R8

No. 1788-850191

IN THE

Supreme Court of the United States

NOVEMBER TERM, 2022

UNITED STATES OF AMERICA,
Petitioner
v.

NICK NADAULD
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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II. Under the Fourth Amendment's protection against unreasonable searches, was Nadauld's home unconstitutionally searched when law enforcement entered without permission, probable cause, or warrant exception where they then found an assault rifle and resulted in a confession from Nadauld.

STATEMENT OF THE FACTS

On September 14, 2021, a masked shooter fired an M16A1 ("M16") automatic assault rifle on an open crowd from a rooftop in Balboa Park, killing nine people and injuring six others. R. at 2. Two weeks after the incident, police identified 33-year-old Frank McKennery ("McKennery") as the "Balboa Park Shooter." R. at 2. Facing public and media backlash calling it a "humiliating catastrophe," R. at 31, and lack of leads, R. at 3., law enforcement analyzed the surveillance footage from security cameras in and around Balboa Park. *Id.* The camera footage captured about forty unidentified individuals who fled on foot. *Id.* The camera footage also revealed fifty vehicles leaving the scene prior to the police's arrival. *Id.* During their search, law enforcement determined that none of the fifty vehicle registered owners were members of the Jora Guru religion that was referenced in the Balboa Park Shooter's Manifesto. *Id.* Additionally, law enforcement retrieved a list of legally registered assault rifle owners in the area. *Id*. Upon cross referencing the list with the fifty vehicles law enforcement discovered that none of the fifty registered vehicle owners were law enforcement officers and none of them were on the list of registered assault rifle owners. Id. Nick Nadauld ("Nadauld") was only found on the list of those who legally own a gun. *Id.*

Law enforcement acquired information from the Automatic License Plate Recognition ("ALPR") database about the movements of the fifty vehicles, which included McKennery's vehicle. *Id.* The purpose of the ALPR is to allow law enforcement to check if a vehicle is legally registered or licensed and compares it to a "hot list." *Id.* A camera, usually mounted on police vehicles or poles at selected intersections, scans passing cars for their license plate information and is used to instantly compare the information with a police database. *Id.* The time and location information are retained for a fixed retention period and is only re-accessible by law enforcement

given a legitimate law enforcement purpose. R. at 38. The ALPR only acts as a pointer system which allows law enforcement to conduct searches with limited information, including partial license plate information. *Id.* The system only contains the data sets of license plate numbers, photos of the vehicles, and geospatial location from where the images were captured. R. at 39. The ALPR system does not contain personal identifying information associated with data collected through ALPR devices. R. at 38.

As part of their investigation, law enforcement also examined the movements of vehicles owned by the individuals on the list who legally own an assault rifle, including Nadauld. R. at 3. They cross-referenced the movements of those who legally own an assault rifle to the movements of the fifty vehicles that fled Balboa Park. *Id*. Only upon making this cross reference were law enforcement able to note that Nadauld's vehicle and McKennery's vehicle had considerable overlaps. R. at 4. Nadauld and the other nine individuals who legally own an assault rifle were selected to be monitored by a pole mounted camera because their movements corresponded the most to the driving location data of those fifty vehicles who were at Balboa Park during the shooting. *Id.* On September 25, 2021, law enforcement mailed a letter to all ten residences, including Nadauld, informing them that in one month officers would be coming to their homes to ensure whether their assault rifles had been rendered inoperable pursuant to California Penal Code Section 30915. *Id.*, which Nadauld received on September 27, 2021. *Id.* On September 29, 2021, at 5:23pm, officers viewed McKennery pulling into Nadauld's driveway and handing him a large duffel bag. R. at 4. Two FBI officers were dispatched and arrived at his home thirty minutes after the exchange of the duffle bag. *Id.* The officers questioned Nadauld outside his home and without consent, forcefully entered his home. *Id.* They searched his house and found the M16 rifle which was not yet rendered inoperable. *Id.* One officer questioned Nadauld more aggressively until it

was revealed that McKennery had borrowed his weapon. *Id*. Nadauld made it clear that as far as he was aware McKennery had been in the desert on the day of the shooting and had even sent a picture of himself there to prove that. R. at 4.

On October 1, 2021, a federal grand jury indicted Nadauld with nine counts of second-degree murder under California Penal Code Section 187, nine counts of involuntary manslaughter under California Penal Code Section 192, one count of lending an assault weapon under California Penal Code Section 30600, and one count of failing to comply with California Penal Code Section 30915. Following his conviction, Nadauld filed a motion to suppress the evidence found on the day of his arrest pursuant to Rule 12(b)(3)(c) of the Federal Rules of Criminal Procedure. R. at 5. The United States District Court denied Nadauld's motion to suppress evidence in its entirety. R. at 12. Nadauld then appealed his conviction to the United States Court of Appeals for the Ninth Circuit. R. at 13. The Ninth Circuit reversed and granted the motion to suppress. R. at 21. The Government now appeals the Ninth Circuit's ruling.

