No. 17-8639

IN THE

SUPREME COURT OF THE UNITED STATES

HERNANDO JAVIER VERGARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY TO BRIEF IN OPPOSITION

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The question here is whether, under *Riley v. California*, 134 S. Ct. 2473 (2014), the Fourth Amendment permits the government to forensically search a citizen's cell phone at the border without a warrant. *See* Pet. at i, 14–22. This question affects "the privacies of life" for practically all Americans. *See Riley*, 134 S. Ct. at 2495 (citations omitted); *see also* Sup. Ct. R. 10(c). Given the undeniable national importance of the question, the government resorts to arguing that review should be denied because: (1) there is no circuit conflict (BIO at 17); (2) Petitioner's case is not the right vehicle (BIO at 20–22); and (3) the majority's decision is correct (BIO at 7–20). Each of these arguments, however, is flawed. As a result, the Court should grant the petition.

I. The Circuit Courts Are Conflicted Over Whether *Riley*'s Reasoning Applies To A Forensic Search Of A Cell Phone At The Border.

The government states, incorrectly, that the decision below does not conflict with another court of appeals' decision. BIO at 17. The government, however, fails to acknowledge that after Mr. Vergara filed his petition in this Court, the circuit courts became split on the fundamental question raised by his petition, "whether *Riley*'s reasoning extends to a search of a citizen's cell phone at the border by means of specialized forensic tools." Pet. at i.

In the decision below, the majority held that "[b]order searches never require probable cause or a warrant," and *Riley*'s analysis does not apply to border searches, not even for forensic searches of cell phones. App. A at 5 (internal quotation marks omitted). Furthermore, after Mr. Vergara filed his petition, the Eleventh Circuit decided *United States v. Touset*, reaffirming that "our decision in *Vergara* made clear that *Riley*, which involved the search-incident-to-arrest exception, does not apply to searches at the border." 890 F.3d 1227, 1234 (11th Cir. 2018). Consequently, the *Touset* court held that "*no suspicion* is necessary to search electronic devices at

the border." *Id.* at 1229 (emphasis added). In so holding, the Eleventh Circuit acknowledged its conflict with the Fourth and the Ninth Circuits, which "concluded—in divided decisions—that the Fourth Amendment requires at least reasonable suspicion for forensic searches of electronic devices at the border." *Id.* (citing *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (en banc)).[1] *Touset* alternatively held that the district court correctly denied Touset's motion to suppress because the forensic searches of his electronic devices were supported by reasonable suspicion. *See id.* at 1237.

In *Kolsuz*, which was also decided after Mr. Vergara filed his petition, the Fourth Circuit concluded that "[a]fter *Riley*, . . . a forensic search of a digital phone must be treated as a nonroutine border search, requiring some form of individualized suspicion." 890 F.3d at 146. The Fourth Circuit, however, did not decide the level of individualized suspicion required (reasonable suspicion or a warrant upon probable cause), because the court found that the agents who conducted the search relied in good faith on binding circuit precedent that no warrant was required for a search of an electronic device at the border. *Id.* at 137.

Thus, there is a clear circuit conflict over whether *Riley*'s reasoning applies to border searches and the corresponding level of Fourth Amendment suspicion required for a forensic cell phone search. The circuit conflict necessitates this Court's review. *See* Sup. Ct. R. 10(a). A citizen's Fourth Amendment protections should not depend on whether he or she travels, for instance, through Dulles International Airport (in the Fourth Circuit) as opposed to Hartsfield-Jackson International Airport (in the Eleventh Circuit). As this Court has explained, "[w]hen a

[1]In *United States v. Cotterman*, decided pre-*Riley*, the Ninth Circuit determined that a forensic search of a laptop computer at the border requires reasonable suspicion. *See* 709 F.3d at 968.

person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459–60 (1981). The Court should grant review to give clear guidance to citizens about the scope of their Fourth Amendment rights when they travel, and to border agents about their constitutional obligations before conducting forensic cell phone searches. *See Riley*, 134 S. Ct. at 2491 (noting this Court's "general preference to provide clear guidance to law enforcement through categorical rules").

II. Mr. Vergara's Case Is An Excellent Vehicle For Considering The Question Presented And Resolving The Circuit Conflict.

Mr. Vergara's case is an ideal vehicle for answering the question because it allows the Court both to deliver complete guidance on the level of Fourth Amendment suspicion required for forensic cell phone border searches and to resolve the circuit split. Should the Court agree with Mr. Vergara and the lower court's dissenting opinion that *Riley*'s analysis applies and that a warrant is required to forensically search a cell phone at the border, the Court's holding will answer the question and resolve the split. If, however, the Court disagrees that *Riley* applies, and concludes that a warrant is not needed, the Court could still decide whether reasonable suspicion is required, and thus still resolve the Fourth Amendment question and the split.[2] Whatever the Court decides, this case allows the Court to answer whether a warrant or reasonable suspicion is required for a forensic search, and its holding will determine the outcome of Mr. Vergara's case. Granting the

