No. 17-8639

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IN THE SUPREME COURT OF THE UNITED STATES

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HERNANDO JAVIER VERGARA, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Fourth Amendment requires customs officers conducting a border search to obtain a warrant before forensically searching a cell phone that a traveler seeks to bring into the United States from abroad.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 884 F.3d 1309.

## JURISDICTION

The judgment of the court of appeals was entered on March 15, 2018. The petition for a writ of certiorari was filed on April 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted on

one count of transportation of child pornography, in violation of 18 U.S.C. 2252(a)(1) and (b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). He was sentenced to 96 months of imprisonment, to be followed by a life term of supervised release. The court of appeals affirmed. Pet. App. 1-21.

1. In April 2015, petitioner, a U.S. citizen, returned to Tampa, Florida, after a cruise to Cozumel, Mexico. Pet. App. 2, 9; Suppression Hr'g Tr. (Tr.) 6-7. Because he had previously been convicted of possessing child pornography, U.S. Customs and Border Protection (CBP) officers selected petitioner for additional scrutiny, known as secondary inspection. Pet. App. 9; Tr. 6-7, 17-18. During that secondary inspection, a CBP officer found two cell phones in petitioner's luggage and a third on his person. Pet. App. 9. The officer looked through one of the phones for about five minutes and found a video of two topless girls who appeared to be under the age of 18. Id. at 2-3. The CBP officer then stopped the inspection and notified Homeland Security Investigations (HSI), another component of the Department of Homeland Security. Id. at 3.

An HSI investigator interviewed petitioner and watched the video, which displayed the logo of a website that the investigator recognized as a source of child pornography. Pet. App. 3, 9-10. The investigator then took all three phones back to her office to be forensically searched. Id. at 10. The record does not describe

the forensic search, but it involved the "extraction of data," including images and videos. Ibid. The search was completed that afternoon, and it revealed more than 100 images and videos of child pornography, as well as thousands of images of child erotica, on two of the phones. Id. at 3, 10; Tr. 39-41. The search did not damage the phones in any way. Pet. App. 3.

2. A grand jury returned an indictment charging petitioner with one count of transportation of child pornography, in violation of 18 U.S.C. 2252(a)(1) and (b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). The district court denied petitioner's motion to suppress the images and videos found on his cell phones. D. Ct. Doc. 34, at 1-9 (Apr. 8, 2016). As relevant here, the court began by observing that this Court has long distinguished searches conducted at the Nation's international borders from other searches. Id. at 4-5 (citing United States v. Flores-Montano, 541 U.S. 149, 152-153 (2004), and United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)). The court explained that "it is clear that an individual's possessions may be searched at the border 'even in the absence of reasonable suspicion, probable cause, or [a] warrant' because of the Government's interest in preventing contraband from entering the United States." Id. at 5 (citation omitted). The court therefore concluded that the CBP officer's initial, manual search of petitioner's cell phone would have been consistent with the Fourth Amendment even absent any

individualized suspicion. Ibid. The court also determined, in the alternative, that the officer had reasonable suspicion. Id. at 6.

The district court also upheld the subsequent forensic search. D. Ct. Doc. 34, at 6-9. The court took the view that "the forensic examination of [petitioner's] cell phones extended beyond a routine customs search and inspection" and that the forensic search was justified only if it was supported by reasonable suspicion. Id. at 7. But the court determined that "the facts and rational inferences known to the [CBP and HSI] agents clearly supported a reasonable suspicion that [petitioner] possessed child pornography" on the phones. Id. at 8. The court observed that petitioner had previously been convicted of possessing child pornography; that he had just returned from Mexico, a known destination for child sex tourism; and that the initial search of his phone had revealed child erotica from a known child-pornography website. Id. at 6, 8.

After a bench trial, the district court found petitioner guilty on both charges. Pet. App. 4. The court sentenced him to 96 months of imprisonment, to be followed by a life term of supervised release. Ibid.

