NO. 19-56448

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAISAM ELSHARKAWI,

PLAINTIFF-APPELLANT,

V.

UNITED STATES OF AMERICA; KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, in his official capacity; JOHN P. SANDERS, Customs and Border Protection, in his official capacity; LAZARO RIVAS, Officer FNU, in his individual capacity; EDUARDO RODRIGUEZ, Officer FNU, in his individual capacity; JOHN STEVENSON, Officer FNU, in his individual capacity; JENNIFER DOYLE, Officer LNU, in her individual capacity,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for Central California, Santa Ana
Case No. 8:18-cv-01971-JLS-DFM

The Honorable Josephine L. Staton, District Court Judge
The Honorable Douglas F. McCormick, Magistrate Judge

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Amicus Curiae Electronic Frontier Foundation is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 30,000 members. EFF has done extensive work to highlight the unprecedented and significant threats to personal privacy posed by border searches of electronic devices, including representing plaintiffs in litigation and writing numerous *amicus* briefs, blog posts, and detailed reports.[2]

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Plaintiff-Appellant consents to the filing of this brief. Defendants-Appellees "do not oppose" the filing of this brief.

[2] *See generally* https://www.eff.org/issues/border-searches.

INTRODUCTION

Digital is different. The Fourth Amendment's border search exception, permitting warrantless searches and suspicionless "routine" searches of belongings and persons at the U.S. border, should not apply to electronic devices like Mr. Elsharkawi's cell phones. All border searches—whether manual or forensic—of the data stored on electronic devices are "non-routine" searches that fall outside the border search exception. This is because *any* search of digital data is a "highly intrusive" search that impacts the "dignity and privacy interests" of the traveler. *U.S. v. Flores-Montano*, 541 U.S. 149, 152 (2004). Following the Supreme Court's analysis in *Riley v. California,* 573 U.S. 373 (2014), border agents should be required to obtain a probable cause warrant to search the data stored on a digital device.

The *Riley* Court presented an analytical framework that complements the border search doctrine's traditional consideration of whether a search is "routine" or "non-routine." The Court explained that, in determining whether to apply an existing warrant exception to a "particular category of effects" such as cell phones, individual privacy interests must be balanced against legitimate governmental interests. *Id.* at 385-86. The government's interests are analyzed by considering whether warrantless, suspicionless searches of a particular category of property are sufficiently "tethered" to the purposes underlying the exception. *Id.* at 386. In the

case of digital data at the border, warrantless, suspicionless searches of electronic devices are not sufficiently "tethered" to the narrow purposes justifying the border search exception: immigration and customs enforcement. That is, they are not necessary to and do not sufficiently advance these goals.

Moreover, even if such "tethering" may be considered sufficient, the unprecedented privacy interests that travelers have in their electronic devices outweigh any legitimate governmental interests. Individual privacy interests are at their zenith in devices such as cell phones and laptops, even at the border. Prior to the rise of mobile computing, the "amount of private information carried by international travelers was traditionally circumscribed by the size of the traveler's luggage or automobile." *U.S. v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (en banc). Today, however, the "sum of an individual's private life" sits in the pocket or purse of any traveler carrying a cell phone, laptop or other electronic device. *Riley*, 573 U.S. at 394.

In this case, the district court erred in granting, in part, the government's motion to dismiss. Mr. Elsharkawi witnessed border agents manually search his two cell phones. ECF 57 (MTD Order) at 3-4. (He also believes that one cell phone was forensically searched. *Id*. at 3.) He brought a Fourth Amendment claim challenging CBP's 2018 policy authorizing suspicionless manual searches of electronic devices at the border. The district court rejected Mr. Elsharkawi's claim,

following *Cotterman*'s holding that manual searches are "routine" searches that do not require any individualized suspicion, while forensic searches are "non-routine" searches that require reasonable suspicion. *Id*. 9-12.

However, a "person's digital life ought not to be hijacked simply by crossing a border." *Cotterman*, 709 F.3d at 965. This Court has an opportunity to revisit the issue of what Fourth Amendment standards apply to electronic devices at the border. *Amicus* urges this Court to hold that *all* border searches of the data stored on electronic devices are "non-routine," and thus, consistent with *Riley*, a probable cause warrant is required.[3]

At minimum, this Court should apply the recent Ninth Circuit ruling in *U.S. v. Cano*, which followed *Cotterman*'s dichotomy but clarified that all electronic device searches at the border, "whether manual or forensic, must be limited in scope to a search for digital contraband." 934 F.3d 1002, 1007 (9th Cir. 2019).[4] *Cf. Alasaad v. Nielsen*, 2019 WL 5899371 (D. Mass. 2019) ("*Alasaad II*") (holding on summary judgment that for both manual and forensic searches, the Fourth

[3] District courts have supported a warrant requirement for border device searches. *See, e.g., U.S. v. Caballero*, 178 F. Supp. 3d 1008, 1017, 1018 (S.D. Cal. 2016) ("If it could, this Court would apply *Riley*."); *U.S. v. Molina-Isidoro*, 267 F. Supp. 3d 900, 909 (W.D. Tex. 2016), *aff'd*, 884 F.3d 287 (5th Cir. 2018) ("Were this Court free to decide this matter in the first instance, it might prefer that a warrant be required to search an individual's cell phone at the border.").