[2]The Eleventh Circuit did not rule on whether the search here satisfied any level of individualized suspicion. If this Court held some level of individualized suspicion were required, the Court could, consistent with its normal practice, remand the case to the Eleventh Circuit to apply that standard in the first instance. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018).

petition here efficiently uses the Court's resources, enabling the Court to answer the question completely while resolving the circuit split.[3]

The government contends that this case is an inadequate vehicle because the record does not detail the mechanics of the forensic examination. BIO at 20. But just the opposite is true. This case is an ideal vehicle because the record is clear that the search was a forensic search, conducted off-site by "forensic agents," using specialized forensic extraction tools. *See* Pet. at 7 (citing App. A at 3, 10). And there is no disputing that the privacy interests implicated by forensic searches are even greater than the searches in *Riley*, given the "much more extensive—and much more heavily protected from a privacy standpoint—[] information [] [a forensic search] may expose." App. A at 16; *see also* Pet. at 18 (discussing the forensic tool Cellebrite). These undisputed facts are more than enough to provide the Court with an excellent setting for considering whether *Riley*'s analysis applies, and whether, under *Riley*, the Fourth Amendment permits border agents to forensically search a cell phone without a warrant.

The government also claims the good faith exception presents an impediment to review. BIO at 21. But as Mr. Vergara explained in his petition, because the Eleventh Circuit did not rule on whether the good faith exception applies, this case presents a clean vehicle for the Court to consider the question presented. *See* Pet. at 25. The lack of a good faith ruling (or any other

[3]On the other hand, if the Court reviewed a case that raises only the reasonable suspicion question, the Court would not have an opportunity to decide whether a warrant is needed for a forensic search, nor would such a case be a good vehicle if, as in *Touset*, the lower court alternatively found that reasonable suspicion existed to support the search. Thus, Mr. Vergara's case is a better candidate for certiorari over a case that narrowly addresses reasonable suspicion. And for this reason, even if the Court were to grant review in a reasonable suspicion case, it should also grant review here to ensure it delivers complete guidance on this important Fourth Amendment question.

alternative holding) by the lower court in Mr. Vergara's case strengthens the point that his case is an ideal vehicle for addressing the question presented and resolving the circuit conflict. *See id.*[4]

III. The Government's Merits Arguments Do Not Afford Any Reason To Deny Review And Are Unpersuasive In Any Event.

None of the government's merits arguments, which rely only on pre-*Riley* case law, provide any reason to deny review. BIO at 7–20. Like the majority below, the government simply dismisses the suggestion that *Riley* has any relevance to border searches. That is reason enough for this Court to grant review given the circuit conflict on that question. *See* Sup. Ct. R. 10(a) & (c). Regardless, the government's merits arguments are unpersuasive and should be rejected.

1. The government's primary contention is that *United States v. Ramsey*, 431 U.S. 606 (1977), precludes that a warrant is ever required for a border search, including a forensic cell phone search. BIO at 9–10. But *Ramsey* was decided well before cell phones even existed. No principled reading of *Ramsey* or its progeny could conclude that the Court exempted all future border searches from the warrant requirement, no matter how intrusive they may be. *See* Pet. at 26.

The government's insistence that *Ramsey* governs whether the Fourth Amendment permits warrantless forensic cell phone searches underscores the need for this Court's intervention. As this Court recently explained, "the Court is obligated—as subtler and more far-reaching means of invading privacy have become available to the Government—to ensure that the progress of science

[4]Moreover, the good faith exception does not apply, because, when Mr. Vergara's phone was searched, there was no binding authority from the Eleventh Circuit on forensically searching a cell phone (or electronic device) at the border. *See Davis v. United States*, 564 U.S. 229, 238 (2011) (holding that the good faith exception applies when law enforcement acts upon binding appellate precedent). Regardless, determining whether the good faith exception applies is a matter for the Eleventh Circuit to address on remand.

does not erode Fourth Amendment protections." *Carpenter v. United States*, 138 S. Ct. 2206 (Slip. Op., at *15) (2018) (internal alterations and quotation marks omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandies, J., dissenting)).

The Court's intervention is necessary because forensic cell phone searches have undeniably "afforded law enforcement a powerful new tool . . . [that] risks Government encroachment of the sort the Framers . . . drafted the Fourth Amendment to prevent." *Id.* at *15; *see also* Pet. at 19–22. Unlike the routine search of envelopes in *Ramsey*, a forensic cell phone search gives the government access to an unprecedented treasure trove of private information that would have been inconceivable before the digital age. Pet. at 18–19. And unlike a routine search of an envelope, a forensic search of a cell phone necessarily implicates additional constitutional rights (such as the First Amendment), given that forensic searches enable the government to read citizens' emails and text messages; monitor citizens' social media activity; surveille citizens' movements through GPS data; spy on journalists and politicians; investigate matters with no nexus to the border; and access business travelers' and professionals' confidential or proprietary information. *See* Pet. at 18–22.[5] As explained in *Riley* and *Carpenter*, these are exactly the type of unrestrained government intrusions upon citizens' privacy and property the Fourth Amendment protects against. *See Carpenter*, Slip. Op., at *4–5 ("The Founding generation crafted the Fourth Amendment as a response to the reviled general warrants and writs of assistance of the colonial era, which allowed