3. The court of appeals affirmed. Pet. App. 1-21.

a. The court of appeals rejected petitioner's argument that the forensic search of his cell phones required a warrant supported by probable cause. Pet. App. 6. The court emphasized that

"searches at the border, 'from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside.'" Id. at 5 (quoting United States v. Ramsey, 431 U.S. 606, 619 (1977)). The court explained that "[b]order searches 'never' require probable cause or a warrant." Ibid. (quoting Ramsey, 431 U.S. at 619). And the court noted that it had "require[d] reasonable suspicion at the border only 'for highly intrusive searches of a person's body such as a strip search or an x-ray examination.'" Ibid. (citation omitted).

The court of appeals also rejected petitioner's contention that Riley v. California, 134 S. Ct. 2473 (2014), which held that a search of a cell phone cannot be justified under the search-incident-to-arrest exception to the warrant requirement, requires a cell-phone-specific departure from the established rules governing border searches. Pet. App. 6-7. The court observed that Riley had not addressed the border-search doctrine, and that the Court had emphasized that "other case-specific exceptions may still justify a warrantless search of a particular phone." Id. at 6-7 (quoting Riley, 134 S. Ct. at 2494). The court recognized that Riley had relied on the breadth of the information often contained in cell phones and the corresponding privacy implications of cell phone searches. Id. at 7. But the court explained that Riley's emphasis on those privacy considerations "does not help" petitioner because "the highest standard for a

search" at the border "is reasonable suspicion," and petitioner "has not challenged the finding of the district court that reasonable suspicion existed for the searches of his phones." Ibid.

b. Judge Jill Pryor dissented. Pet. App. 8-21. She agreed with the majority that Riley is not controlling here because it "did not involve a border search." Id. at 8. She also observed that "[n]either [this] Court nor any federal circuit court ha[d] determined the level of suspicion required to justify the forensic search of a cell phone at the border." Id. at 13. But Judge Pryor believed that the question should be answered by "weigh[ing] the government's interest in conducting warrantless forensic cell phone searches at the border with [petitioner's] privacy interest in his cellular devices," and she concluded based on her view of that balancing that "a forensic search of a cell phone at the border requires a warrant supported by probable cause." Id. at 8-9.

ARGUMENT

Petitioner renews his contention (Pet. 26-29) that the forensic search of his cell phones required a warrant supported by probable cause even though it was a border search conducted as he sought to bring those phones into the country from abroad. The court of appeals correctly rejected that argument. The court's conclusion that no warrant is required at the border does not conflict with any decision of this Court or another court of

appeals. And the sparse factual record and other features of this case would make it a poor vehicle in which to consider the question presented even if that question otherwise warranted this Court's review. The petition for a writ of certiorari should be denied.[1]

1. The court of appeals correctly determined that the forensic search of petitioner's cell phones did not require a warrant. "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985). "Time and again," this Court has held that "'searches made at the border, pursuant to the longstanding 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.'" United States v. Flores-Montano, 541 U.S. 149, 152-153 (2004) (quoting United States v. Ramsey, 431 U.S. 606, 616 (1977)). It is thus well-settled that "[r]outine searches of the persons and effects of entrants are not subject to any

[1] This Court has previously denied other petitions for writs of certiorari challenging border searches of electronic devices. See Cotterman v. United States, 571 U.S. 1156 (2014) (No. 13-186) (forensic search of laptop computer); Hilliard v. United States, 555 U.S. 1177 (2009) (No. 08-6892) (manual search of laptop computer); Arnold v. United States, 555 U.S. 1176 (2009) (No. 08-6708) (manual search of laptop computer, compact discs, and USB memory stick).

requirement of reasonable suspicion, probable cause, or warrant." Montoya de Hernandez, 473 U.S. at 538.

This Court has required a degree of individualized suspicion for a border search or seizure only once, in Montoya de Hernandez. In that case, customs officers who reasonably suspected that a traveler was smuggling drugs in her alimentary canal detained her for sixteen hours to monitor her bowel movements. 473 U.S. at 534-536. The Court upheld the seizure, concluding that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents * * * reasonably suspect that the traveler is smuggling contraband in her alimentary canal." Id. at 541.

In holding that the seizure in Montoya de Hernandez required reasonable suspicion, this Court expressed "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." 473 U.S. at 541 n.4. The Court has also left open "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." Flores-Montano, 541 U.S. at 154 n.2 (quoting Ramsey, 431 U.S. at 618 n.13). But the Court has never suggested that any border search might require probable cause, much less a warrant. To the contrary, it has emphasized that "from before the adoption of the Fourth Amendment," border searches "have been considered to

be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." Ramsey, 431 U.S. at 619. "There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause." Ibid.