[4] The government's petition for rehearing en banc is pending. *See U.S. v. Cano*, No. 17-50151 (9th Cir.), ECF 82.

Amendment requires border agents to have reasonable suspicion that an electronic device contains digital contraband); *U.S. v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019) (holding that forensic border device searches require "individualized suspicion of an offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband").

ARGUMENT

I. Electronic Devices Contain Vast Amounts of Highly Personal Information

Before the digital revolution, border searches of personal property, like searches incident to arrest, were "limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy." *Riley*, 573 U.S. at 393. In *Riley*, the government argued that a search of cell phone data is the same as a search of physical items, and so a cell phone should fall within the search-incident-to-arrest exception, which would permit the warrantless and suspicionless search of an arrestee's cell phone. *Id.* The Court rejected this argument: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Id. See also U.S. v. Kim*, 103 F. Supp. 3d 32, 55 (D.D.C. 2015) (in a border search case, stating *Riley* "strongly indicate[d] that a digital data storage device cannot fairly be compared to an ordinary container when evaluating the privacy concerns involved"). The Court examined the nature of cell phones themselves—

rather than how the devices are searched—and concluded they are "not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Riley*, 573 U.S. at 403 (quoting *Boyd v. U.S.*, 116 U.S. 616, 630 (1886)).

Most people carry electronic devices everywhere they go. Cell phones in particular have become "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. Globally, there are 8 billion cell phone subscriptions, including 5.6 billion for a smartphone.[5] Ninety-six percent of American adults own a cell phone, with 81 percent owning a smartphone.[6] Additionally, 74 percent own a laptop or desktop computer.[7] "Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception." *Riley*, 573 U.S. at 395.

Electronic devices differ fundamentally—in quantitative and qualitative senses—from physical containers like luggage. *Id.* at 393.

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[5] Ericsson, *Ericsson Mobility Report* (Nov. 2019), at 4, 7, https://www.ericsson.com/4acd7e/assets/local/mobility-report/documents/2019/emr-november-2019.pdf.

[6] Pew Research Center, *Mobile Fact Sheet* (June 12, 2019), http://www.pewinternet.org/fact-sheet/mobile/.

[7] *Id.*

Quantitatively, "the sheer quantity of information available on a cell phone makes it unlike other objects to be searched." *U.S. v. Saboonchi*, 48 F.Supp.3d 815, 819 (D. Md. 2014) ("*Saboonchi II*"). With their "immense storage capacity," cell phones, laptops, tablets, and other electronic devices can contain the equivalent of "millions of pages of text, thousands of pictures, or hundreds of videos." *Riley*, 573 U.S. at 394. *Accord Cano*, 934 F.3d at 1020.

Qualitatively, electronic devices "collect[] in one place many distinct types of information … that reveal much more in combination than any isolated record." *Riley*, 573 U.S. at 394. This information can include call logs, emails, text messages, voicemails, browsing history, calendar entries, contact lists, shopping lists, notes, photos and videos, other personal files, and metadata. This information, in turn, can reveal an individual's political affiliations, religious beliefs and practices, sexual and romantic lives, financial status, health conditions, and family and professional associations. *See id.* at 394-96. Electronic devices "are simultaneously offices and personal diaries" and "contain the most intimate details of our lives." *Cotterman*, 709 F.3d at 964. *Accord Cano*, 934 F.3d at 1015. Additionally, "[h]istoric location information is a standard feature on many smartphones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Riley*, 573 U.S. at 396 (citing *U.S. v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J.,

concurring)).

Even electronic devices with more limited features and storage capacity than cell phones and laptops contain a wide variety of highly personal information.[8] Wearable fitness devices track an array of data related to an individual's health and activity.[9] E-readers can reveal every book a person has read.[10] Dedicated GPS devices, including car navigation systems, show where someone has traveled and store the addresses of personal associates and favorite destinations.[11]

Additionally, many electronic devices, including smartphones, permit access

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[8] *See* U.S. Customs and Border Protection, *Border Search of Electronic Devices, Directive No. 3340-049A* (Jan. 4, 2018), § 3.2 (broadly defining "electronic device"), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

[9] *See, e.g.*, Fitbit, *Charge 3*, https://www.fitbit.com/us/products/trackers/charge3. FitBit's Charge 3 records heart rate, calories burned, steps, distance, floors climbed, active minutes, workouts, sleep, and female menstruation and ovulation. It also contains non-health information including the user's GPS location, and call, text, and calendar notifications.

