No. 1788-850191

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

v.

NICK NADAULD

RESPONDENT,

On Writ of Certiorari to the Court of Appeal of the State of California
Fourth Appellate District
Division One

BREIF FOR RESPONDENT

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II. Did the California Fourth District Court of Appeal err in holding that the warrantless entry and search of Defendant’s home violated Defendant's Fourth Amendment rights under our precedents?

STATEMENT OF FACTS

On September 14, 2021, Nick Nadauld leant his late father's M16A1 ("M16") automatic assault rifle to his coworker Frank McKennery, who wanted to use the rifle for an outdoor target shooting excursion. R. at 1. McKennery had spoken to Nadauld earlier that week expressing that he was a shooting enthusiast and wanted to try an automatic assault rifle. R. at 1. Nadauld, who was legally bequeathed his former veteran father's M16 rifle five years prior, was willing to indulge his coworker. R. at 1. That same day, McKennery arrived in Balboa Park in non-descript clothing, set up the rifle on a rooftop, and began shooting at civilians in the park. R. at 1. McKennery killed nine people and wounded six others, before escaping the scene. R. at 1. By the time police arrived, all they found was a typed document titled "Manifesto," which indicated that the shooter was an individual who had a difficult upbringing and felt as if the world had dealt him a cruel hand. R. at 36. The Manifesto insinuated that the shooter worked with others and that they would perpetrate another shooting "soon." R. at 36.

Considering the violence and seemingly random nature of the crime, law enforcement used several methods of investigation to garner any leads. R. at 3. By analyzing the surveillance footage from security cameras in an around Balboa Park, law enforcement were able to gather the license plates of fifty vehicles that were recording leaving the scene before police secured the area. R. at 3. Notably, the recording showed forty unidentified individuals fleeing the scene on foot whose faces could not be matched in government databases because of the blurriness of the footage. R. at 3. Police checked the criminal records of the owners of all fifty vehicles that fled the scene, in which McKennery was listed for a violent crime. R. at 3. Police then cross-referenced that list with a list of registered assault rifle owners in California, excluding law enforcement officers. R. at 3. Nadauld was one of the owners named in this list. R. at 3. None of

the owners of vehicles who fled the scene overlapped with owners of assault rifles in the state. R. at 3.

Police furthered their investigation by retrieving information from the Automatic License Plate Recognition ("ALPR") database. R. at 3. The system captures an image of a vehicle and its license plate and compares the plate number acquired to one or more databases of vehicles of interest to law enforcement. R. at 38. ALPR technology is commonly used to compare plates encountered against databases that contain plate numbers associated with active investigations, such as stolen cars, Amber Alerts, or missing persons cases. R. at 38. The California ALPR FAQs states the ALPR system does not contain personal identifying information Police used the database to track the movements of the fifty vehicles that fled the scene of the shooting, including McKennery's vehicle, and the movements of the vehicles owned by assault rifle owners, including Nadauld's vehicle. R. at 3–4. Police cross-referenced the movement of vehicles from both groups and found that Nadauld and McKennery were consistently in the same locations at similar times. R. at 4. The driving location data of the fifty vehicles that fled the scene and those on the registered assault rifle list corresponded the most with ten reisdences, which included Nadauld's residence. R. at 4. On September 24, law enforcement placed cameras on utility poles near each of the ten residences facing the homes. R. at 4. On September 25, law enforcement mailed letter to each of the ten residences, stating that in a month pursuant to California Penal Code 30915. R. at 4, 35. Nadauld received this letter on September 27. R. at 4.

On September 28 at 10:37 AM, police received an anonymous phone call from an individual who claimed to be the Balboa Park Shooter stating "this time, it's gonna be a school." R. at 4. On September 29 at 5:23 pm, the pole-mount camera in front of Nadauld's home recorded McKennery pulling into Nadauld's driveway, giving Nadauld a large duffel bag, and

leaving. R. at 4. FBI Officers Jack Hawkins and Jennifer Maldonado were immediately dispatched to Nadauld's home without a warrant or backup. R. at 4, 23. Upon a knock, Nadauld opened the door and officers began questioning him outside his door regarding whether he rendered his rifle inoperable. R. at 23. Nadauld was confused about how early the officers came to perform the check, but nonetheless offered to retrieve the rifle for the officers while they waited at the threshold of the door. R. at 23. Despite Nadauld's protests against the officers entering his home, Officer Hawkins walked into the house. R. at 24. Nadauld stepped aside for Officer Hawkins while saying "I didn't say you could come into my house. Aren't you not allowed if I don't say so?" R. at 24. Officer Maldonado entered as well and began checking rooms, finding the gun in his bedroom through an open door. R. at 24. Nadauld explained to the officers that he did not have the gun during the time of the Balboa Park shooting because he had lent it to McKennery, whom he believed was in Arizona target shooting. R. at 24. Subsequently, Police heard a gunshot as soon as they arrived at McKennery's residence, finding him dead with a letter confessing to the crime. R. at 5.