SUMMARY OF THE ARGUMENT

This Court should affirm the Ninth Circuit's holding because the electronic surveillance violates the privacy guarantees under Fourth Amendment when it permeates into Nadauld's reasonable expectation of privacies. The use of the ALPR database to track his uniquely private movements constitutes a search. Additionally, the twenty-four-hour surveillance of his home reveals private information that violates societal expectation of privacy in their private residences. The unlawful entry and search of Nadauld's home was unconstitutional because the legal gun ownership and natural compliance response to law enforcement does not provide probable cause. Further, a shooting that occurred over a week and a threat to a school after hours does not grant an exception the warrant. All evidence and "fruits" were illegal obtained and must be suppressed.

STANDARD OF REVIEW

On a motion to suppress, this Court reviews legal conclusions *de novo* and the district court's factual findings for clear error. *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE PERMEATING ELECTRONIC SURVEILLANCE OF NADAULD, EVEN WITH SOME LEVEL OF PUBLIC KNOWLEDGE OF HIS ACTIVITIES, VIOLATES THE PRIVACY GUARANTEES UNDER THE FOURTH AMENDMENT.

The Fourth Amendment precludes the search that occurred when law enforcement used the ALPR database and pole mounted cameras to specifically target and monitor Nadauld's movements. The Fourth Amendment, as applied to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. This Court has long held that the "touchstone of Fourth Amendment analysis" is whether a government action intrudes upon an individual's "reasonable expectation of privacy," and is thus a "search" for which a warrant must generally be obtained. *Katz v. United States*, 389 U.S. 346, 361 (1967). An expectation of privacy is protected by the Fourth Amendment 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. *Id.* "Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carpenter v. United States*, 138 S. Ct. 2206, 2213-14 (2018). This Court has provided two guideposts to determine whether a person's expectation of privacy is entitled to protection. One is to resolve the "privacies of life" against "arbitrary state power." *Id*.

The second is to consider that the Framers intended to "place obstacle in the way of too permeating police surveillance. *Id.*

In applying this Court's longstanding test under *Katz* and the two guideposts provided by this Court, the Ninth Circuit held— and Nadauld argues— that a warrantless search through the ALPR database and pole-mounted cameras, even when there is some public knowledge, violates the Fourth Amendment. R. at 18. This Court should affirm the Ninth Circuit in granting Nadauld's motion to suppress the evidence that was illegally obtained through an unreasonable search. First, Nadauld has a reasonable expectation of privacy in the unique private movements that were captured and aggregated by the Government's baseless acquisition of the ALPR database. Second, Nadauld has a reasonable expectation of privacy to be free from the Government's baseless 24-hour surveillance such that uniquely private information is discovered.

A. Nadauld has a reasonable expectation of privacy in the uniquely private movements and location that were captured by the Government's baseless acquisition of the ALPR database.

The retroactive tracking and cross-referencing of the movements between fifty registered vehicle owners and fifty individuals who legally own a gun in the area, which included Nadauld, violates the privacy guarantees under the Fourth Amendment. R. at 3. This information about a person's pattern of movements and location is uniquely private. *Carpenter*, 138 S. Ct. at 2213. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 2217(quoting *Katz,* 389 U.S. at 351-352). "There is no need for the Court to craft a new rule to decide [a] case," when, as has occurred here, "it is controlled by established principles from [the Court's] Fourth Amendment jurisprudence." *Kyllo v. United States*, 533 U.S. 27, 41-42 (2001). As a matter of first impression the Court has not ruled

the constitutionally of the ALPR database. However, the phenomenon regarding the government's "ability to chronicle a person's past movements" through technological enhancement has already been determined to be unconstitutional without a warrant. *Carpenter*, 138 S. Ct. at *2216. Carpenter*, recognizes that "individuals have a reasonable expectation of privacy in the whole of their physical movements" even when moving across public areas. *Carpenter*, 138 S. Ct. at 2217 (holding tracking of CSLI data, even in public roads, is unconstitutional without a warrant)*; see also United States v. Jones,* 565 U.S. 400 (2012)(explaining GPS tracking of individual's vehicle in public roads is unreasonable). *But see United States v. Hufford*, 539 F.2d (9th Cir. 1976)(holding individual does not have a reasonable expectation of privacy in Government's installation of beeper on a vehicle). Such tracking of a person provides the Government "an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Carpenter*, 138 S. Ct. at 2217. Thus, this Court has recognized that any police measures that permeates into private information is at the core of the privacy guarantees under the Fourth Amendment.

Here, it is beyond dispute that Nadauld had a subjective expectation of privacy in that the Government would not use his license plate information to retroactively track his movements such that private information is revealed. R. at 4. As the Ninth Circuit held, Nadauld did not vitiate his subjective expectation, unlike the individual in *Yang. United States v. Yang,* 958 F.3d 851 (9th Cir. 2020)(holding no subjective expectation of privacy when there is no common practice to keep a rental past contract termination). Thus, the "focal issue is whether the warrantless usage of the ALPR database violates societal expectation." R. at 15.

