No._____

IN THE SUPREME COURT OF THE UNITED STATES

ALFREDO AGUILAR JR., PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a warrantless forensic search of a cell phone at a border port of entry is an unreasonable search.
2. Whether, in the light of the privacy interests identified in *Riley v. California,* 573 U.S. 373 (2014) and *Riley*'s statement that a warrant is generally required before a cell phone is searched it was unreasonable to believe that an warrantless forensic search of a cell phone was permitted.

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PETITION FOR WRIT OF CERTIORARI

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Alfredo Aguilar Jr. asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 2, 2020.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals, *United States v. Aguilar,* 973 F.3d 445 (5th Cir. 2020), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 2, 2020. This petition is filed within 150 days after entry of judgment. Supreme Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fourth amendment to the U.S. Constitution provides that "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."

STATEMENT

This case presents the Court with an opportunity to resolve important questions that have divided the courts of appeals and appears to have brought most of the courts of appeals into conflict with the holding in *Riley v. California,* 573 U.S. 373 (2014). *Riley* held that the baseline rule for searches of cell phones was that such searches had to be done pursuant to a search warrant: "Our holding, of course, is not

that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." 573 U.S. at 401. In the course of reaching that holding, the Court set out at length the reasons why cell phones deserved that level of protection. It also explained how and why obtaining a warrant to search a cell phone validated the protection of privacies fundamental to the original meaning of the fourth amendment. *Id.* at 393-403. *Riley* acknowledged that the need for a warrant for a cell phone might yield when circumstances existed that might "*justify a warrantless search of a particular phone.*" *Id.* at 401-02 (emphasis added).

The *Riley* warrant rule appeared to establish clearly the precedent governing cell phone searches. However, at entry points along the country's international borders, and at the border's functional equivalents, such as airports receiving international flights, law enforcement officers acted as if *Riley* did not apply to them. They continued to conduct warrantless searches of cell phones routinely. *See, e.g.,* App. C; *United States v. Wanjiku,* 919 F.3d 472 (7th Cir. 2019); *United States v. Vergara,* 884 F.3d 1309 (11th Cir. 2018); *United States v. Molina-Isidoro,* 884 F.3d 287 (5th Cir. 2018).

To a great extent, the courts of appeals have agreed with the agents. Thus, *Riley*'s rule that cell phones searches be conducted pursuant to warrant has, largely, been abandoned at the border by the courts of appeals. Only the Ninth Circuit has adhered to the rule that a warrant is generally required to search a cell phone at the border. *See United States v. Cano,* 934 F.3d 1002 (9th Cir. 2019). In this case, the

Fifth Circuit, as it had before, *see United States v. Molina-Isidoro,* 884 F.3d 287 (5th Cir. 2018), held that, despite the clear statement in *Riley* that a warrant is generally required for a search of a cell phone and the clear statement that exceptions to that rule were to be assessed in the context of particular phones, 573 U.S. at 401-02, the border agents could have had a reasonable good-faith belief that a warrantless cell phone search was permitted at the border.

The Fifth Circuit had before it these facts. Petitioner Alfredo Aguilar Jr. Cristin Cano, and Cristal Hernandez walked across the Gateway to the Americas bridge from Nuevo Laredo, Mexico, to Laredo, Texas. At the port of entry on the U.S. side, Cano reached the inspection station first. App. A, 973 F.3d at 446-47. She told the agent there that she had been grocery shopping in Nuevo Laredo, and showed a bag in which she carried two one-gallon cans labeled as hominy. *Id.* The cans seemed off to the agent. When he shook them, he did not like the sound they made. *Id.* He referred Cano for further inspection. *Id.*

Hernandez entered next. She told a similar story and carried similarly sized cans. She too was referred for secondary inspection. App. A, 973 F.3d at 447. Aguilar, when it was his turn to enter, stated that he had been shopping with the women and had paid for the groceries they bought. He also was ordered to secondary. *Id.*

In the secondary inspection area, a narcotics-detecting dog alerted to the cans the women were carrying. An x-ray of the cans revealed that they did not contain food. Aguilar and the women were arrested. Agents eventually determined that the

cans contained a total of 10.7 kilograms of methamphetamine. App. A, 973 F.3d at 447.

