No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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SAMANTHA VELAZQUEZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a warrantless, post-arrest cell phone search is permissible under the Fourth Amendment, simply because it takes place near the United States boundary with Mexico. In other words, does *Riley v. California*, 134 S. Ct. 2473 (2014), apply at the border?

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Petitioner Samantha Velazquez respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals affirmed petitioner's conviction. *United States v. Velazquez*, No. 16-50323 (9th Cir. 2018).[1] After ordering a response from the government, the Ninth Circuit denied a petition for rehearing en banc without analysis.[2]

JURISDICTION

On October 3, 2018, the Ninth Circuit denied the timely petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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[1] A copy of the memorandum is attached as Appendix A.

[2] A copy of the order denying the petition for rehearing en banc is attached as Appendix B.

STATEMENT OF THE CASE

A. The warrantless cell phone search and the motion to suppress.

Federal agents found drugs in Ms. Velazquez's car, as she crossed the border from Mexico. ER:353-56.[3] They arrested her. Six hours later (and after securing the drugs), the agents used a Cellebrite terminal at the port of entry to conduct a warrantless, forensic search of her Galaxy Note 3 smartphone. ER:141, 156, 235. The examination revealed an audio recording of Ms. Velazquez being recruited to smuggle marijuana. ER:181-203. The government charged her with violations of 21 U.S.C. §§ 952, 960. ER:1.

Ms. Velazquez moved to suppress the fruits of the search. She argued that, under *Riley*, a warrant was required. ER:122-23; 204-212. The government disagreed, arguing the agents performed a "lawful border search for which particularized suspicion was not required." ER:142. The district court denied the motion. It concluded the border search exception applied and thus no warrant was required. ER:238-43.

[3] ER is the excerpt of record on file with the Ninth Circuit.

The government used the recording at trial. ER:401; 446. The jury convicted Ms. Velazquez. ER:596-97. The district court sentenced her to 80 months in custody. ER:609.

B. The appeal.

On appeal, Ms. Velazquez argued the district court erred in failing to suppress the results of the agents' warrantless phone search. She explained that, because the search was conducted post-arrest, and was done entirely for evidentiary purposes – not to prevent importation of contraband – it did not fall within the border search exception. Under *Riley*, therefore, the agents were required to obtain a warrant.

The government argued no warrant was required. Further, it claimed that, in any event, suppression was not appropriate under the independent source rule, an argument it had not pursued in district court.

In reply, Ms. Velazquez explained the government's reliance on the independent source doctrine was misplaced. She noted that *Murray v. United States*, 487 U.S. 533, 543 (1988) held, "it is the function of the District Court rather than the Court of Appeals to determine the facts[.]" *Id.* at 543. Thus, where the district court "did not [] explicitly find that the agents would have sought a warrant if they had not earlier [conducted an unlawful search]," the government could not prevail on an independent source claim. *Id.* Rather, in that scenario, the requisite

course was to "vacate the judgment and . . . remand to the District Court for determination whether the warrant-authorized search [] was an independent source of the challenged evidence[.]" *Id.* at 543-44. Accordingly, given that the government conceded, "the district court never reached this issue," GB:31, Ms. Velazquez argued remand was required.

The court of appeals, however, ignored this Court's rule. Following oral argument, but without remanding for a hearing to determine the facts, it affirmed the convictions solely under an independent source theory:

> [B]ecause we find that the independent source doctrine applies, the district court properly denied Velazquez's motion to suppress an audio recording discovered when Homeland Security Investigations (HSI) agents downloaded the contents of her cell phone with a Cellebrite device at the Port of Entry. Under the independent source doctrine, "evidence initially discovered during, or as a consequence of an unlawful search, but later obtained independently from activities untainted by the initial illegality," may be admitted. Here, almost three months after the arrest, Special Agent Gayton obtained a warrant to search Velazquez's cell phone, along with two other cell phones that Velazquez had in her possession at the time of arrest. Agent Gayton had probable cause for the warrant and would have sought the warrant absent any tainted evidence of the audio recording on Velazquez's cell phone because, given the drugs found in Velazquez's car, there was reason to believe that the cell phone had been used to traffic drugs. Thus, the audio recording was "separately discovered through an independent source."