In this case, petitioner does not dispute that the search he is challenging occurred at the border, as he attempted to bring his cell phones into the country from abroad. Pet. App. 2-3. He also does not challenge the district court's determination that the search was supported by reasonable suspicion that he was using the phones to transport contraband -- specifically, child pornography. Id. at 7. The search thus satisfied the most demanding Fourth Amendment standard any court has found applicable in the border-search context. See ibid. ("At the border, the highest standard for a search is reasonable suspicion."); United States v. Kolsuz, 890 F.3d 133, 147 (4th Cir. 2018) ("[C]ourts consistently have required only reasonable suspicion even when reviewing the most intrusive of nonroutine border searches and seizures."). And the court of appeals correctly concluded that this Court's "longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable,'" Ramsey, 431 U.S. at 619, forecloses petitioner's contention that the search of his phones required a warrant supported by probable cause. Pet. App. 7.

2. Petitioner provides no sound reason to question the court of appeals' decision.

a. Petitioner first asserts, without citation or explanation, that the court of appeals "misread[] this Court's border precedent," which -- according to petitioner -- "does not provide that a warrant is 'never' required at the border." Pet. 26. In fact, this Court has expressly recognized that "[t]here has never been any additional requirement that the reasonableness of a border search depend[] on the existence of probable cause," Ramsey, 431 U.S. at 619 (emphasis added), and that the Court has "faithfully adhered" to the understanding that "border searches [a]re not subject to the warrant provisions of the Fourth Amendment," id. at 617; see, e.g., Montoya de Hernandez, 473 U.S. at 537-538.[2]

b. Rather than attempting to reconcile his proposed rule with this Court's border-search precedents, petitioner principally contends (Pet. 26) that those precedents should be "reexamine[d]"

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[2] Petitioner elsewhere asserts (Pet. 18) that "[t]his Court's border search doctrine does not even go so far as to allow officials to read the contents of a letter" without a warrant. This Court has not recognized any such limitation. In Ramsey, the decision on which petitioner relies, the Court upheld a search of a piece of international mail without a warrant or probable cause and specifically held that "letters" fall "within the border-search exception." 431 U.S. at 607-608, 619-620. The Court noted that postal regulations prohibited the reading of correspondence absent a warrant. Id. at 623. But contrary to petitioner's suggestion, the Court did not hold that the limitation in the regulations was required by the Fourth Amendment. Id. at 623-624 & n.18.

in light of Riley v. California, 134 S. Ct. 2473 (2014). But Riley arose in a very different context, and the Court's decision in that case provides no sound basis for reexamining the border-search doctrine -- a distinct exception to the warrant requirement that traces its roots to the Nation's founding.

i. Riley involved the search-incident-to-arrest doctrine, which allows an arresting officer, without a search warrant or additional justification, "to search the person arrested in order to remove any weapons" and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." 134 S. Ct at 2483 (quoting Chimel v. California, 395 U.S. 752, 762-763 (1969)). This Court stated that although the doctrine has been recognized in some form "for a century," debate has existed "for nearly as long" over "the extent to which officers may search property found on or near the arrestee" at the time of the arrest. Id. at 2482-2483. For example, the Court noted that it had previously clarified that the exception is "limited to 'personal property . . . immediately associated with the person of the arrestee'" and thus that it did not extend to a "200-pound, locked footlocker" an arrestee was transporting at the time of the arrest. Id. at 2484 (quoting United States v. Chadwick, 433 U.S. 1, 15 (1977)).

The question presented in Riley was whether the search-incident-to-arrest doctrine encompassed a search of the data on a cell phone carried by an arrestee. 134 S. Ct. at 2484. The Court

explained that, "[a]bsent more precise guidance from the founding era, [it] generally determine[s] whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" Ibid. (citation omitted). The Court stated that this balancing of interests supports a "categorical" search-incident-to-arrest exception for searches of "physical objects" found on or near an arrestee's person. Ibid. But the Court concluded that "neither of [the exception's] rationales has much force with respect to digital content on cell phones." Ibid.