Nadauld was arrested and charged with nine counts of second-degree murder, nine counts of involuntary manslaughter, one count of lending an assault weapon and one count of failing to comply with the California Penal Code 30915. R. at 5. Nadauld filed a motion to suppress the evidence found on the day of his arrest, which the district court denied. R. at 12.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Fourth District Appeals Court. The warrantless retrieval of Mr. Nadauld's vehicle location data from the ALPR database violated his Fourth Amendment right to be secure against unreasonable searches. Law Enforcement's retrieval of this data constituted an unreasonable search as it violated Nadauld's reasonable

expectation of privacy in the whole of his movements. Similarly, the evidence obtained from the Pole-Camera mounted in front of Nadaud's home should be suppressed as it was derivative of the illegal search conducted via the ALPR system. Moreover, in addition to the derivative nature of the Pole-Camera, it violated Nadauld's reasonable expectation of privacy by producing a long-term record of his behavior in the vicinity of his home.

Nadauld's Fourth Amendment right against unreasonable searches and government intrusion in the home were blatantly violated. This Court has upheld that constitutional principle in consistently protecting the home from warrantless searches, provided for limited exceptions. Where exigent circumstances are present and law enforcement possess probable cause, law enforcement may enter and search a home for select circumstances, including to prevent the imminent destruction of evidence or risk of immediate harm to themselves or others. Unless either of those exceptions and probable cause are present, evidence found in a warrantless search of the home must not be admitted.

Law enforcement had no probable cause in this case, as there was no information that could connect Nadauld to the shooting or any definitive evidence that connecting Nadauld to any of the vehicles fleeing the scene. Probable cause requires a fair probability that Nadauld was involved in the shooting, which the facts within the record fail to support. Even if this court finds law enforcement had probable cause at the time they entered Nadauld's home, there were no exigent circumstances at the time. Law enforcement had no firsthand knowledge that Nadauld was threatening to shoot a school or harm anyone immediately. Additionally, that police ordered all potential owners of the weapon to destroy it within one month, the exigency of destruction of evidence is police-created and does not stand. Ultimately, under the fruit of the poisonous tree

doctrine, if this Court finds there was no probable cause or no exigent circumstances present, the rifle must be excluded.

STANDARD OF REVIEW

This Court reviews the Fourth District Appeals Court's reversal of the Superior Court's dismissal of Respondent's Motion to Suppress evidence. In reviewing a denial of a motion to suppress this Court reviews factual findings for clear error and legal conclusions *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Here the facts are not in dispute, therefore de novo review is proper in reviewing the lower court's legal conclusions regarding Fourth Amendment issues.

ARGUMENT

I. THE FOURTH DISTRICT APPEALS COURT CORRECTLY HELD THAT THE RETRIEVAL OF DEFENDANT'S INFORMATION FROM THE AUTOMATIC LICENSE PLATE RECOGNITION DATABASE REQUIRED A WARRANT UNDER THE FOURTH AMENDMENT.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," providing that "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Through this Court's decisions in *Katz v. United States*, *United States* v. *Jones*, and their progeny, a two-track analysis has been established for evaluating Fourth Amendment claims. *Katz*, 389 U.S. 347, 351 (1967); *Jones*, 565 U.S. 400, 409 (2012). Through the predominant test laid out in *Katz*, the Court held that the Fourth Amendment protects individual privacy interests where two criteria are met. 389 U.S. at 361. First, that an individual has exhibited a subjective expectation of privacy, and second, that the expectation is one society is prepared to recognize. *Id.* Through a layering approach taken in *Jones*, the Court added its pre-*Katz* common-law trespass analysis to cases

where the Government engages in the physical intrusion of a constitutionally protected area. 565 U.S. at 407.

A. Law enforcement's warrantless retrieval of Nadauld's data from the ALPR database constitutes a search.

The threshold question in this case is whether law enforcement's use of ALPR to track driving location data, and the subsequent warrantless retrieval of that data constitutes a search under the Fourth Amendment. *See Franks v. Delaware*, 438 U.S. 154, 164 (1978) (requiring that police acquire a warrant to conduct searches outside clearly delineated exceptions). The Government and Superior Court point to *New York v. Class* to substantiate their contention that any tracking of a car's public movements does not constitute a search. However, as this Court pointed out in *Jones*, this comparison is inapposite. *Class*, 475 U.S. 106, 114 (1986); 565 U.S. at 410. While *Class* involved the police's isolated observation of a vehicle's VIN number, the extended tracking of a vehicle at issue in the instant case and *Jones* does constitute a search. *Jones*, 565 U.S. at 409; *Class*, 475 U.S. at 114.