[10] *See, e.g.*, Amazon, *Kindle*, https://www.amazon.com/dp/B07DLPWYB7. Amazon's Kindle "holds thousands of books" as well as personal documents.

[11] *See*, *e.g.*, Garmin, *Garmin Drive Product Line*, https://static.garmincdn.com/emea/com/sites/drive/docs/uk/drive-brochure-2017.pdf; Nissan, *Nissan Navigation System*, https://www.nissanusa.com/connect/features-apps/navigation-system.html. Additionally, the next generation of "connected cars"—with Internet access, and a variety of sensors and features—promise to be a treasure trove of data on drivers and their passengers. *See* PwC Strategy&, *Connected Car Report 2016: Opportunities, Risk, and Turmoil on the Road to Autonomous Vehicles* (Sept. 28, 2016), https://www.strategyand.pwc.com/gx/en/insights/2016/connected-car-2016-study.html.

to personal information stored in the "cloud"—that is, not on the devices themselves, but on servers accessible via the Internet.[12] CBP announced in 2018 that its agents may not search cloud content.[13] However, depending on how an app or browser is designed and configured, copies of cloud data often are temporarily stored or cached on the device itself, thereby revealing even more information.[14]

Today's electronic devices enable the reconstruction of "the sum of an individual's private life" covering a lengthy amount of time—"back to the purchase of the [device], or even earlier." *Riley*, 573 U.S. at 394. *Accord Cano*, 934 F.3d at 1020. While people cannot physically "lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read," they now do so digitally. *Riley*, 573 U.S. at 393. *See also Cotterman*, 709 F.3d at 965 (stating "digital devices allow us to carry the very papers we once stored at home"). But it is not just that a cell phone "contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any

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[12] *See* Peter Mell, Timothy Grance, *The NIST Definition of Cloud Computing* [Special Pub. 800-145], National Institute of Standards and Technology (Sept. 2011), http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf.

[13] *See supra* n.8, § 5.1.2.

[14] *See* Lee Bell, *What is caching and how does it work?*, Wired UK (May 7, 2017), https://www.wired.co.uk/article/caching-cached-data-explained-delete.

form—unless the phone is." *Riley*, 573 U.S. at 396-97.

In sum, because electronic devices differ wildly from luggage and other physical items that travelers carry across the border, border searches of electronic devices have extraordinary privacy implications. As the Supreme Court stated, "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. U.S.*, 533 U.S. 27, 33-34 (2001).

II. The Border Search Exception Is Narrow

"[T]he ultimate touchstone of the Fourth Amendment is reasonableness." *Riley*, 573 U.S. at 381. Normally, reasonableness requires a warrant based on probable cause. *Id.* at 382. However, warrant exceptions may be justified when legitimate governmental interests outweigh individual privacy interests. *Id.* at 385. Suspicionless searches, in particular, have been justified where the "primary purpose" of a search is "beyond the normal need for law enforcement" or "beyond the general interest in crime control." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 48 (2000). Crucially, warrantless and suspicionless searches in a particular context cannot be "untether[ed]" from the purposes justifying the exception at issue. *Riley*, 573 U.S. at 386. *See also Florida v. Royer*, 460 U.S. 491, 500 (1983) (warrantless searches "must be limited in scope to that which is justified by the particular purposes

served by the exception"); *Cano*, 934 F.3d at 1011; *Aigbekaen*, 943 F.3d at 720; *Alasaad II*, 2019 WL 5899371, *9.

The search-incident-to-arrest exception at issue in *Riley* is not justified by the need to gather additional evidence of the alleged crime, but instead the need to protect officer safety and prevent the destruction of evidence. *Riley*, 573 U.S. at 384-85. The warrantless, suspicionless drug tests at issue in *Vernonia* were upheld as reasonable to protect the health and safety of minor student athletes, not to find evidence to prosecute drug crimes. 515 U.S. at 665. Warrantless, suspicionless sobriety checkpoints are reasonable because they advance the non-criminal purpose of roadway safety. *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990). By contrast, the warrantless, suspicionless vehicle checkpoint in *Edmond* to uncover illegal narcotics was unconstitutional because its primary purpose was to "uncover evidence of ordinary criminal wrongdoing." 531 U.S. at 42.

