No. 23-199

IN THE
Supreme Court of the United States

GEORGE ANIBOWEI,

Petitioner,

v.

ALEJANDRO MAYORKAS, et al.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE**

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A.

* No counsel for a party authored this brief in whole or in part, and no entity or person other than Cato, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of Cato's intent to file this brief at least 10 days before its due date under this Court's Rule 37.2.

Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual Cato Supreme Court Review.

Consistent with its values, Cato believes that the Bill of Rights, including the Fourth Amendment, must be preserved as a safeguard against government infringement on individual liberty. Cato offers this brief to urge this Court to grant review and reaffirm that the Fourth Amendment's core protections do not evaporate at the border. The government's power to conduct targeted searches at the border has never given officers a free-floating right to search or seize all of a traveler's private papers. And those historical protections are even more vital today because, as a practical matter, travelers now carry nearly all of their private papers with them on their cell phones.

SUMMARY OF ARGUMENT

I. The Fourth Amendment generally forbids government agents to search or seize the digital contents of cell phones without first obtaining a warrant. That prohibition applies to searches of cell phones at the border no less than anywhere else.

A. As a matter of history, this Court has recognized that the government's ransacking of a person's private papers was the epitome of "an unreasonable search and seizure when the Fourth Amendment was adopted." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214 (2018) (cleaned up). At the time of the Founding, English decisions had already established that indiscriminate searches and seizures of private papers, a person's "dearest property," "would be more pernicious to the innocent than useful to the public."

Entick v. *Carrington*, 19 How. St. Tr. 1029, 1066, 1073 (C.P. 1765). Decisions like *Entick* "undoubtedly" influenced "those who framed" the Fourth Amendment's protection of private papers. *Boyd* v. *United States*, 116 U.S. 616, 626-27 (1886). And they also have held sway with this Court, which has recognized from its earliest Fourth Amendment decisions that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." *Ex parte Jackson*, 96 U.S. 727, 733 (1878).

The border-search exception to the Fourth Amendment's warrant requirement has never permitted government agents to perform sweeping searches of private papers. From its roots in the Collection Act of 1789, this exception has been limited to searching for "stolen goods" and "goods forfeited for a breach of the revenue laws." *Boyd*, 116 U.S. at 623 & n.†. The Collection Act, like the English laws on which it was based, gave agents the ability to search vessels and containers for dutiable items like tea or rum—but nothing suggests agents at the Founding could have boarded a ship and demanded to read the captain's log, the first mate's diary, or a passenger's cherished correspondence.

In short, the Fourth Amendment's history reveals that the government cannot search private papers without a warrant and that this rule applies even at the Nation's borders.

B. The same holds true as a matter of precedent. In *Riley* v. *California*, 573 U.S. 373 (2014), this Court held that the uniquely strong privacy interests in the digital contents of a cell phone prevented government agents from conducting warrantless searches of

phones, even pursuant to lawful arrests. *Id.* at 385-403. The same should be true with respect to cell-phone searches at the border.

Cell-phone searches intrude on liberty to a degree unmatched by most other searches. Given the wealth of private information that can be stored on a cell phone and the ubiquity of smartphones in modern life, virtually everyone now carries with them "a cache of sensitive personal information." *Riley*, 573 U.S. at 393-96. Searches of this vast and varied information, this Court explained, "would typically expose to the government far *more* than the most exhaustive search of a house"—an invasion of privacy for which the Fourth Amendment makes a warrant paramount. *Id.* at 396-97. And since *Riley*, cell-phone usage has only continued to grow. The government can reconstruct practically everything about a person's private life from the universe of mobile apps on a typical phone—banking and business, physical and mental health, dating and romance, politics and peccadilloes.