The Government's baseless acquisition of the ALPR database to track individual's uniquely private movements requires Fourth Amendment protections for three reasons: (1) it

functions identically to the CSLI data in revealing private information, which this Court has determined may not be obtained without a warrant, (2) some level of public knowledge does not vitiate an individual's reasonable expectation to be free of an intrusive Government search, and (3) the third-party doctrine does not govern when the APLR database is technology used for geographical tracking and it is not voluntarily disclosed.

1. The ALPR database functions identically to CSLI data, which this Court has held cannot be obtained without a warrant.

This Court already confirmed the unconstitutionality in the government's usage of a technological enhancing device mirroring the issue at hand. In *Carpenter*, this Court denied the use of CSLI data— an identical device to the one the Government employed in this case—to collect and track the movements of Nadauld and the rest of the other 99 individuals that were targeted. *Carpenter*, 138 S. Ct. at 2221. In so doing, *Carpenter* recognized that "[t]he rule the Court adopts must take account of more sophisticated systems that are already in use or development." *Carpenter*, 138 S. Ct. at 2221 (quoting *Kyllo*, 533 U.S. at 36)(internal quotations omitted) *See*, *e.g*. *Carpenter*, 138 S. Ct 2206 (cell-site location information); *Kyllo*, 533 U.S. 27 (thermal-imaging device). *But see United States v. Knotts*, 460 U.S. 276 (1983)(beeper);*United States v. Hufford*, 539 F.2d (9th Cir. 1976)(beeper). *Carpenter* "decline[d] to grant the state unrestricted access to a wireless carrier's database of physical location information." *Carpenter*, 138 S. Ct. at 2223. This holding followed this Court's determination that the accuracy of the CSLI data is "rapidly approaching GPS-level precision" and the "retrospective quality of the CSLI gives police access to a category of information otherwise unknowable." *Id.* at 2218 (reasoning such tracking partakes many of the qualities of the GPS monitoring considered in *Jones*). In dicta, this Court in *Carpenter* distinguished a cellphone from a vehicle in that a cellphone was a "feature of human autonomy" because a person takes their cell phone into private places. *Id.* at 2218. However, in the application

to the ALPR database, this distinction falls apart. The ALPR database is just as advanced and reveals information equivalent to the CSLI data, while a vast majority of population uses their vehicle as a primary mode of transportation.[1]

The CSLI data at issue in *Carpenter* and the ALPR database at issue here are identical in form and function. For example, both reveal "retrospective quality of the data" that gives "police access to a category of information otherwise unknowable". *Carpenter*, 138 S. Ct. at 2218. Moreover, each serves the role of pinpointing and compiling an individual to a location that is "detailed, encyclopedic, and effortlessly compiled." *Id.* at 2216. This is possible because both pinpoint an individual at a location and time such that when they are aggregated, they reveal an individual's whole movements. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. *Id.* Access to the quality of information in ALPR database, like CSLI data, the Government can utilize it to travel back in time and retrace a person's whereabouts, subject to simply getting in their car and driving to their destinations. R. at 40.

Unlike the beepers used in *Knotts* and *Hufford*, which targets a single person of interest, the ALPR database indiscriminately runs and logs the license-plate number of every driver in their line of sight. The beeper from the 1980s in *Knotts* and a tracker from the 1970s in *Hufford* are not capable of storing and retroactively tracking an individual's movements for up to five years, or more, if the Government uses its discretion to decide it will be part of a criminal, civil or any lawful action. R. at 40. On the contrary, modern day CSLI data is equivalent to the ALPR database. Thus, if the CSLI data used in *Carpenter* may not be obtained without a warrant under the Fourth

[1] *ACLU Win Court Ruling That Police Can't Keep License Plate Data Secret*, Electronic Frontier Foundation (Aug. 31, 2017), https://www.eff.org/press/releases/electronic-frontier-foundation-aclu-win-court-ruling-police-cant-keep-license-plate

Amendment—and this Court made clear that a warrant is required—than so should the ALPR database that the Government employed here.

2. Some level of public knowledge does not vitiate an individual's reasonable expectation to be free of arbitrary state power and mass surveillance.

Nothing screams "arbitrary state power" into "the privacies of life" louder than the Government requiring individuals to display their license plates[2] and taking advantage of that regulation to monitor the movements and locations with a technological device that allows them to easily monitor a vast majority of the population. The Founders crafted the Fourth Amendment with the intent of ending the regime of general writs, which principally relied on arbitrary state action and mass surveillance. *Carpenter*, 138 S. Ct. at 2213-14. Because individuals maintain a "legitimate expectation of privacy in the record of his physical movements" accessing the substantial history of their movements on public roads contravenes societal expectation to be free from perpetual surveillance. *Id.* at 2217.