On the government-interest side, the Court observed that "[d]igital data stored on a cell phone," unlike physical objects, "cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." Riley, 134 S. Ct. at 2485. The Court also reasoned that "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee * * * will be able to delete incriminating data from the phone." Id. at 2486.

On the privacy side of the balance, the Court observed that the typical search incident to arrest "works no substantial additional intrusion on privacy beyond the arrest itself." Riley, 134 S. Ct. at 2489. But the Court concluded that "[c]ell phones differ in both a quantitative and a qualitative sense from other

objects that might be kept on an arrestee's person," primarily because of their "immense storage capacity." Ibid.[3] The Court emphasized that people do not "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" -- and, if they did, "they would have to drag behind them a trunk of the sort held to require a search warrant in Chadwick rather than a [pocket-sized] container" that would be subject to a traditional search incident to an arrest. Ibid. (citation omitted). The Court thus concluded that a search of a cell phone cannot be justified as merely a marginal additional intrusion on privacy.

Because the Court determined that the justifications for the doctrine do not extend to the search of data stored on an arrestee's cell phone, Riley held that "the search incident to arrest exception does not apply to cell phones." 134 S. Ct. at 2494. But the Court emphasized the narrow scope of its holding, noting that "other case-specific exceptions may still justify a warrantless search of a particular phone." Ibid.

ii. One established exception to the warrant requirement is the border-search doctrine. And for two reasons, nothing in Riley justifies a departure from the long-settled rule that a search at the border does not require a warrant supported by probable cause.

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[3] The Court also noted that "certain types of data" that may be found on cell phones, including "Internet search and browsing history," are "qualitatively different" from the physical records that might be revealed during a search incident to arrest. Riley, 134 S. Ct. at 2490.

First, unlike in Riley, "more precise guidance from the founding era" demonstrates the absence of a warrant requirement for border searches. 134 S. Ct. at 2484; see id. at 2482. "The Congress which proposed the Bill of Rights, including the Fourth Amendment," also enacted the Nation's first customs statute, which recognized a "plenary customs power" to conduct warrantless searches at the border. Ramsey, 431 U.S. at 616. "The historical importance of the enactment of this customs statute by the same Congress which prosed the Fourth Amendment is * * * manifest," because it demonstrates a Framing-era understanding that "border searches were not subject to the warrant provisions of the Fourth Amendment." Id. at 616-617. This Court has thus recognized that the rule that "searches at our borders" do not require "probable cause" or "a warrant" has "a history as old as the Fourth Amendment itself." Id. at 619; see, e.g., Montoya de Hernandez, 473 U.S. at 537 (tracing the rule's history to "the founding of our Republic").

Second, any balancing of interests would not support the imposition of a warrant requirement in this very different context. The border-search doctrine rests on different justifications than the search-incident-to-arrest doctrine, and those justifications continue to apply with full force where, as here, the object that a traveler seeks to bring across the Nation's international border is a cell phone.

On the government-interest side, Riley emphasized that the interests served by a search incident to arrest -- preventing "harm

to officers and destruction of evidence" -- do not apply "when the search is of digital data." 134 S. Ct. at 2484-2485; see id. at 2485-2488. The border-search exception, in contrast, reflects "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country," Ramsey, 431 U.S. at 616, in order to "prevent the introduction of contraband," Montoya de Hernandez, 473 U.S. at 537. That vital interest "is at its zenith at the international border," Flores-Montano, 541 U.S. at 152, and is directly implicated where, as here, a traveler seeks to transport digital information across the border using a cell phone. As this case illustrates, cell phones can be used to transport child pornography or other contraband, including pirated intellectual property or "highly classified technical information." Kolsuz, 890 F.3d at 152 (Wilkinson, J., concurring in the judgment). And "the government interest in stopping contraband at the border does not depend on whether child pornography takes the form of digital files or physical photographs." United States v. Touset, 890 F.3d 1227, 1235 (11th Cir. 2018).