[5]The government seeks to minimize the ramifications of allowing warrantless forensic searches as only affecting citizens seeking to bring cell phones into the country from abroad. BIO at (I). In fact, the border search exception not only covers both entry and exit searches, but, as Mr. Vergara explained in his petition, the government uses the border as a means to forensically search the cell phones of the millions of citizens who travel daily through our land borders, sea ports, and international airports, including, in some cases, citizens who travel on exclusively domestic flights. *See* Pet. at 14–16.

British officers to rummage through homes in an unrestrained search for evidence of criminal activity.") (internal quotation marks omitted) (quoting *Riley*, 134 S. Ct. at 2494).

2. Like the majority below, the government also contends that *Riley* applies only to searches incident to arrest. BIO at 11. This Court's recent decision in *Carpenter*, however, plainly shows that *Riley* is not so limited. *See* Slip. Op., at *15.

Despite *Carpenter*, the government persists in arguing that *Riley*'s reasoning should not apply here because there is "more precise guidance" from the Founding-era demonstrating that the warrant requirement does not apply at the border. BIO at 14. But this argument misconstrues how this Court obtains guidance from the Founding-era and is misleading about what *Riley* said about that era.

In determining whether a warrantless search violates the Fourth Amendment, this Court "inquire[s] first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, [the Court] must evaluate the search or seizure under traditional standards of reasonableness 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." *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (internal citations omitted).

As *Riley* explains, there is necessarily an absence of guidance from the Founding-era about searching cell phones, "technology nearly inconceivable just a few decades ago." 134 S. Ct. at 2484. Given the lack of guidance from the Founding-era about searching cell phones, *Riley* turned to traditional principles of reasonableness to determine whether cell phone searches are exempt from the search incident to arrest exception. *See id.* (citing *Wyoming*, 526 U.S. at 299–300).

Guidance from the Founding-era about cell phone searches is just as absent in Mr. Vergara's case as it was in *Riley*. And just as *Riley* concluded that the historical justifications for the search incident to arrest exception do not logically apply to a search unimaginable to our Founders—a search for data on a cell phone—the Court here should conclude that "the rationales underlying the border search exception lose force when applied to forensic cell phone searches." App. A at 17.[6]

3. The government also contends that suspicionless, forensic cell phone searches are permissible at the border because citizens have a lesser expectation of privacy there. BIO at 15–17. In the government's view, this lesser expectation of privacy is demonstrated by the fact that the border search exception extends to the search of luggage or a trunk. BIO at 15–16. But the government ignores that *Riley* categorically rejected comparisons between the search of a cell phone and the search of luggage, a trunk, or any other closed container. *See* 134 S. Ct. at 2491, 2493; *see also* Pet. at 4, 29.

Finally, the government claims that travelers are on notice that their cell phones will be searched and advises travelers to leave their cell phones at home if they wish to keep the private contents of their cell phones out of the government's hands. BIO at 17. This advice, however, is impossible to reconcile with both *Riley*'s and *Carpenter*'s recognition that "carrying [cell phones] is [so] indispensable to participation in modern society" that they are almost like a "feature of human anatomy." *Riley*, 134 S. Ct. at 2484; *Carpenter*, Slip. Op., at *12. Indeed, the government's unreasonable advice magnifies the need for this Court's intervention. No citizen should have to

[6]The government also argues that the passage of the nation's first customs statute shows that border searches are not subject to the warrant provisions. BIO at 14. But the government again fails to appreciate that cell phones did not exist in the 1700's.

choose between freedom from arbitrary government intrusion into the most private aspects of his or her life and freedom to travel. Our Constitution, especially the Fourth Amendment, affords citizens both.

CONCLUSION

Twice in the last five terms, this Court has assessed the reasonableness of extending one of the historical Fourth Amendment doctrines to a search unimaginable to the Founders—a search for digital content on a cell phone. *See Riley*, 134 S. Ct. at 2484; *Carpenter*, Slip. Op., at *10. And twice, this Court has declined to exempt cell phone searches from the Fourth Amendment's warrant requirement because of the unique privacy concerns associated with cell phones searches. *See Riley*, 134. S. Ct. at 2485; *Carpenter*, Slip. Op., at *12.

Like *Riley* and *Carpenter*, Mr. Vergara's case raises a fundamental question about the scope of the Fourth Amendment protection in the contents of our cell phones. The circuits are divided on how to answer that question. This is the right case at the right time for the Court to provide an answer. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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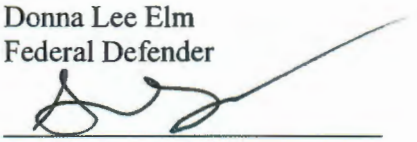

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