The ALPR database has the capability of revealing not only individual's particular movements, but through them his familial, political, professional, religious, and sexual associations." *Id.* Some public knowledge does not equate to the information that the Government obtained here. In one fell-swoop through the tracking of movements through the ALPR scans, the Government was able to determine that none of the register owners were part of the Jora Guru religious group, that ten individuals who legally owned a gun had overlapping patterns with vehicles that fled the Balboa Park shooting, where each of those individuals lived and that Nadauld and McKennery were co-workers. R. at 3-4. Although it is socially acceptable that the government may run a person's license plate for safety and regulatory reasons, there is no common standard

[2] Cal. Veh. Code § 5200 (West, Westlaw current with urgency legislation through Ch. 997 of 2022 Regular Session).

practice that the Government will compile them to cross reference it in a manner that reveals private information. The Government doesn't suggest that such a practice exists either considering the ALPR database "only acts as a pointer system that allows law enforcement to conduct searches with limited information" and the ALPR is not used to collect person identifying information. R. at 38. When individuals turn over information to the Department of Motor Vehicle and display their license plates, they do not expect their information to be used to reveal their patterns of movements where they go to church or their relationships to other drivers on the roadway.

Furthermore, the Government does not disclose the location of the ALPR cameras nor release any records they have on an individual. R. at 39. This means the Government is free to track an individual's movements on public roadway without even giving them any opportunity to avoid their cameras if they wish to remain private. Allowing the Government free access to this information, simply because it is in public roads, runs afoul to the Framer's intention to restrain permeating surveillance into individuals' private life.

3. <u>The Third-Party Doctrine does not govern when the APLR database is technology used for geographical tracking and it is not voluntarily disclosed.</u>

Nadauld did not voluntarily disclose his private movements by choosing to drive on the roads. The third-party doctrine only stands for the notion that an individual has no reasonable expectation of privacy in information that he volitionally provides to another. *See*, *e.g*., *United States v. White*, 401 U.S. 745, 752 (1971)(holding conversation with informant did not require a warrant); *United States v. Miller*, 425 U.S. 435, 443 (1976)(holding bank records held by third-party did not require a warrant). To the extent that some novel technologies may jeopardize the third-party doctrine's applicability— the question regarding the geographical tracking nature of the ALPR database has been resolved in *Carpenter*. "We decline to extend *Smith* and *Miller* to

cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." *Carpenter*, 138 S. Ct. at 2216. The ALPR database is a relatively intrusive "novel circumstance" like the worries of geographical tracking CSLI data at issue in *Carpenter*. This Court does not need to disturb the holdings in *Smith* or *Miller* to conclude they do not apply in this context. The degree of the sensitive information revealed here is enough to distinguish it from *Smith* and *Miller*. The Government peered into individuals' religion and associations, not phone numbers or bank records, through the geographical tracking by the ALPR database. Furthermore, there is nothing voluntary about driving your vehicle on the roads, especially when it is not a common practice that an individual's license plate while be scanned and complied with the rest to track their past movements. People should not be forced to choose between "running a risk" of disclosing their privacy and the livelihood and convenience that a vehicle provides. A holding otherwise strips Fourth Amendment rights of all Americans who drive on public roads and could be captured by the ALPR database without them knowing where or when.

B. The warrantless surveillance of Nadauld's home is a violation of his Fourth Amendment rights when he has a reasonable expectation to be free from constant surveillance in his residential neighborhood.

Should this Court wish to reach the question whether the pole-mounted camera was unconstitutional, *Cutter v. Wilkinson,* 544 U.S. 709, 718 (2005)(reasoning "[W]e are a court of review, not of first review"), it should hold that a warrant is required for a twenty-four-hour surveillance of Nadauld's home because Nadauld has a reasonable expectation of privacy of the privacy in the front of his home that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. at 361. Places of residence that invoke increased privacy protections because

activities that occur in and around the home are more intimate than public activity. *Dow Chemical Co. v. United States,* 476 U.S. 227, 235 (1986). The Fourth Amendment and *Katz* are not meant to be applied in a rigid fashion. *See Kyllo v. United States*, 533 U.S. 27, 35 (2001)(noting that *Katz* rejected the rigid application of the Fourth Amendment using the physical trespass theory, and adopted a standard that is more flexible and capable of dealing with advancing technology). The *Katz* principle is far more expansive and is designed to deal with the problem that technology can still invade a person's privacy without ever making physical contact. *Katz*, 389 U.S. at 350-53 (dealing with the issue of the Government eavesdropping without physically intruding into the phone booth). The concern that non-human surreptitious surveillance "is worrisome because it evades the ordinary checks that constrain abusive law enforcement practices, limited police resources and community hostility. *United States v. Houston*, 813 F. 3d 282 (6th Cir. 2016)(Rose concurrence). *Knotts* even warned that the Fourth Amendment might not tolerate a future technology that enabled twenty-four-hour surveillance of any citizen of this country. *United States v. Knotts*, 460 U.S. at 283.

Nadauld was monitored in his own residential home. Individuals relocate to private residential areas for the very reason of living a private life. Unlike the common knowledge that individuals are recorded in public areas for safety and crime deterrence, an individual does not expect their private residence to be monitored in such this way. Furthermore, societal expectation does not condone a mass surveillance of individuals who legally own a gun and they do not expect a twenty-four surveillance of one's private residence. Without the utilizing surveillance cameras, police officers did not have the resources to monitor a person for this long and people do not expect it. Utilizing technology only makes it much easier to mass surveil and intrude into individual's private affairs.