Similarly, the Supreme Court has consistently found that where relevant data is independently stored and only later accessed by law enforcement, the subsequent retrieval of information also constitutes a search. *Carpenter v. United States*, 138 S.Ct. 2206, 2219 (2018); *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 344 (4th Cir. 2021) (En banc). In *Carpenter*, the Court held that the Government's retrieval of CSLI data from wireless carriers constituted a search. 138 S.Ct. at 2219. Here the police were not even prompted to complete the extra step of acquiring the relevant data from a third-party, since the ALPR database is maintained by the Government. R. at 38-39. While in *Carpenter* there was some dispute amongst the Justices as to whether the third-party doctrine rendered CSLI data retrieval not a search, the

Court's holding makes clear that Police access to internally held location data is a search under the Fourth Amendment. 138 S.Ct. at 2220.

B. Law enforcement's warrantless retrieval of Nadauld's data from the ALPR database violated his reasonable expectation of privacy.

The ALPR surveillance program utilized by the San Diego Police Department does not involve a physical intrusion into a protected area. ALPR scans license plates and records their geographical location without making any contact with the vehicle. R. at 38. Consequently, the appropriate inquiry is whether the warrantless retrieval of Nadauld's data from the ALPR database violated his reasonable expectation of privacy. *Jones* at 409. Prior to the Supreme Court's decision in *Jones*, its jurisprudence with respect to motor vehicles on public roads was anchored by *United States v. Knotts* and *United States v. Karo*. *Knotts*, 460 U.S. 276, 278 (1983); *Karo*, 468 U.S. 705,708 (1984); *Jones*, 565 U.S. at 409. *Knotts* and *Karo* involved the use of "beepers" by police to aid in tailing a vehicle on public roads. In both cases, a beeper was placed in a container and loaded into the target vehicle, either with the consent of the container's original owner or the vehicle owner himself. *Knotts*, 460 U.S. at 278; Karo, 468 U.S. at 708. This Court held that law enforcement's use of these beepers did not violate the driver's expectations of privacy because the information obtained had "been voluntarily conveyed to the public." 460 at 281. Decades later in *Jones*, this Court distinguished the use of beepers to aid police in tailing vehicles on discrete trips, with the long-term tracking capabilities afforded by GPS technology. 565 U.S. at 415. Justice Sotomayor observed that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.*

Justice Sotomayor's concerns about the long-term tracking of a person's movements were incorporated into the Court's opinion in *Carpenter* a few years after *Jones*. 138 S.Ct. at

2217. *Carpenter* involved law enforcement's access to CLSI data held by cellular phone companies, and the subsequent use of that data to chronicle the movements of suspects. 138 S.Ct. at 2208. This Court held that individuals maintain "a legitimate expectation of privacy in the record of their physical movements as captured through CSLI" and that the location information obtained from Carpenter's wireless carriers was the product of a search. *Id.* at 2217. The Superior Court discounts the applicability of *Jones* and *Carpenter* in its assessment that ALPR data "creates a sparse collection of datapoints on public roads which reveals little about a person's private life." R. at 6. However, the record simply does not support that characterization of ALPR.

ALPR scanners are present on patrol vehicles utilized by the San Diego Police Department and placed at an undisclosed number of fixed points. R. at 38-39. These scanners record passing license plates, record the geographic location of each scan, and upload the data to the ALPR database. *Id.* Since law enforcement does not disclose the number of fixed ALPR scanner locations, there is some ambiguity as to how complete a record of a person's movements this database creates. However, the degree of accuracy with which law enforcement reconstructed the movements of citizens during their investigation indicate that the program is expansive, and well within the bounds of the datasets at issue in *Jones* and *Carpenter*. 565 U.S. at 409; 138 S.Ct. at 2208. For example, the presence of ALPR scanners on patrol vehicles in the city is alone enough to suggest a comprehensive web of surveillance. R. at 3. Combining that with the information the police were able to gather in their investigation into Nadauld, and little doubt remains as to the expansive nature of the ALPR database.

In the wake of the shooting in Balboa Park, the police retrieved information from the ALPR database on one-hundred people, those who fled the park in vehicles and civilians with

registered assault weapons. R. at 9. The police then examined the movements of these people and crossed referenced the vehicle movements of both groups to reveal significant overlap at the same locations at similar times. R. at 9-10. This masterclass in investigative data analytics would not have been possible if ALPR scanners only existed at scattered intersections and on the occasional patrol car as the Superior Court seems to suggest. Notably, pinpoint accuracy is not necessary to render a record of a person's movements too revealing. 138 S.Ct. at 2218. The record of *Carpenter*'s movements created by CSLI was represented by wedge shaped sectors "ranging from one-eighth to four square miles." *Carpenter* at 2218. Given the degree of detail with which law enforcement retraced the movements of 100 random citizens, it is hard to imagine the ALPR database creates a record less detailed than CSLI.