Agent Alonzo Salazar was called to the bridge to interview the three arrestees. Aguilar declined to speak with Salazar. Agent Salazar also took possession of Aguilar's cell phone, which had been seized when he was arrested. App. C. For the next week, the phone sat in a lockbox in Agent Salazar's office, until on May 22, he took it to Homeland Security officer Manuel Gutierrez for a forensic search. App C.[1] That search revealed records of calls that Aguilar made to Mexico, which the government, based on the statements of Cano and Hernandez, believed to be evidence that he was arranging a drug deal. App. A, 973 F.3d at 447.

The forensic search of the phone was carried out without a warrant. No agent applied for a warrant because, as Agent Salazar explained, "[We] exercised our border search authority." App. C. Salinas admitted that it would not have been difficult or time-consuming to prepare a warrant application and affidavit for the phone–most of the application and affidavit material was in a form on his computer. App. C.

After Aguilar was charged with four methamphetamine offenses in violation of 21 U.S.C. § 841, 846, 952, and 960, he moved to suppress the evidence recovered through the forensic search of his cell phone. Aguilar argued that, under *Riley v. California,* 573 U.S. 373 (2014) a warrant was required to search a cell phone. The

[1] Consistent with the agents' position that border agents did not need search warrants for cell phones, Agent Salazar also had warrantless forensic searches performed on the phones seized from Cano and Hernandez. App. C.

district court denied the motion. App. B. It concluded that *Riley* was not the relevant precedent: "no binding precedent [exists] concerning whether the border exception to the warrant requirement extends to searches of cell phones." App. B. The court, relied on *United States v. Molina-Isidoro,* 884 F.3d 287 (5th Cir. 2018), not *Riley*. It reasoned that, because *Riley* had not explicitly stated that its rule applied to cell phone searches conducted at the border, border agents could have had a good-faith belief that they were permitted to conduct warrantless cell phone searches. App. B. The district court therefore concluded that good-faith exception meant that the evidence did not need to be suppressed. App. B .

After that ruling, Aguilar and the government consented to a bench trial. The parties introduced stipulated facts, which the district court considered before finding Aguilar guilty. App. A, 973 F.3d at 448. The court sentenced Aguilar to 20 years' imprisonment.

Aguilar appealed. He contended that *Riley* set out the applicable law, that under *Riley* a search warrant was generally required to search a cell phone, that no pressing circumstances justified the warrantless search of his phone, and that, given the clear statement in *Riley* that a warrant was required, the agents could not have believed that controlling appellate precedent permitted warrantless cell phone searches. *Cf. Davis v. United States,* 564 U.S. 229, 232 (2011) (officers act in good faith when they act under appellate precedent that clearly permits the action taken). The Fifth Circuit rejected those arguments. It ruled that the warrantless search did

not require suppression of the evidence because the agents' had a good-faith belief that they could conduct the search. 973 F.3d at 449-50.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A WARRANT IS NEED FOR A FORENSIC SEARCH OF A CELL PHONE AT THE INTERNATIONAL BORDER.

The fourth amendment prohibits unreasonable searches. In *Riley v. California,* the Court held that, as a general rule, warrantless searches of cell phones are unreasonable. 573 U.S. 373, 401 (2014). The rule was based on the tremendous amount of information and the quality of information, both intimate and wide-ranging, that a cell phone search can reveal, information that may exist many miles away from the sight of the search. 573 U.S. at 393-403. The Court recognized that, on occasions, particular circumstances might justify a warrantless search of a particular phone, 573 U.S. at 401-02, but nothing in *Riley* suggested that the general rule governing cell phones did not apply in all places. The Court also firmly rejected the notion that a search of a cell phone was like a search of a container. Comparing a cell phone to a container, the Court wrote, was " like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley,* 573 U.S. at 393.

The *Riley* warrant rule appeared to be clearly established law. However, at the border and its functional equivalent such as U.S. airports receiving international flights, *Riley* was treated by law enforcement as a rule for other places and other officers. That border-agent perception has been validated by a number of the courts

of appeal. These courts have relied on the border-search doctrine, a doctrine largely based on container and property searches, to hold that cell phones may be searched without a warrant.