The continuous surveillance of Nadauld's home effortlessly compiles intimate patterns of daily life. Thus, even if the front of the home is viewable by the public, the continuous surveillance reveals private information that should constitute a search. Monitoring a person's home reveals many private things about their lives. Here, it revealed the Nadauld and McKennery were acquaintances. Through surveillance it can be discovered who frequently visits, who the individual has a relationship with, religious visits, or even in-home medical care. The concern is of course not that this extensive surveillance will aid the Government in detecting crime. Rather, it is that if law enforcement agents are permitted to use such extensive surveillance without first obtaining a warrant, they will use it to capture broad swaths of innocent information. Thus, because the baseless twenty-four-hour surveillance of Nadauld's home reveals private information that would otherwise not be discoverable it is unconstitutional to search without a warrant.

In conclusion, this case is simply about the government seeking evidence to inculpate Nadauld and eventually convict him at trial. This Court should provide a simple answer to the question presented: "get a warrant."

II. THE NINTH CIRCUIT CORRECTLY HELD THAT LAW ENFORCEMENT DID NOT HAVE SUFFICIENT PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES FOR A WARRANTLESS ENTRY AND SEARCH OF NADAULD'S HOME.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 651 (1980). In *United States v. Jones*, the Court has articulated that a search occurs when the government physically intrudes on a Defendant's property which the FBI officers did here when they illegally entered Nadauld's home which is a constitutionally protected area. *Jones,* 565 U.S. at 407. A reasonable search conducted in accordance with the Fourth Amendment requires both probable cause and a warrant issued by a neutral magistrate. *Id*. The Government failed to meet both

requirements. This Court has stated, "unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the [Fourth] Amendment." *Payton*, 445 U.S. 585. It has also reiterated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). Although there are certain recognized circumstances in which law enforcement can conduct searches of a home without a warrant — probable cause requirement must always be met.

One such circumstance is the exigent circumstances exception which allows for warrantless searches. *Brigham City v. Stuart*, 547 U.S. 398 (2006). Here, the Government cannot rely on the exigent circumstances exception to the warrant requirement to justify the warrantless entry Nadauld's home. The burden of proof for both probable cause and exigent circumstances lies with the Government. *Katz*, 389 U.S. at 356-57. Under the Fourth Amendment, the search of Nadauld's home was unconstitutional, thus the evidence gathered therein should be excluded including the confession obtained from Nadauld based on the Fruit of the Poisonous Tree Doctrine. *Wong Sun v. United States*, 371 U.S. 471 (1963).

A. Nadauld's Fourth Amendment right to be free from unreasonable searches was violated when law enforcement unlawfully entered his home without sufficient probable cause.

To determine whether there is probable cause for an arrest in a circumstance an examination of the events that led up to the arrest is necessary. *Maryland v. Pringle,* 540 U.S. 366, 371 (2003). In *Pringle*, this Court stated that whether there is probable cause depends on the totality of the circumstances. *Id.* at 371. A finding of probable cause requires that there must be a substantial chance that criminal activity is taking place. *Id*. at 243-44.

In *Brinegar v. United States*, this Court held that a police officer had probable cause to arrest when the facts and circumstances within the officer's knowledge would lead an objectively reasonable individual to believe criminal activity had been or would be committed. *Brinegar v. United States*, 338 U.S. 160, 162 (1949). In *Illinois v. Gates*, this Court has stated the totality of circumstances should indicate that all the facts leading up to and at the time of the search must be considered. This includes a close look into how law enforcement reached their finding of suspicion of a particular individual. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). The totality of circumstances here does not support a finding of probable cause that warrants law the entry and search of Nadauld's home.

1. <u>All findings leading up the search of his home did not support a finding of probable cause as there were numbers of other individuals who could have been suspects but were not investigated due to law enforcement failure.</u>

All the facts leading up to the search of Nadauld's home indicate that officers did not have enough facts to lead to a finding of probable cause. Nadauld was one of fifty individuals who the police discovered legally owned an automatic assault rifle. R. at 3. In investigating, law enforcement deliberately failed to investigate the other owners of assault rifles who were law enforcement. Although, being part of law enforcement does not eliminate the possibility that individuals could commit such a crime. *Id*. They also assumed that the suspect was from San Diego without indicating why they had done so or if they had any evidence to prove that the shooter was in fact from San Diego. *Id*. Additionally, law enforcement failed to account for individuals who could have traveled from elsewhere in California or even out of state to commit the shooting. Furthermore, they did not investigate individuals who may have had a semi-automatic assault rifle and then illegally converted it into an automatic assault rifle. *Id*. They failed to consider individuals that may have illegally obtained an automatic assault rifle and again assumed that the shooter was

among those who legally own an automatic assault rifle. *Id*. Lastly, law enforcement did not attempt to track the forty individuals who were left unidentified and had fled from Balboa Park on foot on the day of the shooting. *Id*. They made another assumption that the shooter was not one of those people.

2. The events that took place on the day of the illegal entry and search and conversation between the two FBI officers and Nadauld did not indicate anything objectively suspicious that would lead a reasonable person to believe there was probable cause of criminal activity occurring.