The crux of the inquiry into Nadauld's expectation of privacy comes down to whether the data generated by ALPR is more like the discrete monitoring at issue in *Knotts* and *Karo*, or the expansive surveillance generated by GPS and CSLI in *Jones* and *Carpenter*, respectively. *Knotts*, 460 U.S. at 281; *Karo*, 468 U.S. at 708; *Jones*, 565 U.S. at 409; *Carpenter*, 138 S.Ct. at 2208. Here, the record indicates that the data generated by ALPR is closely analogous to GPS and CSLI, while easily distinguishable from a mere aid to law enforcement in monitoring discrete journeys on public roads. While ALPR's initial function of scanning a passing license plate could be construed as more of a *Knotts* issue, it is the subsequent aggregation and storage of the data ALPR scanners capture that is dispositive in showing ALPR violated Nadauld's reasonable expectation of privacy. 460 U.S. at 281.

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. 138 S.Ct. at 2217. The Supreme Court has distinguished the technological equivalent of tailing at issue in *Knotts* and *Karo* to law enforcement's access to aggregated

records of a person's whereabouts, holding that "individuals have a reasonable expectation of privacy in the whole of their physical movements" 565 U.S. at 430. Indeed, the Court opined that "Society's expectation has been that law enforcement…could not secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 430. In *Carpenter*, Justice Roberts emphasized the retrospective quality of CSLI data, and that police need not even know in advance whether they want to follow a particular individual to travel back in time and retrace their steps. 138 S.Ct. at 2218. ALPR is precisely the type of "permeating police surveillance" the Court has struck down in recent years. *United States v. Di Re*, 332 U.S. 581, 595 (1948).

The analysis of Nadauld's expectation of privacy is informed not just by the type of information gathered by ALPR, but the means with which it was collected. Unlike the GPS at issue in *Jones*, ALPR vehicle location data was not gathered by GPS, but by state-of-the-art license plate scanners. 565 U.S. at 430. In *Kyllo v. United States*, The Supreme Court held that law enforcement's utilization of technology not in common use to obtain protected information heightens the expectation of privacy at issue. *Kyllo*, 533 U.S. 27, 30 (2001). The license plate scanners that make up ALPR are certainly not in common use, therefore heightening Nadauld's expectation of privacy. In recording the geographical location of each license plate it scans, ALPR produces a database of all scans of that plate throughout San Diego for the past five years. R. at 46. Using this database, law enforcement can quickly, accurately, and with minimal resources produce an exhaustive chronology of a person's movements in the city spanning five years. *Id.* Notably, Carpenter's location data spanned 127 days, and in his *Jones* concurrence, Justice Alito opined that "the line was surely crossed before the 4-week mark" *Carpenter*, 138 S.Ct. at 2218; *Jones*, 565 U.S. at 430. In light of these precedents, we can be sure that the five-

year record produced by ALPR crosses the line and violated Nadauld's reasonable expectation of privacy when the police accessed his, and 99 others, ALPR data without a warrant.

C. Law enforcement's 24/7 surveillance of Nadauld's home through a fixed pole-camera violated his reasonable expectation of privacy.

Law enforcement's warrantless surveillance of Nadauld's home was unlawful because the decision to mount a camera on a pole outside his home was based purely on evidence unlawfully obtained from the ALPR database. R. at 10. Consequently, the surveillance footage that led law enforcement to Nadauld's home on September 29, 2021 is derivative evidence and should be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). Setting aside the derivative evidence issue, the constitutionality of the pole-mounted surveillance conducted in this case largely turns on the distinction between short-term public monitoring and the product of 24/7 surveillance in the aggregate. Much like the aforementioned analysis of ALPR, the product of the pole-mounted camera must be viewed through the lens of what society views as reasonable.

People certainly do not have a reasonable expectation of privacy in the mere observation of their home's exterior. "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). The question presented here is not whether law enforcement can conduct a stakeout outside of a suspect's home, or film the exterior of a home for evidence when they believe evidence of a crime is about to present itself. Here, the inquiry is whether individuals reasonably expect law enforcement to have the ability to surveil their home 24/7 indefinitely, without judicial oversight. 389 U.S. at 351. Critical to this analysis is the heightened protection the Court's jurisprudence has afforded to the home. 533 U.S. at 31. While traditionally it has been the interior of the home at issue in the

Fourth Amendment context, areas on the periphery of the home or "curtilage" have also been afforded protection. *Id.* at 34.