The Eleventh Circuit has granted officers the most authority, ruling that the border-search doctrine justifies all searches of cell phones and other electronic devices. *United States v. Vergara,* 884 F.3d 1309 (11th Cir. 2018) (cell phone search); *United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018) (flash drive search). The Tenth Circuit requires only that agents have reasonable suspicion of any crime to justify a warrantless search of a cell phone. *United States v. Williams,* 942 F.3d 1187, 1190-91 (10th Cir. 2019). The Fourth Circuit has held that a warrantless search of a cell phone is permitted at the border, if agents "have reasonable suspicion that it contains evidence of a particular crime with a nexus to the purposes of the border search exception" *See United States v. Aigbekaen*, 943 F.3d 713, 720–23 (4th Cir. 2019). The Fifth and Seventh Circuit have approached the question in a different way, holding that, a border agent might have a reasonable belief that *Riley*'s cell phone rule did not apply to his work watching the border. App. A; *United States v. Molina-Isidoro,* 884 F.3d 287 (5th Cir. 2018); *United States v. Wanjiku,* 919 F.3d 472 (7th Cir. 2019).

A clear division among the circuits exists, however. The Ninth Circuit has held that warrantless searches of cell phones at the border are unreasonable. *United States v. Cano,* 934 F.3d 1002 (9th Cir. 2019), *r'hrg en banc denied,* 973 F.3d 966 (9th Cir. 2020). The Ninth Circuit follows *Riley*'s general rule that a warrant is required

for a forensic cell phone search; it does not allow the free-ranging searches that other circuits do. 934 F.3d at 1007, 1018. It does, however, allow an exception to the warrant requirement if the agents have a reasonable suspicion that the phone contains digital contraband. 934 F.3d at 1007. *Cano* also held that agents could not have a good-faith belief that *Riley* allowed a warrantless forensic search of a cell phone in the absence of a well-founded suspicion that the phone contained digital contraband, bringing it into conflict with the Fifth and Seventh Circuits. *Cano,* 934 F.3d at 1021-22.

These circuit court cases call for resolution and guidance from this Court. Cell phone searches at the border have split the courts of appeals on their permissibility and on the good-faith rule of *Davis v. United States,* 564 U.S. 229 (2011). The Fifth and Seventh Circuits think that a perceived lack of the binding nature of the *Riley* rule was sufficient for border agents to search as they wished. App. A, 973 F.3d at 449-50; *Wanjiku,* 919 F.3d at 485-86. The Ninth Circuit understood *Riley* to state a general rule that a warrant is required for all cell phone searches and *Davis* to hold that agents may search in good-faith only when appellate precedent specifically permits it. *Cano,* 934 F.3d 1021-22. The Fifth and Seventh Circuits understood *Davis* to allow warrantless border cell phone searches in good-faith because *Riley* did not explicitly prohibit them, it only issued a general rule for cell phones.

The conflict between what *Riley* appears to mean and what the court of appeals have read in it, as well as the division among the circuits as to what *Davis* means and how it interacts with *Riley,* present questions important to travelers, to law

enforcement, and to the criminal justice system. Cell phones, and their trove of information, accompany people everywhere, including on foreign travels. *Riley,* 573 U.S. at 395; *Carpenter v. United States,* 138 S. Ct. 2206, 2218; *United States v. Kolsuz*, 890 F.3d 133, 145 (4th Cir. 2018) ("[I]t is neither realistic nor reasonable to expect the average traveler to leave his digital devices at home when traveling.").

The division among the circuits means that, in different areas of the country, people have different levels of protection for their cell phones and the information they carry. It means law enforcement is uneven. It means questionable practices may pass in the name of good-faith. Because the same concerns about government intrusion into vast amounts of private information obtain at the border as in the rest of the country, because the government has no contraband-interdiction interest in the vast information stored on or accessed through cell phones, because *Riley* has taught us that searches of cell phones require a warrant, and because the circuits are divided, the Court should takes this opportunity to clarify whether a warrant is needed for searches of cell phones at the border.

A. *Riley* teaches that the nature of cell phones means that a warrant is ordinarily required before they can be searched.

Riley made two things clear. First, *Riley* rejected the contention that a cell phone was analogous to a physical container holding physical objects. 573 U.S. at 393, 397. The Court wrote that this analogy "crumble[d] entirely" upon consideration that, unlike a container whose contents are housed in a single, fixed place, "a cell phone is used to access data located elsewhere, at the tap of a screen." 573 U.S. at 397 (citing

New York v. Belton, 453 U.S. 454, 460 n.4 (1981)). That cell phones are not containers meant that the rationales that permitted searches of containers did not justify searches of cell phones. 573 U.S. at 393.

