence. There was no additional questioning of any other automatic assault rifle owners or anyone else leaving the park that day. Law enforcement's lack of probable cause makes this warrantless entry unconstitutional.

II. The officers' warrantless search of Mr. Nadauld's home was unconstitutional because there were no exigent circumstances.

Probable cause alone does not justify a warrantless search and there is insufficient evidence to prove that any exigent circumstances existed at the time the police officers approached Mr. Nadauld. A warrantless search is "presumptively unreasonable" unless it is supported by both probable cause and exigent circumstances. *Tobin*, F.2d at 1510. The Fourth Amendment contains a "strong preference" for warrants. *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984). The test used to determine whether exigent circumstances exist is objective: "whether the facts . . . would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant

could be secured." *Id*. (internal quotation marks omitted). The exigency exception only applies when "the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." *United States v. Burgos*, 720 F.2d 1520, 1526 (11th Cir. 1983).

For the circumstances of this case to qualify as "exigent", the government bears the burden of showing that through the totality of the circumstances "(1) there was an imminent risk of death or serious injury, (2) or danger that evidence will be immediately destroyed, or (3) that a suspect will escape." *Brigham v. Stuart*, 547 U.S. 398, 403 (2006).

There is insufficient evidence for the exigent circumstances exception to stand because first, the scene Mr. Nadauld was questioned at was peaceful with no visibility of an assault rifle therefore creating no imminent risk of death or serious injury. Second, there is no evidence that the gun was about to be removed or destroyed, assuming it was even in Mr. Nadauld's home. Third, there is no indication that Mr. Nadauld would have immediately fled given his voluntary cooperation with the police. There was no imminent risk of death or serious injury at the time of the warrantless search of Mr. Nadauld's home.

There was no imminent risk of death or serious injury, given that the automatic assault rifle was not in view of the officers and there was no assurance that the rifle was even in the home. The court in *People v. Ovieda* considered whether or not there was a threat of imminent risk of death or serious injury at the time the police officers arrived at the home of the defendant. *People v. Ovieda*, 7 Cal 5th. 1034, 1041 (Cal. 2019). The police officers were made aware that the defendant was suicidal and although disarmed, there were guns in the home. *Id*. at 1043. Multiple other people were also in the house that could have possibly been harmed prior to their exit. *Id*. The court held that even given the guns in the house and the mental state of the defendant, there was still insufficient evidence to believe there was an imminent risk of death or serious injury. *Id*.

Here, the officers caught Mr. Nadauld by surprise after sending out notice that it would be another few weeks before they were coming. Mr. Nadauld answered the door calmly and remained calm while Officer Hawkins' persistently questioned him. There was no reason to believe Mr. Nadauld was distraught, such as the defendant in *People v. Ovieda*, and there was no evidence confirming the assault rifle was in the house. Although it will likely be argued that the mass shooting in Balboa Park caused this risk of potential harm, nothing Mr. Nadauld was doing signaled there was imminent risk of death or serious injury at the moment Officer Hawkins decided to execute the warrantless search.

i. There was no danger that the evidence, the automatic assault rifle, would have been immediately destroyed.

The police officers had no reason to believe that the evidence would be destroyed considering how difficult it would be to destroy a gun as well as Mr. Nadauld's unawareness that the police were coming to his home on that particular day. The court in *United States v. Lynch* considered whether there was a danger of evidence being destroyed without the defendant's knowledge of police surveillance. *United States v. Lynch*, 934 F.2d 1226 (11th Cir. 1991). After arresting two other individuals involved with the same drug trafficking as the defendant, the police entered the defendant's home in fear of the alleged evidence being destroyed. *Id*. at 1228. There was no way the defendant knew that the two other people had been stopped by the police and therefore was unaware that he was under police surveillance. *Id*. The court held that the circumstances were not considered exigent due to the suspects unawareness of the police surveillance, even considering how quickly the drugs could have been destroyed. *Id*.

There was no risk of the destruction of the gun owned by Mr. Nadauld. It would have been very difficult for Mr. Nadauld to destroy this evidence, especially considering a gun is not easily destroyed. The police officers also caught Mr. Nadauld by surprise, weeks before their supposed

arrival. Therefore, Mr. Nadauld, analogous to the defendant in *Lynch*, had no idea he was under police surveillance at this time. Given the holding in *Lynch*, Mr. Nadauld's unawareness of the police surveillance as well as the much more difficult process of destroying a gun compared to narcotics gave the police officers no reason to believe that the evidence would be destroyed.

ii. There was no risk of Mr. Nadauld's immediate escape.

Given the circumstances that Mr. Nadauld voluntarily opened the door for the police officers, remained calm in place, and answered their questions in no way gave Mr. Nadauld an immediate chance of escaping. The court in *United States v. Lindsey* also considers the issue of the possibility of escape when not obtaining a search warrant. This court held that even when exigent circumstances exist where there is probable cause to believe a crime has been committed, it must be an emergency that leaves the police insufficient time to seek a warrant. *United States v. Lindsey*, 877 F.2d 777, 782 (9th Cir. 1999). The term "exigent circumstances" describes an "emergency situation requiring swift action to prevent imminent danger to life." *Id.* at 780-81. There is no imminent risk of danger to life or property in this situation. Mr. Nadauld opened the door for the police, answered all their questions calmly, and acknowledged knowing they would be coming for the automatic assault rifle. Given the combination of the police randomly showing up at Mr. Nadauld's house and Mr. Nadauld's cooperation, there was no risk of an immediate escape.

III. Fruit of the Poisonous Tree

Due to the police officers having no probable cause and the exigent circumstances exception unable to apply, any statements said by Mr. Nadauld during the warrantless entry must be excluded. The "fruit-of-the-poisonous-tree" doctrine was first considered in *Wong Sun v. United States* by this Court. *Wong Sun v. United States*, 371 U.S. 471 (1963). The poisonous tree is used to illustrate the illegal source in which the evidence was obtained from. *Id.* In *Wong Sun*, the Court

held that "evidence and witnesses discovered because of an illegal search are "tainted" and must be excluded." *Id*. at 492. This applies when the violation is not physical evidence as well. *Id*. at 471. *See Taylor v. Alabama*, 457 U.S. 687, 690 (1982).

Here, Mr. Nadauld's comments to the officers after the unconstitutional search should be excluded because they are "fruit-of-the-poisonous-tree." As described in the aforementioned sections, the use of the ALPR database and pole-mount cameras violated Mr. Nadauld's privacy rights. Additionally, the Officers violated Mr. Nadauld's privacy rights by entering his home without his consent or a warrant. Although Mr. Nadauld's comments to the officers regarding how he lent the rifle to McKennery were not physical evidence, they should be excluded as evidence. The officers would not have obtained these statements if they had not violated Mr. Nadauld's constitutional rights. Therefore, Mr. Nadauld's statements that were given to the police during their illegal search are "tainted" and should be excluded.

CONCLUSION

For the reasons stated above, this Court should (1) affirm the appellate court's finding that the retrieval of Mr. Nadauld's information from the ALPR database required a warrant under the Fourth Amendment and (2) affirm the appellate court's holding that the warrantless entry and search of Mr. Nadauld's home violated his Fourth Amendment rights.