The border search exception permits warrantless searches and suspicionless "routine" searches of individuals and items in their possession when crossing the U.S. border. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985). *Edmond* clarified that although some exceptions, like border searches, might involve law enforcement activities because they can result in "arrests and criminal prosecutions," that does not mean that the exceptions were "designed primarily to serve the general interest in crime control." 531 U.S. at 42.

Rather, the border search exception is intended to serve the two narrow purposes of enforcing the immigration and customs laws. *See Cano*, 934 F.3d at 1013 (emphasizing the "narrow" scope of the border search exception). In 1925, the Supreme Court articulated these two limited justifications for warrantless and suspicionless searches at the border: "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify [i] himself as *entitled* to come in, and [ii] his belongings as effects which may be *lawfully* brought in." *Carroll v. U.S.*, 267 U.S. 132, 154 (1925) (emphasis added). *Carroll* relied on *Boyd*, which drew a clear distinction between focused border searches to enforce customs laws and unfocused border searches to obtain evidence of crime:

> The search for and seizure of … goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.

116 U.S. at 623.

Accordingly, the border search exception permits warrantless, suspicionless searches in order to prevent undocumented immigrants from entering the country. *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272 (1973). It may also be invoked to enforce the laws regulating the importation of goods, including ensuring that duties are paid on those goods; and to prevent the importation of contraband such as

drugs, weapons, infested agricultural products, and other items that could harm individuals or industries if brought into the country. *See Boyd*, 116 U.S. at 624; *Montoya de Hernandez*, 473 U.S. at 537 (discussing "the collection of duties and … prevent[ing] the introduction of contraband into this country").[15]

Not to the contrary is *U.S. v. Ramsey*, which stated that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." 431 U.S. 606, 616 (1977). *Ramsey*'s reliance on *Boyd* and *Carroll* shows that the Court understood that this governmental power must remain "tethered" to the specific and narrow purposes of enforcing the immigration and customs laws. *Id.* at 616-18. This parallels both *Chimel* and *Riley*, which held that searches of a home and of cell phone data, respectively, were outside the scope of the narrow purposes of the search-incident-to-arrest exception. *See Riley*, 573 U.S. at 383 (citing *Chimel v. California*, 395 U.S. 752, 753-54, 762-63 (1969)).

Therefore, it is not "anything goes" at the border. *U.S. v. Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008) (en banc). Rather, under the Fourth Amendment, warrantless, suspicionless border searches must be "tethered" to enforcing the

[15] *See also* Congressional Research Service, *Border Security: Key Agencies and Their Missions* [7-5700] (Jan. 26, 2010) at 2, https://www.fas.org/sgp/crs/homesec/RS21899.pdf.

immigration and customs laws.

III. All Border Searches of Digital Data, Whether Manual or Forensic, Are Highly Intrusive of Personal Privacy and Are Thus "Non-Routine"

Not all border searches are "routine." In *Ramsey*, the Supreme Court made clear that the border search exception "is grounded in the recognized right of the sovereign to control, *subject to substantive limitations imposed by the Constitution*, who and what may enter the country." 431 U.S. at 620 (emphasis added). The Court has defined "non-routine" border searches as those that are "highly intrusive" and impact the "dignity and privacy interests" of travelers. *Flores-Montano*, 541 U.S. at 152. *Accord Cano*, 934 F.3d at 1012; *Aigbekaen*, 943 F.3d at 720. Searches carried out in a "particularly offensive manner" can also be non-routine. *Ramsey*, 431 U.S. at 618 n.13. Thus, in *Montoya de Hernandez*, the Supreme Court held that detaining a traveler until she defecated to see if she was smuggling drugs in her digestive tract was a "non-routine" seizure and search that required reasonable suspicion that she was a drug smuggler. 473 U.S. at 541.

In 2013 (before *Riley*), the Ninth Circuit in *Cotterman* was the first appellate court to conclude that forensic searches of digital data are "non-routine" (and thus require reasonable suspicion), while manual searches of the same data are "routine" and fall within the border search exception (which permits suspicionless searches). 709 F.3d at 967-68. The district court in this case followed *Cotterman*. ECF 57 (MTD Order) at 9-12.

However, *amicus* urges this Court to determine that there is no meaningful distinction between manual and forensic searches because "both implicate the same privacy concerns." *See Alasaad II*, 2019 WL 5899371, *13. *Any* search of the data stored on an electronic device is a "non-routine" search: it is "highly intrusive" and impacts the "dignity and privacy interests" of the traveler, and is "particularly offensive." *Flores-Montano*, 541 U.S. at 152, 154 n.2. It is not correct that forensic searches "intrude[] upon privacy and dignity interests to a far greater degree than" manual searches, *Cotterman*, 709 F.3d at 966, such that a legal distinction should be made between the two types of searches.