Second, *Riley* Court explained that, because of the immense amount of information they contained and the many facets of a life they revealed, cell phones implicated the heart of the privacy protection conferred by the fourth amendment. When, as the Court determined was the case with cell phones, "privacy-related concerns are weighty enough," a warrant is required before a search may take place. *Riley,* 573 U.S. at 592 (quoting *Maryland v. King,* 569 U.S. 435, 464 (2013)). This is so even in situations in which there are "diminished expectations of privacy[.]" *Riley,* 573 U.S. at 592 (quoting *King,* 569 U.S. at 464).

In light of these two propositions, the Court, while considering *Riley*'s specific question of whether a cell phone could be searched incident to arrest, set a baseline rule for cell phone searches: "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." 573 U.S. at 401.

Riley explained that, given the nature of cell phones, a warrant rule was necessary to protect fundamental fourth amendment interests. The immense storage capacity of a cell phone and the access channels a phone can activate means that a huge, varied amount of information is exposed when a cell phone is searched. *Id.* at

393-94. A cell phone search can reveal "[t[he sum of an individual's private life." *Id.* at 394. A cell phone also reveals information that is spatially and temporally distant from the phone itself. It provides the searcher with access to more information that could ever be carried by a single container, more even that might be stored in a single house (and certainly more than would be carried by a traveler returning home after a trip). *Id.* at 394-97. Just as a key found in a pocket does not allow on its own a search of a person's entire house, a cell phone in a pocket does not authorize a search of the vast and varied records. *Id.* at 396-97 (citing *United States v. Kirschenblatt,* 16 F.2d 202, 203 (2d Cir. 1926)). In both cases a warrant is required. *Riley,* 573 U.S. at 397-402.

The Court further explained in *Carpenter* how the warrant rule from *Riley* reflected fundamental fourth amendment protections. A "central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" *Carpenter,* 138 S. Ct. at 2214 (quoting *United States v. Di Re,* 332 U.S. 581, 595 (1948)). This is because the "Amendment seeks to secure 'the privacies of life' against 'arbitrary power.'" *Carpenter,* 138 S. Ct. at 2214 (quoting *Boyd v. United States,* 116 U.S. 616, 630 (1886)). Those privacies have been challenged by technological developments. To "'assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,'" the Court has required that particularly invasive searches enabled by technology may be conducted only pursuant to a warrant. *Carpenter,* 138 S. Ct. at 2214 (quoting *Kyllo v. United States,* 533 U.S. 27, 34 (2001)). Thus, the Court has required warrants before law enforcement may use a

thermal-imaging device on homes, *Kyllo,* 533 U.S. at 40, before law enforcement may obtain cell phone location information from a service provider, *Carpenter,* 138 S. Ct. at 2221, and, before cell phones may be searched, *Riley,* 573 U.S. at 401.

Riley set a general rule governing cell phone searches. In so doing, it rejected the argument that the search-incident-to-arrest doctrine created a categorical exception to that general rule. 573 U.S. at 393-403. Although rejecting a categorical exception, *Riley* recognized that "case-specific exceptions may still justify a warrantless search of a particular phone." 573 U.S. at 401-02. As an example, the Court stated that a warrantless cell phone search might be reasonable when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" (quoting *Kentucky v. King,* 563 U.S. 452, 460 (2011) and *Mincey v. Arizona,* 437 U.S. 385, 394 (1978)). The Court emphasized that the "critical" distinction was between categories and particular incidents, explaining that "the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case." *Riley*, 573 U.S. at 402.

B. The General Rule That Warrants Are Required to Search a Cell Phone Applies Even When the Search Occurs at the Border.

Riley's general rule that warrants are required to search cell phones applies with equal force at the border. People do not lose their Fourth Amendment rights at the border, although it is true that the government's interest in vindicating its search interests are at a "zenith" there. *United States v. Flores-Montano,* 541 U.S. 149, 152

(2004). But, as *Riley* reminded us, when privacy concerns are greatly heightened, as with cell phones, a warrant should still be insisted on. *Riley,* 573 U.S. at 592. This is so because "we generally determine whether to exempt a given type of search from the warrant requirement by assessing on one hand the degree to which the search intrudes on an individual's privacy and on the other the degree to which it is needed for the promotion of legitimate government interests." *Id.* at 385 (*quoting Wyoming v. Houghton,* 526 U.S. 295, 300 (1999). The Court has already decided that cell phones merit the protection of a warrant. *Id.* at 393-402. That a phone is searched at the border does not change the balance of interests because allowing warrantless cell phone searches at the border does not further the interests that justify the border-search doctrine.