App.A at 2 (empcitations omitted).

The panel reached this conclusion, despite the absence of any support in the record. Agent Gayton *never* stated she would have sought the warrant, had it not been for the prior, warrantless search. Moreover, because it relied on independent source, the panel did not address the Fourth Amendment issue of first impression on which the briefing and argument focused.

REASON FOR GRANTING THE PETITION

Review is necessary to reconcile the border search doctrine with *Riley*.

Under *Riley*, agents need a warrant to search a cellphone incident to arrest. The question Ms. Velazquez asks this Court to answer is whether that rule also applies at the border.

A. The border search doctrine.

The government's "interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). As such, "Congress, since the beginning of our Government, 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*." *Id*. at 153 (emphasis added, citation omitted).

This authority is commonly referred to as the "border search doctrine" or "border search exception" to the Fourth Amendment. *United States v. Ramsey*, 431 U.S. 606, 621 (1977). It is rooted in – and constitutionally justified by – the need to protect the country against unwanted people and illicit contraband. *See*, *e.g.*, *Ramsey,* 431 U.S. at 620 ("The border-search exception is grounded in the recognized right . . . to control . . . *who and what may enter the country*.") (emphasis added). The catalogue of border search cases reflects this specific purpose (rather than allowing evidence-gathering in support of a criminal investigation):

- *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971) ("Customs officers characteristically inspect luggage and their power to do so is not questioned...; it is an old practice and is *intimately associated with excluding illegal articles* from the country.") (emphasis added);
- *Carroll v. United States*, 267 U.S. 132, 154 (1925) ("Travelers may be [searched] in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belonging as effects which may be lawfully brought in.");
- *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is undoubtedly within the power of the Federal Government to exclude aliens from the country. It is also without doubt that this power can be effectuated by routine inspections

and searches of individuals or conveyances seeking to cross our borders.") (citation omitted).

In summary, under the border search exception, warrantless searches of property at the border are generally permissible to find and exclude contraband and unwanted visitors. Thus, like any Fourth Amendment exception, a valid "border search" must be tailored to this purpose. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (the permissibility of a particular law enforcement practice at the border is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

B. *Riley.*

In *Riley*, the Court considered another longstanding exception to the Fourth Amendment's warrant requirement, searches incident to arrest. *See* 134 S. Ct. at 2484. It held that modern cell phones implicated Fourth Amendment concerns too compelling for a general incident-to-arrest exception. *See id.*

The decision was grounded in the unique capability of cell phones and the ubiquitous role they play in modern society. Cell phones, the Court explained, are "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*. And they are more integrated into our lives than almost any other technology, including

computers. *Id*. at 2490 ("nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower."). Unlike computers, cell phones accompany their users, and therefore often contain information that can pinpoint an individual's movements. They also contain records of phone calls, voicemail, and text messages generally not found on computers.

Further, cell phones contain "'apps' [which] offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely." *Id*.

In short, "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life[.]'" *Id*. at 2494-95 (citation omitted). Accordingly, the Court unambiguously held: "Our answer to the question of what

police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant." *Id.* at 2495.

C. This case raises the question of whether and to what degree *Riley*'s reasoning undermines the general border search exception.

This case lies at the crossroads between the historical border search doctrine and *Riley*. Indeed, *Riley* specifically left open the question of how to reconcile other historical Fourth Amendment exceptions with modern cell phone technology: "even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." 134 S. Ct. at 2494. This case, therefore, provides a timely opportunity to resolve the issue as to the border search exception.