The privacy side of the balance also differs significantly at the border. Unlike the search-incident-to-arrest doctrine, the border-search doctrine does not rest on the premise that a border search "works no substantial additional intrusion on privacy" beyond some separately authorized intrusion like an arrest. Riley, 134 S. Ct. at 2489. Instead, it reflects a categorical judgment

that "the expectation of privacy is less at the border than it is in the interior." Flores-Montano, 541 U.S. at 154. The border-search doctrine thus extends to all property transported across the border, including "luggage," United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376 (1971) (plurality opinion); "vehicles," Flores-Montano, 541 U.S. at 152; and even "private living quarters aboard [a] ship," United States v. Alfonso, 759 F.2d 728, 738 (9th Cir. 1985); see, e.g., United States v. Whitted, 541 F.3d 480, 486 (3d Cir. 2008) (applying the doctrine to "a passenger's cruise ship cabin"). Unlike the diminished expectation of privacy underlying the search-incident-to-arrest doctrine, therefore, the diminished expectation of privacy at the border does not depend on the quantity of property or information at issue. If, for example, a traveler sought to bring into the country "a trunk of the sort held to require a search warrant in Chadwick," Riley, 134 S. Ct. at 2489, there is no question that the trunk could be searched without a warrant -- even though the same trunk could not be searched incident to an arrest.

The privacy implications of border searches differ from those at issue in Riley for an additional reason. "Riley involved the warrantless search of a cell phone following an ordinary roadside arrest after a traffic violation." Kolsuz, 890 F.3d at 152 (Wilkinson, J., concurring in the judgment). In that case, as in most searches incident to arrest, the arrestee's encounter with law enforcement was involuntary and unanticipated. Border

searches, in contrast, occur only during predictable and voluntary border crossings. "Travelers 'crossing a border . . . are on notice that a search may be made,' and they are free to leave any property they do not want searched" -- including digital data -- "at home." Touset, 890 F.3d at 1235 (brackets and citation omitted).[4]

3. Petitioner does not and could not contend that the court of appeals' decision conflicts with any decision of another court of appeals. Indeed, petitioner does not cite any decision, by any court, holding that a border search of a cell phone requires a warrant supported by probable cause. To the contrary, "[e]ven as Riley has become familiar law, there are no cases requiring more than reasonable suspicion for forensic cell phone searches at the border." Kolsuz, 890 F.3d at 147. The Fourth Circuit has concluded that a forensic search of a cell phone at the border

[4] This Court's recent decision in Carpenter v. United States, No. 16-402 (June 22, 2018), likewise does not provide any reason for further review in this case. The Court held in Carpenter that the government's acquisition of seven days or more of historical cell-cite location records created and maintained by a cell-service provider is a Fourth Amendment search generally subject to the warrant requirement. Carpenter did not involve a border search, and the Court did not mention, let alone question, its longstanding border-search precedents. Although Carpenter relied on certain observations the Court had previously made in Riley, nothing in Carpenter -- a "narrow" decision concerning the application of the reasonable-expectation-of-privacy test for a search and the third-party records doctrine to the specific type of data at issue in that case -- bears on the application of the border-search doctrine to a cell phone that a traveler is attempting to bring into the United States. Slip Op. 17; see, e.g., id. at 7-10.

required some measure of individualized suspicion, but did not require a warrant. Id. at 146-148. The Fifth Circuit has declined to resolve the issue, but has emphasized that "no post-Riley decision * * * has required a warrant for a border search of an electronic device." United States v. Molina-Isidoro, 884 F.3d 287, 292 (2018). And the Ninth Circuit, in a pre-Riley decision, has determined that a "forensic examination of [a] computer" at the border "required a showing of reasonable suspicion," but not probable cause or a warrant. United States v. Cotterman, 709 F.3d 952, 968 (2013) (en banc), cert. denied, 571 U.S. 1156 (2014).[5]

Petitioner thus could not prevail in any circuit. Instead, as evidence of a "dispute" warranting this Court's resolution, he relies (Pet. 23 & n.18) on Judge Pryor's dissenting opinion in this case and a district court decision. But neither a dissent nor a district-court decision could create a conflict warranting this Court's review. See Sup. Ct. R. 10. And the district court decision on which petitioner relies ultimately upheld the search at issue because it recognized that it was "bound" by the Ninth Circuit's decision in Cotterman. United States v. Caballero, 178 F. Supp. 3d 1008, 1020 (S.D. Cal. 2016).[6]

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[5] In a decision issued after the decision below, the Eleventh Circuit concluded that "the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border," but also concluded, in the alternative, that the searches at issue "were supported by reasonable suspicion." Touset, 890 F.3d at 1231-1232.