Nothing in *Riley*'s discussion of its warrant rule implied that recognized exceptions to the warrant requirement constituted blanket dispensations of the cell-phone warrant rule. Indeed, *Riley* specifically rejected the proposition that the search-incident-to-arrest exception categorically permitted warrantless searches of cell phones. *Id.* at 395-402. This was because the rationale behind the exception did not have "much force with respect to" the vast store of sensitive information on cell phone. The same is true of the border exception.

The government's border-search authority rests on a heightened government interest in detecting and interdicting contraband before it can enter the country. *Flores-Montano,* 541 U.S. at 152; *United States v. Montoya de Hernandez,* 473 U.S. 531, 538-40 (1985). Interdiction border searches are traditionally of containers and of

the person, and they are made in exercise of the government's sovereign authority to control what crosses its borders. *See, e.g., United States v. Ramsey,* 431 U.S. 606, 619 (1977) ("Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry."); *United States v. 12 200-Foot Reels of Super 8mm. Film,* 413 U.S. 123 (1973) (border searches are "necessary to prevent smuggling and to prevent prohibited articles from entry"); *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 376 (1971) (same). Under this anti-smuggling rationale, which traces back to a statute passed by the First Congress, the Court has approved warrantless searches for objects hidden in the mail, *Ramsey,* 431 U.S. at 624-25, in vehicles and their compartments, *Flores-Montano,* 541 U.S. at 152-55, and even, in a case where alimentary-canal smuggling was suspected, in a human body, *Montoya de Hernandez,* 473 U.S. at 544.

But cell phones are not smuggling devices.[2] We know from *Riley* that cell phones are not containers. 573 U.S. at 393-94. Cell phones do not become containers when they appear with a traveler at the border. They remain devices to access and view amounts of information, most, if not all of which is physically at great remove and most, if not all, has no relationship with the sovereign's interest in prohibiting physical items or unauthorized persons from entering the country.[3] Little that cell

[2] Border agents would appear to be "free to examine the physical aspects of a phone," *Riley,* 573 U.S. at 387, to see if anything is hidden physically in the phone or its case–such as a tiny amount of drugs or a fake identification–but a forensic search of data on or through the phone should require a warrant.

[3] The sovereign's interest may also extend to what may leave the country, *United States v. Oriakhi,* 57 F.3d 1290, 1296-97 (4th Cir. 1995) but, again, that would not permit warrantless rummaging, by way of the cell phone, through an entire life.

phones show is in the phone, and, indeed, a forensic search by its nature is not looking for physical contraband of the type covered by the interests behind the border-search doctrine.

In other words, cell phones are "fundamentally different from any object traditionally subject to government search at the border." *Vergara,* 884 F.3d at 1315 (Jill Pryor, J., dissenting). "Before cell phones," Judge Pryor observed, "border searches were limited by 'physical realities' that ensured any search would impose a relatively narrow intrusion on privacy," but cell phone searches "'typically expose to the government far *more* than the most exhaustive search of a house[.]'" *Id.* at 1316 (quoting *Riley*, 573 U.S. at 396). Warrantless cell phones searches permit a general rummaging through one's life and privacies, precisely the actions the fourth amendment is meant to forbid. *Riley,* 573 U.S. at 403.

Allowing warrantless searches of cell phones at the border untethers the border-search doctrine from its underpinnings. *Vergara,* 890 F.3d at 1317 (Jill Pryor, J. dissenting); *see also Riley,* 573 U.S. at 386 (warning that warrant exceptions must not be untethered from their justifications); *Cano,* 934 F.3d at 1011 (allowing warrantless search of cell phone at border untethers border-search exception). Searches at the border are to interdict contraband; they are not general searches through and for the entirety of private personal information that makes up a life. Cell phone searches are nothing like the search of a gas tank, "which should be solely a repository for fuel." *Flores-Montano*, 541 U.S. at 154. A cell phone is an accumulation of the detail of, and a record of, one's life. *See Riley,* 573 U.S. at 393-95. Every border

search case in which the Court approved a warrantless, suspicionless search was aimed at physical places to hide contraband, goods that are not permitted to be taken into the country. *See, e.g, Flores-Montano, 541 U.S. at 152-53*; *Ramsey,* 431 U.S. at 624-25 (mail), A forensic search of a cell phone is a general rummaging through all varieties of records and information that have nothing to do with the possibility of contraband being brought into the country. *See Vegara,* 884 F.3d at 1317 (Jill Pryor, J., dissenting) ("electronic contraband is borderless and can be accessed and viewed in the United States without ever having crossed a physical border."); *cf. Riley,* 573 U.S. at 397 (government conceded in its brief that search-incident exception would not cover remotely accessed or stored data). It may yield evidence of a past or future crime, but such a hunt for evidence is not the purpose of the border-search exception. *Cano,* 934 F.3d at 1018; *Vegara,* 884 F.3d at 1317 (Jill Pryor, J., dissenting); *Molina-Isidoro,* 884 F.3d at 296 (Costa, J., concurring) (citing *Boyd,* 116 U.S. at 623)).