This is an important issue on which the Court's guidance is necessary. Judge Pryor's recent dissent in *United States v. Vergara*, 884 F.3d 1309, 1313 (11th Cir. 2018), makes the point: "I acknowledge that I can, at best, attempt to predict how the Supreme Court would balance the interests here. But my weighing of the government's heightened interest at the border with [the defendant's] privacy interest in his cell phones leads me to a result different than the majority's. I respectfully dissent because, in my view, a forensic search of a cell phone at the border requires a warrant supported by probable cause."

Judge Prior continued: "the majority's decision likely will have a profound impact on law enforcement practices at our ports of entry and on the individuals subjected to those practices. Last year, customs officers searched more than 30,000 cell phones or other electronic devices of people entering and leaving the United States—nearly a 60 percent increase over the previous year. Meanwhile, for the more than 95 percent of Americans who own cell phones these devices contain 'the privacies of life' the Fourth Amendment exists to protect. My answer to the question of what law enforcement officials must do before forensically searching a cell phone at the border, like the Supreme Court's answer to manually searching a cell phone incident to arrest, 'is accordingly simple—get a warrant.'" *Id.* at 1318-19 (citations omitted).

The Fifth Circuit has also struggled with this issue. In *United States v. Molina-Isidoro*, 884 F.3d 287 (5th Cir. 2018), it ultimately avoided the constitutional question by resolving the case under the good faith exception. In doing so, it noted: "The contours of the border-search doctrine in this new area—what level of suspicion, if any, is required and whether a warrant is ever required—may well turn on whether the interest at the border in general crime fighting and national security, which phone searches can further, is as weighty as the traditional justification of seizing contraband, which an electronic search is not likely to accomplish. *Because*

the Supreme Court has not said much about this alternative justification the government cites, future developments may provide guidance." *Id.* at 297 (emphasis added).

The Fourth Circuit has also noted the uncertainty of applying the border search exception to cell phones post-*Riley*: "under *Riley*, the forensic examination of [the defendant's] phone must be considered a nonroutine border search, requiring some measure of individualized suspicion. What precisely that standard should be — whether reasonable suspicion is enough, as the district court concluded, or whether there must be a warrant based on probable cause, as the defendant suggests — is a question we need not resolve: Because the agents who conducted the search reasonably relied on precedent holding that no warrant was required, suppression of the report would be inappropriate even if we disagreed. Accordingly, we affirm the judgment of the district court." *United States v. Kolsuz*, 890 F.3d 133, 137 (4th Cir. 2018).

Taken together, these decisions are a collective request for assistance. The lower courts want to know what standard to apply. The Court should answer their call.

D. This case is the right vehicle.

Finally, there is the matter of "vehicle." Given the court of appeal's independent source ruling, is this the right case?

First, even assuming that ruling was correct, it would not lessen the importance of the Fourth Amendment question squarely presented, briefed, and argued to both the district court and court of appeals. Nor does the possibility that Ms. Velazquez could ultimately lose make this case any less worthy of consideration. As explained in *United States v. Leon*, 468 U.S. 897, 925 (1984), "[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the [exceptions to the suppression rule]."

Second, the court of appeals' reliance on the independent source claim was itself contrary to this Court's precedent. The undisputed facts are that, before the district court, the government did not press an independent source claim. Not surprisingly, therefore, the district court never made findings on that ground. And with no evidence in the record as to whether the government would have sought a search warrant but for the initial warrantless search, the panel was not free to decide the issue in the first instance. On this point, under *Murray*, there is no doubt.

Thus, the independent source issue should be no impediment to this Court's review. It simply means that, if the Fourth Amendment issues are resolved in Ms. Velazquez's favor, the case should be remanded to the district court to determine whether suppression is appropriate. Considering that such remands are the normal course in criminal appeals, this case remains an ideal vehicle for the Court's consideration.

CONCLUSION

The Court should grant the petition for a writ of certiorari to determine whether a warrant is required for a post-arrest cell phone search at the border.

Respectfully submitted,

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s/ Devin Burstein

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