In examining the totality of the circumstances, the exchange of the duffel bag that took place outside his home and the conversation between Nadauld and law enforcement that took place at his door should be considered. Again, there was no indication that Nadauld was involved in any criminal activity. The exchange of the duffle bag between McKennery and Nadauld was not in itself suspicious. The duffle bag could have contained any number of things. There was no objective evidence to show the contents in the bag was a gun. Thus, this exchange does not support a finding of probable cause because an individual dropping off a duffle bag would not lead a reasonably objective person to believe criminal activity is taking place.

In *Payton*, this Court stressed the importance and "sanctity" of one's home. 445 U.S. 573. In essence, this Court has stated that Nadauld has a fundamental right to privacy in his own home. *Id*. His actions and responses once law enforcement arrived at his door *unexpectedly* did not indicate that he was guilty or attempting to hide anything. His response to law enforcement was reasonable considering he was not expecting law enforcement on that day because they had informed him they would be coming in a month. His actions were not unusual based on how a reasonable person would react if law enforcement showed up at their door— in a threatening manner— and out of fear that the privacy of their home would be violated.

He did not display "blatant noncompliance," R. at 11. What he displayed was a completely normal reaction to two federal officers questioning him unexpectedly and accusing him of having part in a sensitive, violent incident that killed nine people and wounded six. That is a very serious accusation to make and his reaction to that was one of fear and confusion.

Nadauld was not doing anything suspicious by doing exactly what was asked of him by the officers. Officer Hawkins ordered Nadauld, "well then, we'd like to see the gun." R. at 23. When Nadauld said, "Fine. Why don't you wait here while I go get it," he was simply complying with the officers' requests to see the gun. *Id*. This is not a fact that should lend itself to a finding of probable cause of suspicious criminal activity or that Nadauld was going to get the gun to destroy it or harm the officers. The simple fact that officers are fully aware that an individual legally owns a gun does not automatically indicate that they are threatening violence or harm to the officers. This is not a fact that adds to the totality of circumstances for probable cause.

The facts lending to a finding of probable cause are reviewed by a neutral magistrate who decides whether there is enough to provide a warrant. Here, a neutral magistrate in reviewing the lackluster job that law enforcement had done in collecting the 'evidence' against Nadauld would have concluded that an objectively reasonable person would not conclude a finding of criminal activity based on those facts.

Additionally, it is hard not to acknowledge the difficult job that law enforcement had in this circumstance to catch the shooter who had killed and injured so many. They had a big responsibility and public pressure had been mounting for two weeks which would lead most officers to have tunnel-vision to get the job done. The officers need a suspect and it is difficult for them to step back and realize that objectively their suspicions about an individual may not be accurate. That is the very important and essential job of a neutral magistrate who looks at all the

facts presented by the officers to conclude whether there is objectively any suspicious criminal activity occurring. Here, the officers bypassed the requirement for a neutral magistrate to review their work and grant them a warrant by entering and searching without one. Allowing the officers to justify their actions is allowing them unchecked and unrestrained power. There is a need for a neutral magistrate to keep them in check and ensure no constitutional violations are occurring so that law enforcement is not given excessive power.

In conclusion, law enforcement failed to conduct the investigation in a proper and complete manner. They did not account for all the other individuals that could have been possible suspects because they had already concluded that Nadauld, a legal gun owner, was their suspect. At that point they decided to gather evidence that incriminated him instead of continuing to pursue other possible suspects and continue to conduct their investigation in a truthful manner. They were feeling the pressure from the community to produce a suspect and someone to blame and prosecute for the shooting. They found Nadauld and put all their resources and efforts behind surveilling him and violated his fundamental Fourth Amendment rights. In this case all the facts show that there was not enough evidence for a finding of probable cause which might have allowed law enforcement to obtain a warrant and conduct a search.

B. There were no exigent circumstances that would've allowed the officers to conduct a warrantless search of Nadauld's home, therefore the search that occurred was in violation of his Fourth Amendment rights.

"The presumption of unreasonableness that attaches to all warrantless home entries is difficult to rebut." *Welsh v. Wisconsin*, 466 U.S. at 750. The Court has only identified two exceptions that can overcome this presumption which are consent and exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 211-12 (1981). These two exceptions have been "jealousy and carefully drawn." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). Because of this the Court

hesitates to find exigent circumstances especially in the home as that is such a highly protected area. Here, Nadauld did not give consent for the officers to enter and search his home.

1. The three exigent circumstances that have been recognized by this Court do not apply in this situation therefore, a warrant was required prior to the search.

This Court has recognized exigent circumstances when there is (1) an imminent risk of death or serious injury, (2) danger of evidence being destroyed, and (3) danger of a fleeing suspect. *Brigham City,* 547 U.S. at 403. Probable cause is still required to believe exigent circumstances existed. *Id*. For these exceptions to apply there are requirements that must be met. The destruction of evidence must be "imminent," *Kentucky v. King*, 563 U.S. 452, 460 (2011); a hot pursuit of a fleeing suspect requires that the suspect be fleeing from the scene of a crime immediately, *Welsh*, 466 U.S. at 753; and the emergency aid doctrine applies only when there is an objectively reasonable belief that an individual inside the home is injured or imminently threatened with injury, *Brigham City*, 547 U.S. at 400. The one thing that all these circumstances have in common is that there *must* be a need for immediate police action. In this case, none of these three circumstances were present.