[6] In a decision issued after the petition for a writ of certiorari was filed, another district court found a challenge to

4. In asserting that this Court's review is warranted notwithstanding the absence of a circuit conflict -- or, indeed, any decision adopting the rule he seeks -- petitioner begins with the premise (Pet. 19) that the court of appeals' decision "radically expands the government's power at the border." That premise is mistaken. This Court has long held that border searches never require a warrant supported by probable cause, and no court has reached a contrary conclusion in the context of border searches of cell phones. See pp. 7-9, 17-18, supra. The decision below thus leaves the legal landscape entirely unchanged.

Petitioner also asserts (Pet. 19) that the court of appeals' decision "raises serious concerns that the government will abuse its power" in conducting border searches of electronic devices. But the concerns that he describes, which have been raised in other contexts, are far afield from this case. Petitioner does not assert that he was targeted for "discriminatory reasons." Pet. 20. He does not claim that he was subjected to any "demeaning" or "gratuitously intrusive treatment" before or during the search of his cell phones. Pet. 16 (citation omitted). And he does not claim that his phones were searched in the absence of any suspicion that he was "committing a crime." Pet. 17. To the contrary, the court of appeals emphasized that petitioner "has not challenged

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warrantless border searches of electronic devices to be "plausible," but did not resolve the Fourth Amendment question. Alasaad v. Nielsen, No. 17-cv-11730, 2018 WL 2170323, at *20-*21 (D. Mass. May 9, 2018)

the finding of the district court that reasonable suspicion existed" to believe that he was using his phones to transport child pornography into the country. Pet. App. 7. The court's decision upholding a search under those circumstances broke no new ground.

5. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it for two independent reasons.

First, the question that petitioner asks this Court to resolve "specifically involves a forensic cell phone search, as opposed to a manual cell phone search." Pet. 25; see Pet. i. But "[t]he record does not detail the mechanics of the forensic examination" at issue here. Pet. App. 10 (Pryor, J., dissenting). The record reveals only that the search involved the "extraction of data," including images and videos, and that it was completed in a single afternoon. Ibid. (citation omitted); see Tr. 39-41. The record does not disclose the type of software or other technology used for the search; the particular forms of data that were within the scope of the search; or how any data retrieved from the phone, aside from the contraband images and videos, was revealed to the searching officers. That sparse record would make this case an unsuitable vehicle in which to make rules governing typical forensic searches.

Second, petitioner would not be entitled to suppression of the child pornography found on his phones even if he prevailed on the question presented. The exclusionary rule is a "judicially

created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Leon, 468 U.S. 897, 906 (1984) (citation omitted). This Court has emphasized, however, that suppression is an "extreme sanction," id. at 916, because the "exclusion of relevant incriminating evidence always entails" "grave" societal costs, Hudson v. Michigan, 547 U.S. 586, 595 (2006). Most obviously, it allows "guilty and possibly dangerous defendants [to] go free -- something that 'offends basic concepts of the criminal justice system.'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Leon, 468 U.S. at 908).

This Court has thus held that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. Suppression may be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." Davis v. United States, 564 U.S. 229, 238 (2011) (citation omitted). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, * * * the deterrence rationale loses much of its force, and exclusion cannot pay its way." Ibid. (citations and internal quotation marks omitted). Reliance on binding appellate precedent can establish the applicability of the good-faith exception. Id. at 239-241.

As the government argued in the court of appeals, those familiar principles confirm that suppression would not be appropriate here even if the warrantless search of petitioner's phones were held to violate the Fourth Amendment. Gov't C.A. Br. 30-32. As the Fourth Circuit recently emphasized, an "established and uniform body of precedent" has consistently upheld "warrantless border searches of digital devices that are based on at least reasonable suspicion." Kolsuz, 890 F.3d at 148. Here, as in Kolsuz, "it was reasonable for the [HSI agent] who conducted the forensic analysis of [petitioner's] phone[s] to rely on" that unbroken line of decisions. Ibid. Under the circumstances, petitioner cannot contend that the agent displayed anything approaching the sort of "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" that is required to justify the high costs of suppression. Davis, 564 U.S. at 238 (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2018