Like CSLI, GPS, and data created by ALPR, round-the-clock surveillance of a home over a lengthy period reveals a great deal about a person. In addition to pole-mounted cameras offering law enforcement a live view of a home, the camera also provides law enforcement the ability to mine previously recorded footage to assemble "a wealth of detail about [the home occupant's] familial, political, religious, and sexual associations." *State v. Jones*, 903 N.W.2d 101, 112 (S.D. 2017) (Citing *Jones*, 565 at 415). From the pole-mounted camera, law enforcement recorded every person that visited Nadauld's home, every package he received, and countless other routines and activities that made up his life. This type of extended surveillance would be beyond the scope of law enforcements resources prior to the advances of technology, and this Court's jurisprudence must advance along with changes in technology and the evolution of societies expectations. 565 U.S. at 430.

Then-Justice Rehnquist made a prediction in *Knotts*, which aptly highlights the characteristic of the pole-mounted camera surveillance that crosses the line. In response to the Respondent's view in that case that a holding for the government would be "twenty-four hour surveillance of any citizen…without judicial knowledge or supervision" Justice Rehnquist stated that "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Knotts*, 460 U.S. at 284. Justice Rehnquist's prediction is exactly what has transpired in this case, a ruling that the pole camera surveillance outside Mr. Nadauld's home was lawful, would allow the government to film the exterior of every home in America 24/7 365 days a year. It is precisely that kind of "permeating police surveillance" that is antithetical to

American values and to every American's reasonable expectation of privacy under the Fourth Amendment. 332 U.S. at 595.

II. THE CALIFORNIA FOURTH DISTRICT COURT OF APPEALS CORRECTLY HELD THE WARRANTLESS ENTRY AND SEARCH OF NADAULD'S HOME VIOLATED HIS FOURTH AMENDMENT RIGHTS

The "very core" of the Fourth's Amendment right against unreasonable searches is the guarantee of "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). The Fourth Amendment's reasonableness standard generally requires law enforcement to obtain a warrant supported by probable cause to enter a home without permission. *Riley v. California*, 573 U.S. 373, 382 (2014). Warrantless searches in the home are presumptively unreasonable and probable cause to believe that incriminating evidence for a felony offence is within the home is not sufficient to justify a warrantless search. *Payton v. United States*, 445 U.S. 573, 586–88 (1980). Without a warrant, probable cause is not enough to justify a search within the home unless the officers receive consent or exigent circumstances are present at the time of the search. *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009); *Bailey v. Newland*, 263 F.3d 1022, 1032 (9th Cir. 2001) ("It is clearly established Federal law that the warrantless search of a dwelling must be supported by probable cause and the existence of exigent circumstances").

"[W]hen the government relies on the exigent circumstances exception, it ... must satisfy two requirements: first, the government must prove that the officer had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion." *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir.2001) (en banc). In protecting Nadauld's right to privacy in the home free from government intrusion and honoring one of the most fundamental principles of the Constitution, this Court must find that Officers

Hawkins and Maldonado lacked probable cause and exigent circumstances necessary to enter Nadauld's home without consent. Unless this Court finds both probable cause and the presence of exigent circumstances, this Court must affirm the Fourth District California Court of Appeal's decision.

A. Law enforcement lacked the requisite probable cause necessary to enter and search Nadauld's home without a warrant.

"A man's house is his castle." [1] The Framers of the Constitution valued the sanctity of that home to such a degree that they dedicated two amendments in the Bill of Rights to protecting the privacy of the home. *Moore v. Peterson*, 806 F.3d 1036, 1043 (11th Cir. 2015). In upholding this fundamental right, Supreme Court Fourth Amendment jurisprudence has consistently held that a warrant is generally required for the search of a home. *Fernandez v. California*, 571 U.S. 292, 298 (2014). Although there are exceptions to the warrant requirement, both warrants and exceptions require officers conducting the search to have probable cause. A police officer has probable cause to conduct a search when "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief' " that contraband or evidence of a crime is present. *Texas v. Brown*, 460 U.S. 730, 742 (1983). Though there is no precise definition of probable cause, this Court has required a showing of "fair probability" on which a "reasonable and prudent person, not legal technicians, [would] act." *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

In order to determine whether a police officer has probable cause to conduct a search, the totality of the circumstances must demonstrate that the facts available to the officer would warrant a reasonable person to believe that contraband or evidence of a crime is present. *Florida v. Harris*, 568 U.S. 237, 243 (2013); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (examining

[1] 2 Legal Papers of John Adams 142 (L. Wroth & H. Zobel eds. 1965).

the events leading up to the arrest to determine whether an officer had probable cause for an arrest); *Gates*, 462 U.S. at 238 (rejecting the *Aguillar-Spinelli* two prong test in favor of a totality of the circumstances test to determine the presence of probable cause). Though probable cause is necessary to obtain a warrant, searches conducted under an exception to the warrant requirement, including the exigent circumstances exception, do not relieve police from needing probable cause for a search. *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) (en banc).