In *Brigham City*, the three officers responded to a call regarding a loud party at a residence at 3am. 547 U.S. at 401. They heard shouting when they arrived and observed two juveniles drinking beer in the backyard. *Id*. They then observed through a window door an altercation taking place in the kitchen. *Id*. Four adults were attempting to restrain a juvenile who broke free and struck one adult in the face. *Id*. The entrance there was found to be objectively reasonable because the individuals in the home were engaged in a fight that had injured people. Id. This exception refers to situations in which police need to enter a home or building quickly, with no time to obtain a warrant, for reasons that have nothing to do with catching a criminal or finding evidence. *Id*.

Such as elderly people in need of assistance or a neighbor who has not been heard from in a while. *Id*.

In *Michigan v. Fisher*, officers arrived at a residence home after receiving a complaint that there was a disturbance. *Michigan v. Fisher*, 558 U.S. 45 (2009). They viewed a smashed pickup truck parked outside the home, damaged fence posts, broken windows, and blood on the truck. *Id* at 45-6. They also saw the respondent inside the house screaming, throwing things, and his hand was bleeding. *Id*. Officers knocked and entered the home despite the respondent swearing at them and telling them to get a warrant. *Id*. The respondent pointed a gun at the officer. *Id*. The Court found that there were exigent circumstances here.

Exigent circumstances justifying warrantless home entries need to be strictly restricted to protect against any invasions that may occur by a suspicious officer. *Welsh*, 466 U.S. at 750-51. This Court in Welsh stated that the exigent circumstances exception can only apply when police must act immediately. *Id*. In that case, the Court held the police could not justify the arrest by any of the exceptions because there was no need for immediate police action, no immediate or continuous pursuit from scene of crime, and no threat to public safety. *Id*.

Brigham City and *Fisher* are both distinguishable cases from this one for a few reasons. Here, the officers did not respond to any disturbance. All they saw was a duffle bag being exchanged, which is not suspicious behavior since they did not know what was inside the duffle bag. Also, Nadauld's behavior was in strict contrast to the behavior displayed by the respondent in *Fisher*. He answered the door, was not screaming, was not throwing things, and was not injured in any manner. He complied with the officer's requests so there was no immediate need for the officers to enter his home unlawfully as there was no imminent risk of injury.

The Government argues that there were exigent circumstances as there was an imminent risk of death or injury since the police had received an anonymous call from a telephone booth supposedly from the Balboa Park shooter. In the call received on September 28, 2021 at 10:37am, the person states, "this time it's gonna be a school" threatening more violence and death. R. at 4. The warrantless entry and search of Nadauld's home occurred the next day on September 29, 2021 around 5:53pm. R. at 4. This occurred after the school day had already ended and the next school day would not begin until the next morning. The threat of a school shooting is only an exigent circumstance if there is *imminent* risk of death or injury. The officers conducted the warrantless entry and search in the evening when there was more than enough time to obtain a warrant from a magistrate and conduct a proper search before the next school day even began and the threat of the school shooting became real. There was no imminent risk of death or injury to the general public or to Nadauld inside his own home, so officers did not have the circumstances to enter without a warrant.

Similar to the *Welsh* case, there was no danger of evidence being destroyed or Nadauld fleeing. The officers were already conducting surveillance and monitoring Nadauld's movements for twenty-four hours. *United States v. Cole*, 437 F. 3d 361, 371 (3rd Cir. 2006)(holding police officers created exigency by prior surveillance). This especially applies in this circumstance when Nadauld was not even aware he was being surveilled by law enforcement so there was no urgency to bypass the warrant requirement. There was no danger of him fleeing or destroying evidence from the officers. Moreover, there was no real risk of destruction of evidence as the evidence in this case was a gun, which is not easily destroyed or discarded in the short period of time it would have taken law enforcements to obtain a warrant. The destruction of the gun is not comparable to other cases where this exception has been applied.

Most importantly there was no need for immediate police action as is required by all three circumstances. The investigation was now taking place two weeks after the Balboa Park shooting and at this point there was no longer any immediacy to the investigation. R. at 4. It was not exigent in these circumstances to unlawfully enter Nadauld's home without probable cause or a warrant. Although finding the shooter was important, it was no longer exigent and certainly did not override or excuse Nadauld's fundamental Fourth Amendment rights. The officers had ample time to obtain a warrant and then conduct the search of his home.

Although law enforcement has a vital public interest in quick investigations of extremely serious crimes such as murder, this is not different than their interest to investigate other serious crimes. *Mincey v. Arizona,* 437 U.S. 385, 393 (1978). There must be rational limitation set by this Court that doesn't allow officers to conduct warrantless searches and then use the very narrow exigent circumstances exception to justify their actions. Here, the pressure was mounting on law enforcement to find the individual responsible for the shooting which resulted in many dead and injured people. Once law enforcement suspected Nadauld, they bypassed the requirement for not only probable cause but also a warrant. Although there are circumstances in which law enforcement are allowed to conduct warrantless searches, this was not such a circumstance.