Given the vast amounts of highly personal information that electronic devices contain, manual searches of electronic devices greatly burden privacy interests by accessing effectively the same data as forensic searches. While forensic searches may "uncover deleted or encrypted data," manual searches "are not such routine searches given the breadth of intrusion into personal information." *Alasaad II*, 2019 WL 5899371, *13-14. *See also U.S. v. Saboonchi*, 990 F.Supp.2d 536, 547 (D. Md. 2014) ("*Saboonchi I*") (acknowledging that "a conventional computer search can be deeply probing"). Manual searches can access call logs, emails, text messages, voicemails, browsing history, calendar entries, contact lists, shopping lists, notes, photos and videos, other personal files, and metadata that can reveal highly sensitive information about individuals. *See Alasaad II*, 2019 WL

5899371, *11, 13. Even a history of a traveler's physical location may be uncovered through a manual search: for example, on an iPhone, a user may have toggled on the "Significant Locations" feature.[16] If a traveler uses Google Maps while logged into their Google account, a manual search of the app would reveal the traveler's navigation history.[17] Travelers' electronic devices increasingly feature expanded hard drive capacities and powerful search capabilities.[18] Thus, the rapid rate of technological change will enable manual searches to reveal ever more personal information, making the distinction between them and forensic searches even more immaterial.

Therefore, the dichotomy between manual and forensic searches is factually meaningless and constitutionally unworkable. Constitutional rights should not turn on such a flimsy distinction. *See Kim*, 103 F. Supp. 3d at 55 (stating that whether the border search of the defendant's laptop was reasonable does not "turn on the application of an undefined term like 'forensic'"). The risk of an "unfettered dragnet," *Cotterman*, 709 F.3d at 966, is just as real for manual searches as for forensic searches.

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[16] For Apple iOS 13: Settings>Privacy>Location Services>System Services>Significant Locations.

[17] *See* Google, *Maps*, https://www.google.com/maps/.

[18] Apple's iPhone currently has a search function that pulls content based on keywords. Apple, *Use Search on Your iPhone, iPad, or iPod Touch*, https://support.apple.com/en-us/HT201285.

Importantly, even though the searches in *Riley* were manual, the Court required a probable cause warrant for *all searches* of a cell phone seized incident to an arrest. *Riley*, 573 U.S. at 379-80.

In sum, *all* searches of digital data at the border—both manual and forensic— are "non-routine" searches that fall outside the border search exception.

IV. A Probable Cause Warrant Should Be Required for Border Searches of Data Stored on Electronic Devices

Reasonable suspicion is not the highest standard that may apply to the extraordinarily invasive "non-routine" searches (manual and forensic) of travelers' electronic devices. The Supreme Court has never suggested that the reasonable suspicion it required in *Montoya de Hernandez* is a ceiling for every border search, or that property searches can never require heightened protection. Rather, the Court's border search decisions establish reasonable suspicion as the *floor* for highly intrusive searches. *See Montoya de Hernandez,* 473 U.S. at 541 n.4 ("today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches"); *Flores-Montano*, 541 U.S. at 152; *House v. Napolitano*, 2012 WL 1038816, *7 (D. Mass. 2012) (recognizing the "Supreme Court has not explicitly held that all property searches" at the border never require suspicion).

The *Riley* Court's analytical framework complements the border search doctrine's traditional consideration of whether a search is "routine" or "non-

routine."[19] In determining whether to apply an existing warrant exception to a "particular category of effects," individual privacy interests must be balanced against legitimate governmental interests. *Riley*, 573 U.S. at 385-86. *See also Alasaad II*, 2019 WL 5899371, *12 (the Supreme "Court's reasoning in *Riley* holds the same force when applied to border searches"). In the case of border searches of digital "effects" such as the data on cell phones and laptops, this balancing clearly tips in favor of the traveler.

The Supreme Court prefers "clear guidance" and "categorical rules." *Riley*, 573 U.S. at 398. Thus, this Court should adopt the clear rule that *all* border searches of data stored on electronic devices are "non-routine" searches that require a probable cause warrant.[20] Notably, *Riley* rejected requiring reasonable

[19] The Supreme Court has recognized the similarity between the border search exception and the search-incident-to-arrest exception. *Ramsey*, 431 U.S. at 621.