When officers witnessed an attempted shooting by an individual, described as "adult male, Hispanic in his 20s, thin build, taller, wearing a white sweater, and armed with a firearm," who fled in a Green Ford Focus. *United States v. Lopez*, 482 F.3d 1067, 1069–70 (9th Cir. 2007). Later that day, police located a Green Ford Focus and identified the owner of the car as Roberto Lopez Gomez, who seemed to fit the description based on his DMV information. *Id.* at 1070. Upon further observation, officers saw a woman leave a Ford Taurus driven by Hosvaldo Lopez, a Hispanic man, start the Ford Focus and drive it away. *Id.* Both vehicles were stopped, and Lopez was taken into custody despite officers seeing his driver's license. *Id.* The Ninth Circuit held that though probable cause based on suspect's description dissipated before the officer's took him into custody, there was sufficient probable cause that Lopez knew the Ford Focus was connected to a crime and Lopez's actions in helping retrieve the car provided further reason to believe that he was acting to assist the attempted shooter. *Id.* at 1077.

When a defendant was the sole passenger in a car carrying thirty-seven pounds of marijuana hidden in the dashboard and rear panels, the Ninth Circuit noted that the relevant facts indicating a fair probability defendant was linked to drug trafficking included: the car belonged to neither occupant and was procured under suspicious circumstances, the car was entering the United States from a Mexican city known as a drug source, and officers considered it typical for

drug traffickers to travel in pairs to deflect suspicion. *United States v. Buckner*, 482 F.3d 1067, 1074 (4th Cir. 2007); *see also United States v. Valencia-Amezcua*, 278 F.3d 901, 906-08 (9th Cir. 2002) (finding probable cause based on defendant's physical proximity to the crime scene and suspicious conduct in helping to attempt to conceal a secret door).

Police had considerably less information connecting Nadauld to the Balboa Park shooting than what was present in *Lopez*, including a lack of any physical description of the Balboa Park shooter. Looking to the probability that Nadauld knew his gun was connected to the crime, Nadauld's residence was one of ten that the investigation had determined had the most driving location data corresponding to the data of vehicles leaving the area of the shooting. R. at 4. This meant that at the time letters regarding rifle inoperability were sent and pole cameras were placed in front of homes, law enforcement could not identify with any definiteness that Nadauld was the shooter any more than they could of nine other individuals. What surety law enforcement did have is cut substantially when considering the fact that police limited the investigation to cars fleeing the scene of the shooting and non-law enforcement individuals who owned assault rifles. R. at 3. Unlike Lopez's retrieval of a getaway car, which could reasonably indicate to law enforcement that he knew the car was connected to a crime, Nadauld performed no act that law enforcement could have reasonably interpreted as knowing his gun was connected to the crime before searching his home. At the time of the search, law enforcement only knew that Nadauld owned a registered assault rifle and that he was given a duffle bag from a co-worker whose vehicle was seen leaving the scene of the shooting. R. at 2–4.

While a search subsequent to arrest revealed Nadauld was concerned about where McKennery was the day of the shooting, those messages are irrelevant to determining whether police had probable cause before the search. That police found evidence to support their

unconstitutional acts after they have been committed is not justification for violating Nadauld's fundamental right to privacy in the home. Nadauld's case is also unlike *Buckner* and *Valencia-Amezuca* because Nadauld was not temporally or physically near the scene of the crime. Nadauld was not on the list of vehicles fleeing the scene on the day of the shooting, and what the police determined to be a suspiciously similar driving pattern becomes less suspicious in knowing that McKennery and Nadauld were both coworkers. R. at 2–3. Finally, police's observation that Nadauld received a duffle bag by McKennery is insufficient to determine that the bag were the rifle. Considering the totality of the circumstances, there was less than a fair probability that Nadauld was the shooter.

B. There were no exigent circumstances present to justify a warrantless search of Nadauld's home.

The exigency exception enables law enforcement to handle situations that objectively present a compelling need for official action and no time to secure a warrant. *Riley v. California*, 573 U.S. 373, 388 (2014); *Missouri v. McNeely*, 569 U.S. 141, 149 (2013). Exigent circumstances are defined to include "those circumstances that would cause a reasonable person to believe that entry was necessary to prevent imminent risk of death or serious injury, the imminent destruction of relevant evidence, or the escape of the suspect." *See Kentucky v. King*, 563 U.S. 452, 473 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir.1989). Considering there is no indication in the record that Officers Hawkins and Maldonado were preventing the escape of any suspect, this argument will focus on the exigencies of destruction of evidence and risk of imminent danger or death to others. In assessing whether an exigency exists, the courts must analyze whether a "now or never situation" actually existed based on the totality of the circumstances. *Lange v. California*, 141 S. Ct. 2011, 2018 (2021).

i. Any threat of destruction of evidence created by police does not classify as a legitimate exigent circumstance