Still, only the Ninth Circuit in *Cano* and Judge Pryor's dissent in *Vegara* have expressed concern with such expansive searches. The Eleventh Circuit majority in *Vegara* was entirely unbothered. It held that "border searches never require a warrant or probable cause," and thus that a search of a cell phone at the border did not require a warrant. 884 F.3d at 1311. *Vegara* saw the statement in *Riley* that "other case-specific exceptions may still justify a warrantless search of a particular phone'" as allowing searches of all cell phones at the border, *id.* (quoting *Riley*, 573 U.S. at 401–02), a proposition difficult to reconcile with *Riley*'s word choice (particular), reasoning, and rule.

The Eleventh Circuit went further in *United States v. Touset,* declaring that electronics, such as cell phones, are merely "other personal property," and could be searched the same as any other property carried to the border. 890 F.3d at 1233. This directly contradicts *Riley,* which explained at length how and why cell phones were unlike other owned objects. 573 U.S. at 393-403. Just as cell phones do not become mere physical containers at the border, they do not become mere physical property at the border. The same privacy interests that *Riley* recognized and protected apply at the border. *Cf. Cano,* 934 F.3d at 1018. The Tenth Circuit did not require a warrant for a border cell phone search, though it did require reasonable suspicion of a crime. *Williams,* 942 F.3d at 1190-91. Given the privacy interests cell phones carry, that standard seems insufficient. The Fifth and the Seventh Circuit have kicked the issue down the road, choosing to say that border agents who found *Riley* inapposite could have done so in good faith. App. A, 973 F.3d at 449-50; *Wanjiku,* 919 F.3d at 485-86. Such pretermitting of the merits of the search allows constitutionally questionable behavior to persist. As Agent Salazar's testimony in this case shows, border agents decline to seek warrants, even though obtaining is warrant would not take much time or effort. App. C; *Birchfield v. North Dakota,* 136 S. Ct. 2160, 2192 (2016) (discussing ease of process for electronically applying for warrants).

The Court should end the division among the circuit and clarify the propriety, or impropriety, of warrantless cell phone searches at the border. This case is a good vehicle for doing so. It is undisputed here that a forensic search occurred without a warrant. It is undisputed here that there was plenty of time to seek a warrant; there

were no exigent circumstances; the phone sat in a drawer in the agent's office for a week. It is undisputed here that a warrantless search occurred because the border agents did not think *Riley* applied to them. This case therefore presents both the warrant issue, as Aguilar's trial counsel insisted that only a warrant would allow for a search of the cell phone in the undisputed circumstances , and the good-faith issue, as the district court and the court of appeals declined to determine whether *Riley* required a warrant.

The case also shows that the courts of appeals interpret *Davis v. United States* differently. The Fifth Circuit in this case thought that, under *Davis,* good-faith existed if there was not a case telling the agents they couldn't search. App. A. 973 F.3d at 449-50; *see also Wanjiku,* 919 F.3d at 485-86. The Ninth Circuit in *Cano* thought that, under *Davis,* good-faith existed only if there was a case telling the agents they could search cell phones without a warrant. 934 F.3d at 1021-22. It would appear that no reasonable officer could objectively, reasonably believe that a deep, forensic search of a phone, even one seized at the border, could be conducted without a warrant. *Riley* had made clear how intrusive such a search was, *Riley,* 573 U.S. at 401-02, and *Flores-Montano* had long ago cast doubt on highly intrusive warrantless border searches, 541 U.S. at 152. Resolution of the issues presented is needed, by travelers, courts, and law enforcement. Given the important privacies implicated by cell phone searches and the number of travelers affected, even in these pandemic times, clarity and consistency should be brought to the border.

CONCLUSION

For these reasons, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

/s/ PHILIP J. LYNCH
Counsel for Petitioner

DATED: November 2, 2020.