[20] A warrant should not be difficult to obtain at the border. "Recent technological advances… have… made the process of obtaining a warrant itself more efficient." *Riley*, 573 U.S. at 401. Border agents clearly know how to obtain judicial authorization for "non-routine" searches and seizures. *See, e.g., Montoya de Hernandez*, 473 U.S. at 535 ("[C]ustoms officials sought a court order authorizing a pregnancy test, an [x-ray], and a rectal examination."). Moreover, border agents may still benefit from the border search exception: for example, they can search without a warrant or individualized suspicion the "physical aspects" of a digital device, e.g., a laptop battery compartment, to ensure that it does not contain contraband such as drugs or explosives. *See Riley*, 573 U.S. at 387; *Alasaad II*, 2019 WL 5899371, *13 (a search "determining whether a device is owned by the person carrying it across the border, confirming that it is operational and that it contains data" falls within the border search exception).

suspicion for cell phone searches incident to arrest, and required a warrant instead. *Id.* at 398-99.

The Fourth Circuit was the first federal appellate court to hold post-*Riley* that certain border device searches require some level of suspicion about the traveler. *U.S. v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018) ("*Kolsuz II*"). In doing so, the court linked the "non-routine" component of the border search doctrine and *Riley*, holding that "under *Riley*, the forensic examination of Kolsuz's phone must be considered a nonroutine border search, requiring some measure of individualized suspicion." *Id*. at 137. Although the Fourth Circuit has twice declined to hold what the level of suspicion should be, the court left open the possibility of a warrant requirement for both forensic and manual searches. *Kolsuz II*, 890 F.3d at 137, 141; *Aigbekaen*, 943 F.3d at 723. *See also U.S. v. Molina-Isidoro*, 884 F.3d 287, 292 (5th Cir. 2018) (declining to rule on whether *Riley* requires a warrant for border device searches, but emphasizing that a leading Fourth Amendment legal treatise recognizes that "*Riley* may prompt a reassessment" of the question); *U.S. v. Vergara*, 884 F.3d 1309, 1313 (11th Cir. 2018) (Pryor, J., dissenting) (concluding that "a forensic search of a cell phone at the border requires a warrant supported by probable cause.").

A. A Probable Cause Warrant Should Be Required Given the Highly Personal Information Stored on Electronic Devices

Modern electronic devices like cell phones and laptops reveal the "sum of an individual's private life," *Riley*, 573 U.S. at 394, making any search by the government an extraordinary invasion of individual privacy requiring a probable cause warrant. Any border search of an electronic device—whether a manual or forensic search—is highly intrusive and "bears little resemblance" to searches of travelers' luggage. *Id.* at 386. The Fourth Circuit recognized, in the context of border device searches, "the Supreme Court's … decision in *Riley* and its emphasis on the significant privacy interests in the digital contents of phones." *Kolsuz II*, 890 F.3d at 140.

The fact that luggage may contain physical items with personal information does not negate the unique and significant privacy interests in electronic devices. A letter in a suitcase does not compare to the detailed record of correspondence via email or text message over months or years that a cell phone may contain and even a manual search would reveal. Nor does paper correspondence have a keyword search function, and people do not carry all the letters they have ever exchanged when they travel. *See Riley*, 134 573 U.S. at 400.

The Supreme Court's landmark decision in *Carpenter v. U.S.* also informs the border search doctrine. In that case, the Court held that the government must obtain a probable cause warrant for historical cell phone location information

maintained by cell phone service providers. 138 S. Ct. 2206, 2221 (2018). The *Carpenter* Court extensively relied on *Riley* in examining the significant privacy interests that individuals have in a record of their physical movements. Historical location information can also be obtained from a border search of a cell phone. *See supra* Sec. I.

Citing *Riley*, the *Carpenter* Court stated, "When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." 138 S. Ct. at 2222. Similarly, the border search exception should not be extended to electronic devices. *See Alasaad v. Nielsen*, 2018 WL 2170323, *20 (D. Mass. 2018) ("*Alasaad I*") (denying government's motion to dismiss, and relying on *Riley* to hold that "digital searches are different … since they 'implicate privacy concerns far beyond those implicated' in a typical container search"); *Kim*, 103 F. Supp. 3d at 59 (granting defendant's motion to suppress evidence obtained from a forensic border search of laptop, and relying on *Riley* to hold that laptop search "was so invasive of Kim's privacy"). Even DHS acknowledges that there is a privacy risk in border searches of electronic devices "due to the volume of the information that is either stored on, or accessible by, today's electronic devices."[21]

[21] Department of Homeland Security, *Privacy Impact Assessment Update for CBP Border Searches of Electronic Devices, DHS/CBP/PIA-008(a)*, at 2 (Jan. 4, 2018), https://www.dhs.gov/publication/border-searches-electronic-devices.