The need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search. *See U.S. v. Alaimalo*, 313 F.3d 1188, 1193 (9th Cir. 2002) (justifying warrantless entry into a home to secure the premises where there was probable cause a package of narcotics was present); *U.S. v. Lindsey*, 877 F.2d 777, 781 (9th Cir. 1989) (finding that exigent circumstances are frequently found when explosives are involved). However, the mere presence of a firearm does not create an exigent circumstance. *U.S. v. Johnson*, 22 F.3d 674, 680 (4th Cir. 1994) (holding there were no exigent circumstances justifying the warrantless seizure of a gun after police freed a victim who held against her will because they had ample time to secure the premises and receive a search warrant after she was freed); *U.S. v. Simmons*, 661 F.3d 151, 158 (2d Cir. 2011) (finding no exigent circumstances justifying the search for gun in an apartment because police had exercised control over a compliant occupant and surrounded the premises, neutralizing any threat that defendant or the gun may have posed).

When an informant told police that an escapee from a juvenile detention center had drugs and guns at his residence and threatened to kill her for contacting the police initially, officers arrived at the residence and performed a warrantless search of the premises. *U.S. v. Dawkins*, 17 F.3d 399, 406 (D.C. Cir. 1994). The D.C. Circuit Court determined that there were several points in the investigation when officers should have known they were interacting with the defendant and that there was an absence of destruction from within the apartment. *Id.* Critically, the court distinguished the case from others where police had independent knowledge that the destruction of evidence was immediate or very likely. *Id.*

Looking to the circumstances that transpired at Nadauld's residence, officers delivered a letter eleven days after the Balboa Park shooting instructing everyone with a registered assault rifle to destroy or dispose of the gun within the month. R. at 4. Nadauld received the letter only two days before the warrantless search. R. at 4. Though police may have had independent knowledge that destruction of the gun used during the Balboa Park shooting was very likely, it is only because they created the circumstances by instrucing any potential suspect to destroy or dispose of the weapon. Under the police-created exigency doctrine, police may not rely on the need to prevent destruction of evidence when the exigency was "created" or "manufactured" by the police. *King*, 563 U.S. at 461. Because law enforcement delivered a letter to all registered assault weapon owners requiring them to render the potential weapon involved in the crime inoperable, the officers created a perpetual exigency that the evidence will be destroyed. Additionally, upon initial questioning, Nadauld offered to bring the officers the gun they requested to see under the guise that it was rendered inoperable. R. at 23. This interaction and the officers' false pretenses only perpetuated Nadauld to comply with the police's order to render the weapon permanently inoperable before turning it over to police. R. at 35. Considering officers were observing Nadauld via video surveillance and two officers were at the premises, it is reasonable that an officer could obtain a warrant while other officers secured the premises, as the *Dawkins* court suggested. Instead, Hawkins willingly chose to forego backup that could have helped him secure the premises or assist him in obtaining a search warrant while he spoke with Nadauld. R. at 23. Per the police created exigency doctrine, the destruction of evidence in this case may not be used to justify a warrantless search in the home under the exigency exception.

ii. There was no threat of imminent danger to the public that required officers to enter Nadauld's home without a warrant

If police reasonably believe they or the general public are at risk of imminent harm or

death, the exigency exception permits officers to conduct a warrantless search. *U.S. v. Moskow*, 588 F.2d 882, 892 (3d Cir. 1978) (entry justified because police knew suspected arson had been in building and delay would have created risk of harm to officers and general public); *U.S. v. Atchley*, 474 F.3d 840, 851 (6th Cir. 2007) (entry justified because officers reasonably believed that occupants were manufacturing methamphetamine in hotel room and such operations present danger of explosion, which could harm people nearby). In *Armijo v. Peterson*, officers arrested a student in his home and searched it without a warrant after students, the principal, and the student's alleged co-conspirator's mother provided information that, when coupled with two bomb threats against the school made by an anonymous caller to the police, led the police to believe a shooting would occur that day. 601 F.3d 1065, 1068–69 (10th Cir. 2010). The Tenth Circuit determined that the exigent circumstances exception permits warrantless home entries when officers reasonably believe someone or something in a house may *immediately* cause harm to persons not in or near the house. *Id.* at 1071.

By contrast, Officers Hawkins and Maldonado had considerably less information that connected Nadauld to any threat of imminent harm to persons in or outside of his home. Police received an anonymous call on September 28th from someone claiming to be the Balboa Park shooter and threatening "this time, it's gonna be a school." R. at 4. In *Armijo*, police knew which school was under threat, when the potential shooting would occur, and had information that indicated who would carry out the crime. In Nadauld's case, police had none of that detailed information and the record is devoid of any attempts by the police to secure schools or obtain warrants to investigate those areas that most correlated to the driving location data of the fifty vehicles that fled the scene of the shooting. Additionally, officers were watching Nadauld and the other suspects through consistently running pole cameras, which would allow them to

monitor whether Nadauld was leaving his home with a rifle. Considering the officers felt that the duffle bag McKennery gave Nadauld was likely to contain the rifle enough to spring into action without a warrant, it follows that they would have made that assumption had Nadauld left his home with a rifle shortly after the anonymous call.