2. <u>There is no basis for creating a new exception to the warrant requirement.</u>

This Court has stated that public safety needs do not justify creating a new exception to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 391-92 (1978). Although this Court has the power to create a new exception this Court should not do so because this will create a slippery slope that will result in unreasonable searches being conducted with the hope that a new exception will be created. The Fourth Amendment's protection is supposed to be high and creating exceptions to the requirements that already exist is not the answer. The exceptions are supposed

to be very limited because if more exceptions are created then the protections of the Fourth Amendment diminish. If today a new exception is created, then tomorrow it will be followed by other cases where there might be the insistence to create other exceptions. Today if there is a mass shooting exception created then it will be difficult for the Court to draw the line at where the exceptions must be limited. More exceptions that will override the protection of the Fourth Amendment goes against what the Framers intended in its creation. This Court is very specific and critical about what exceptions are to be considered exigent circumstances knowing they will be used to conduct warrantless entries and search of individuals violating their very serious privacy and constitutional rights under the Fourth Amendment. Here the Court must be especially critical in its analysis of whether this was truly an exigent circumstance because allowing this entry and search would violate the sanctity of the home.

There were no exigent circumstances that existed at the time of the warrantless entry and search conducted by the Government; therefore Petitioner has failed to meet their burden of proof and the evidence collected as a result of the entry should be suppressed.

C. The fruit of the poisonous tree doctrine does apply and Nadauld's confession was obtained as a result of the tainted unconstitutional entry and search of his home, therefore it should be suppressed.

In using the 'Fruit of the Poisonous Tree' doctrine in *Wong Sun* this Court explained that the 'fruit' is the evidence that is gathered from an illegal source which would be an illegal search. *Id*. The doctrine does not apply solely to physical evidence but also to a confession. *Id*. at 471.

Similar to *Wong Sun*, the evidence gathered by the officers through unlawful action must be excluded. This includes any evidence gathered from the searches conducted by the ALPR and pole-mount cameras. Additionally, it includes the confession by Nadauld because the confession resulted from the illegal search of his home without probable cause and a warrant.

The original burden of proof to establish that the evidence obtained is "fruit of the poisonous tree" lies with Nadauld. *Wong Sun,* 371 U.S. at 471. Nadauld has proven that the ALPR database and the pole-mount cameras are considered unreasonable searches, which without a warrant are illegal. Without the evidence found through the ALPR database and pole-mount cameras there would be no finding of probable cause so any evidence that stemmed from the illegally obtained information is the "fruits" of that search and illegal. Furthermore, Nadauld has shown that the warrantless entry and search of his home was illegal therefore the gun which was found in the search is the "fruits" of the initial illegality and the confession obtained from him as a result of the gun being found is also tainted evidence.

The burden then shifts to the Government to show that the evidence should be admitted because of some exception to the fruit of the poisonous tree doctrine. *Id*. The petitioner has failed to do so. The three exceptions of the doctrine are (1) attenuation, (2) independent source, and (3) inevitable discovery. *Id*. The attenuation is only applicable when the causal connection between the evidence found and the illegality is so attenuated that the evidence is not considered tainted. *Id*. Unlike in *Wong Sun* where the defendants returned voluntarily to make statements much after their arrests, here Nadauld confessed as a direct result of the gun being found and within minutes of that illegal search occurring. The independent source exception applies when the evidence obtained was gathered by independent means of the constitutional violation that occurred. *Id*. Once again the evidence obtained here was found as a direct result of the illegality, which was the warrantless searches, thus there was no independent source.

Moreover, the inevitable discovery exception states that the evidence would have been eventually discovered. *Id*. Officers would not have inevitably discovered the gun in Nadauld's

home because the reason they conducted the illegal entry and search that resulted in finding the gun was due to the illegal search conducted via the ALPR database and pole-mount cameras. Had the Government conducted its investigation in a correct procedural manner, then they would not have had enough probable cause that would allowed them to obtain a warrant. Therefore, they never would have been allowed to track Nadauld's movements through ALPR database and the pole-mount cameras. This never would have led them to observe the exchange that occurred outside his home with McKennery and would not have resulted in a search of his home. Petitioner cannot prove that the gun would have inevitably been discovered as Nadauld was only one of ten suspects that they had in their initial investigation and had they conducted it procedurally they may never have discovered that there was any connection between Nadauld and McKennery. Nadauld has met his burden and the Government has not, therefore all evidence gathered should be suppressed.

CONCLUSION

Because the Fourth Amendment protects all people who, like Nadauld, demonstrate a legitimate expectation of privacy to be free from unwarranted searches in their movements, and because officers, as in this case, may not intrude into Nadauld's privately protected home without a warrant, this Court should affirm the decision of the Ninth Circuit Court of Appeals granting Nadauld's motion to suppress evidence collected against him through unwarranted searches.