B. A Probable Cause Warrant Should Be Required Because Warrantless, Suspicionless Border Searches of Digital Data Are Not Tethered to the Narrow Purposes of the Border Search Exception

Under the Fourth Amendment balancing test, the government's interests are analyzed by considering whether warrantless, suspicionless searches of a particular category of property are sufficiently "tethered" to the purposes underlying the warrant exception. *Riley*, 573 U.S. at 386. In creating the categorical rule that the search-incident-to-arrest exception does not extend to cell phones, *Riley* found that warrantless, suspicionless searches of cell phones seized during an arrest are not sufficiently "tethered" to the narrow purposes of the search-incident-to-arrest exception: 1) to protect officers from an arrestee who might use a weapon against them, and 2) to prevent the destruction of evidence. *Id.* at 384-85. The Court reasoned that 1) "data on the phone can endanger no one," and 2) the probability is small that associates of the arrestee will remotely delete digital data. *Id.* at 387-391. Regarding the latter concern, the Court emphasized that the problem is not "prevalent," and that possibility does not justify a categorical rule allowing such a significant privacy invasion—that is, permitting a warrantless, suspicionless search of a cell phone *for every arrest*. *Id*. at 389-90.

Likewise, warrantless, suspicionless searches of electronic devices at the border are not sufficiently "tethered" to the narrow purposes justifying the border search exception: immigration and customs enforcement. That is, they are not

necessary to and do not sufficiently advance these goals. *See U.S. v. Wurie*, 728 F.3d 1, 13 (1st Cir. 2013), *aff'd*, *Riley*, 573 U.S. 373. As with the search-incident-to-arrest exception, the border search exception "strikes the appropriate balance in the context of physical objects, [but] neither of its rationales has much force with respect to digital content on cell phones" or other electronic devices. *Riley*, 573 U.S. at 386.

Judges have recognized the weak "tethering" between warrantless, suspicionless border searches of electronic devices and enforcing the immigration and customs laws.

Border agents determine a traveler's immigration status and authority to enter the United States by questioning travelers and inspecting official documents such as passports and visas. Border agents should not also have warrantless, suspicionless access to travelers' electronic devices to determine admissibility. In *Alasaad II*, in holding on summary judgment that all border device searches must be limited to searching for digital contraband (albeit pursuant to reasonable suspicion), the district court questioned the need of the government to have suspicionless access to travelers' electronic devices in order to prevent the entry of inadmissible persons when those travelers are U.S. persons who are automatically

admissible. 2019 WL 5899371, *15.[22] The court further stated, "Even as to an alien, where CBP posits that an electronic device might contain contradictory information about his/her intentions to work in the U.S. contrary to the limitations of a visa, there is no indication as to the frequency of same or the necessity of unfettered access to the trove of personal information on electronic devices for this purpose." *Id*. (citation omitted).

Border agents enforce customs laws by searching travelers' luggage, vehicles, and, if necessary, their persons. *See*, *e.g.*, *Flores-Montano*, 541 U.S. at 151; *U.S. v. Molina-Gomez*, 781 F.3d 13, 16–17 (1st Cir. 2015). Border agents should not also have warrantless, suspicionless access to travelers' electronic devices to enforce the customs laws. The purpose of the customs rationale of the border search exception is to prevent *physical items* from entering the country at the moment the traveler crosses the border, typically because the items were not properly declared for duties, or are contraband that could harm individuals or industries if brought into the country. Just as the *Riley* Court stated that "data on the phone can endanger no one," 573 U.S. at 387, physical items cannot be hidden

[22] *See* U.S. Customs and Border Protection, *Immigration and Inspection Program* (Feb. 21, 2014) ("U.S. citizens are automatically admitted upon verification of citizenship; aliens are questioned and their documents are examined to determine admissibility"), https://www.cbp.gov/border-security/ports-entry/overview.

in digital data.

In *Molina-Isidoro*, a case involving the attempted smuggling of drugs into the country, Fifth Circuit Judge Gregg Costa in his concurring opinion stated, "Detection of … contraband is the strongest historic rationale for the border search exception." 884 F.3d at 295 (Costa, J., concurring). *Accord Cano*, 934 F.3d at 1018; *Aigbekaen*, 943 F.3d at 721. Yet, "[m]ost contraband, the drugs in this case being an example, cannot be stored within the data of a cell phone." *Molina-Isidoro*, 884 F.3d at 295 (Costa, J., concurring). Judge Costa concluded, "this detection-of-contraband justification would not seem to apply to an electronic search of a cellphone or computer." *Id*.