The Superior Court of California's opinion emphasized that the public fear of an unresolved shooting two weeks prior to Nadauld's arrest and pressure from the media added to the exigent circumstances present at the time the search was conducted. R. at 11. The Ninth Circuit recognizes an exception for police fulfilling their community caretaker role, which permits the admission of evidence discovered without probable cause. *U.S. v. Russell*, 436 F.3d 1086, 1092–93 (9th Cir. 2006). Indeed, this Court has recognized the caretaking role of local police in permitting the search of a car without warrant or probable cause. *Cady v. Dombrowski*, 413 U.S. 433 (1973). However, this exception flows from the "emergency doctrine" which is district from the traditional exigent circumstances analysis. Still, the community caretaker exception has pointedly not extended to warrantless searches of a firearm in the home because there is a constitutional difference in applying the exception to a home and a vehicle. *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021). Therefore, public pressures and media frenzy are not a legitimate factor to consider in analyzing the totality of the circumstances to determine whether exigent circumstances were present. Looking to Nadauld's case, the lack of suspects and pressure from the public for police to do their job does not weigh in favor of or against either party.

C. Under the Fruit of the Poisonous Tree doctrine, the rifle found in Nadauld's home is impermissible evidence because it was obtained through an investigation that continuously violated his Fourth Amendment rights.

The fruits of police conduct which actually infringes a defendant's constitutional rights

must be suppressed. *Michigan v. Tucker*, 417 U.S. 433, 445 (1974). The exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and evidence later found to be derivative of an illegality. Unless this Court finds that the police had probable cause and exigent circumstances were present at the time Officer Hawkins entered Nadauld's home, the rifle is a direct result of an illegal search. Even if this Court finds that the warrantless search of Nadauld's home fell within the exigent circumstances exception, the rifle is still inadmissible as the fruit of unconstitutional surveillance through ALPR cameras.

There are three exceptions to the exclusionary rule, three of which involve the causal relationship between the unconstitutional act and discovery of the evidence. *Utah v. Strieff*, 579 U.S. 232, 238 (2016). The independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. *Murray v. United States*, 487 U.S. 533, 537 (1988). The inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. *Nix v. Williams*, 467 U.S. 431, 443–44 (1984). Finally, the attenuation doctrine allows for the admission of evidence when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance. *Hudson v. Michigan*, 547 U.S. 586, 593 (2006). Considering Nadauld's rifle was not acquired from a separate source from the search, nor was it inevitable that the rifle would have been discovered outside of McKennery returning the gun to Nadauld, neither the independent source doctrine nor the inevitable discovery doctrine would apply.

The attenuation doctrine allows evidence obtained as a result of an event that breaks the causal chain of discovery of the evidence from the unconstitutional act. *Streiff*, 579 U.S. at 238. In *Segura v. United States* and *Utah v. Streiff*, this Court qualified the discovery of a valid

warrant after police had unlawfully acted against the respective defendant favors finding that the connection between unlawful conduct and the discovery of evidence is "sufficiently attenuated to dissipate the taint." 468 U.S. 769, 799–801, 815 (1984) (entering an apartment after seeking a warrant, but before it was issued by a magistrate judge, and discovering drugs in a limited search for security purposes); 579 U.S. at 240–41 (stopping defendant unlawfully, but upon learning he had an outstanding warrant for his arrest, lawfully arrested and searched him incident to the arrest). These examples of attenuation demonstrate the principle that the discovery or seeking out of a warrant during or before the unconstitutional actions of law enforcement are sufficient to render evidence obtained through unconstitutional actions admissible. In Nadauld's case, law enforcement did not seek warrants before entering Nadauld's home nor was there discovery of an active warrant at the time they entered his home. Law enforcement made no effort to legitimize their search because they had no probable cause, acting on hunches and tenuous connections to find a "prime suspect" two weeks after a highly criticized investigation. R. at 31.

With none of the exceptions applicable, the assault rifle found in Nadauld's home is undoubtedly the fruit of not just a poisonous tree, but a whole orchard. As such, this Court should affirm the Fourth Division of California Court of Appeal's decision to grant Nadauld's Motion to Suppress.

CONCLUSION

The use of ALPR surveillance and pole cameras during the investigation and the warrantless entry into Nadauld's home violate Nadauld's Fourth Amendment right to be free from unreasonable searches and seizures. Because of law enforcement's unconstitutional actions, Respondent respectfully requests that this Court AFFIRM the California Court of Appeals' decision to grant his motion to suppress.

Respectfully submitted,

/s/ R4

R4

Counsel for the Respondent