In *Vergara*, Eleventh Circuit Judge Jill Pryor, in concluding that she would have required a probable cause warrant to conduct a forensic search of an electronic device at the border, similarly stated, "the rationales underlying the border search exception lose force when applied to forensic cell phone searches… [C]ell phones do not contain the physical contraband that border searches traditionally have prevented from crossing the border." *Vergara*, 884 F.3d at 1317 (Pryor, J., dissenting).

Judges have also rejected a new "evidence-gathering justification" or general law enforcement purpose of the border search exception to support unfettered access to travelers' electronic devices.

Judge Costa of the Firth Circuit explained that *Boyd*'s "emphatic distinction between the sovereign's historic interest in seizing imported contraband and its lesser interest in seizing records revealing unlawful importation has potential ramifications for the application of the border-search authority to electronic data that cannot conceal contraband and that, to a much greater degree than the papers in *Boyd*, contains information that is like an extension of the individual's mind." *Molina-Isidoro*, 884 F.3d at 297 (Costa, J., concurring) (internal quotations omitted).

Similarly, Judge Pryor of the Eleventh Circuit determined that a new "general law enforcement justification" does not support conducting warrantless, suspicionless cell phone searches at the border. *Vergara*, 884 F.3d at 1317 (Pryor, J., dissenting). She stated that this justification is "quite far removed from the purpose originally underlying the border search exception: 'protecting the Nation from entrants who may bring anything harmful into this country.'" *Id*. She concluded, quoting *Riley*, "Excepting forensic cell phone searches from the warrant requirement because those searches may produce evidence helpful in future criminal investigations would thus 'untether the rule from [its] justifications.'" *Id*. *See also Cano*, 934 F.3d at 1018 (recognizing "the distinction between seizing goods at the border because their importation is prohibited and seizing goods at the border because they may be useful in prosecuting crimes");

Aigbekaen, 943 F.3d at 721 ("Government may not invoke the border exception on behalf of its generalized interest in law enforcement and combatting crime") (internal quotations and citation omitted); *Alasaad II*, 2019 WL 5899371, *15 (recognizing the "long-standing distinction that the Supreme Court has made between the search for contraband, a paramount interest at the border, and the search of evidence of past or future crimes at the border, which is a general law enforcement interest not unique to the border"); *U.S. v. Kolsuz*, 185 F. Supp. 3d 843, 858 (E.D. Va. 2016) ("*Kolsuz I*") (digital data "is merely indirect evidence of the things an individual seeks to export illegally—not the things themselves").

Some digital content, such as child pornography, can be considered "digital contraband" that may be interdicted at the U.S. border. *Cf. U.S. v. Thirty-Seven Photographs*, 402 U.S. 363, 376–77 (1971) ("Congress may declare [obscenity] contraband and prohibit its importation."). However, this interdiction should not be facilitated by warrantless, suspicionless searches of electronic devices given that the *Riley* factors for sufficient tethering are not met. First, the government cannot show "that the ability to conduct a warrantless search would make much of a difference" in preventing the importation of digital contraband into the country. *See Riley*, 573 U.S. at 390. This is because, unlike physical contraband, digital contraband can easily be transported across borders via the Internet. *See Vergara*,

884 F.3d at 1317 (Pryor, J., dissenting) ("electronic contraband is borderless").[23] Second, the government cannot demonstrate that any digital contraband that might be on travelers' devices is a "prevalent" problem *at the border*. *See Riley*, 573 U.S. at 389. This is because the government provided a "dearth of information of the prevalence of digital contraband entering the U.S. at the border." *Alasaad II*, 2019 WL 5899371, *10.

Thus, governmental interests cannot justify a *categorical rule* permitting warrantless, suspicionless border searches of *all* electronic devices entering or exiting the country. "[L]egitimate concerns about child pornography do not justify unfettered crime-fighting searches or an unregulated assault on citizens' private information." *Cotterman*, 709 F.3d at 966.

Ultimately, even if "tethering" may be considered sufficient here, the extraordinary privacy interests that travelers have in their cell phones and laptops still outweigh any legitimate governmental interests. Governmental interests do "not justify dispensing with the warrant requirement across the board." *Riley*, 573 U.S. at 388. In short, "some searches, even when conducted within the scope of the

[23] "The vast majority of child pornography offenders today use the Internet or Internet-related technologies to access and distribute child pornography." *Alasaad I*, 2018 WL 2170323, *19, quoting U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* (2012), at 41-42, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

[border search] exception, are so *intrusive* that they require additional justification, up to and including probable cause and a warrant." *Cano*, 934 F.3d at 1011 (emphasis in original). *Accord Alasaad II*, 2019 WL 5899371, *9.

CONCLUSION

This Court should adopt the categorical rule that all border searches of data stored on electronic devices are "non-routine," and that, consistent with *Riley v. California*, a probable cause warrant is required.

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