The border-search exception, like the search-incident-to-arrest exception, does not override those privacy concerns. Now, as at the Founding, the government can search a traveler's physical "belongings" to determine which "effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U.S. 132, 154 (1925). And the government may seize unlawful items, just as it could seize stolen and smuggled property under the Collection Act. But that longstanding authority does not give border officials a free pass to search and copy the digital information on cell phones that almost no person could travel without. True, those who pass through the Nation's borders do so with a reduced expectation of privacy. But the mere fact of "diminished privacy interests does not mean

that the Fourth Amendment falls out of the picture entirely." *Riley*, 573 U.S. at 392. The Amendment still requires a warrant when, as here, "privacy-related concerns are weighty enough." *Id.*

II. The time has come for the Court to address this issue. It is not going away: growth in the use and capacity of cell phones continues apace, and border searches of phones are themselves becoming increasingly common. And since *Riley*, the courts of appeals to weigh in have splintered hopelessly. Some have endorsed the government's view that cell-phone searches at the border are always reasonable; others have demanded at least reasonable suspicion of criminal activity. Some courts have gone off on a tangent, crafting different rules depending on whether searches of cell-phone data are "manual" or "forensic." Still others have reached differing conclusions about the government interests that define the necessary limits of cell-phone searches at the border. Many of these decisions share little reasoning in common—except that they all seem to neglect *Riley*'s insight that cell-phone searches expose to the government a person's most private papers, and in a quantity and variety unlike any other physical object the government could search.

The patchwork quilt of different rules and reasoning now blanketing the Nation needs mending. The Court should grant review, and it should hold that a warrant is generally required before the government can search the digital contents of a cell phone at the border.

ARGUMENT

I. The Petition Should Be Granted Because Warrantless Cell-Phone Searches Generally Violate the Fourth Amendment.

The Fourth Amendment shields every person's private spaces and thoughts from government intrusion. Today, the most important repository for private information is not a safe, shoebox, or pillowcase; it is a cell phone. So before government officials can rummage through the troves of information available on a smartphone, they generally must first get a warrant.

That requirement does not yield simply because the person holding the phone is standing at the border. That much is clear as a matter of history: the border-search exception to the warrant requirement has never permitted government agents to search through the private "papers" enshrined in the Fourth Amendment's text. And it is equally clear as a matter of precedent: this Court has already held that an exception to the warrant requirement could not justify warrantless searches of cell phones, *Riley* v. *California*, 573 U.S. 373, 385-403 (2014), and the border-search exception should be no different.

A. History Instructs That the Border-Search Exception Does Not Permit the Warrantless Search of "Papers."

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In interpreting the Amendment, this Court looks to the "historical understandings 'of what was deemed an unreasonable search and seizure'" at the Founding. *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Carroll* v. *United States*,

267 U.S. 132, 149 (1925)). In this case, there is no historical basis—in either English law or this Nation's traditions—for the warrantless search of papers at the border.

1. Papers occupy pride of place in the Fourth Amendment. The separate enumeration of "papers" was a legacy of "the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley*, 573 U.S. at 403. Across the Atlantic, English judges had already curbed that practice in two landmark cases establishing that publishers could sue government agents who ransacked their private papers. *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765).

In *Wilkes*, government officials executed a limitless warrant at MP John Wilkes's home, "rummaged all the papers together they could find," and "fetched a sack, and filled it with papers." 19 How. St. Tr. at 1156. The officials asserted a right to "seize [his] papers" upon the "general warrant." *Id.* at 1167. Lord Chief Justice Pratt disagreed, reasoning that such a power would be "totally subversive of the liberty of the subject," and instructed the jury that the search and seizure of the private papers were "clearly illegal." *Id.* at 1167-70.

Similarly, in *Entick*, officials entered the home of John Entick, a writer critical of the Crown, and broke open his chests and drawers, "carr[ying] away 100 printed charts [and] 100 printed pamphlets." 19 How. St. Tr. at 1030. The officials insisted that their ability to search and seize papers was "essential to government, and the only means of quieting clamours and

sedition." *Id.* at 1064. Lord Camden disagreed, explaining that papers are a person's "dearest property; and so far from enduring a seizure, that they will hardly bear an inspection." *Id.* at 1066. Although the officials' concerns about combating serious crimes were no doubt weighty in the abstract, Lord Camden foresaw that the asserted powers of search and seizure "would be more pernicious to the innocent than useful to the public." *Id.* at 1073.

This Court has called *Entick* a "monument of English freedom" that "undoubtedly" occupied "the minds of those who framed the fourth amendment." *Boyd* v. *United States*, 116 U.S. 616, 626-27 (1886). That makes *Entick* "the true and ultimate expression of constitutional law with regard to search and seizure." *United States* v. *Jones*, 565 U.S. 400, 405 (2012) (cleaned up); *see, e.g.*, *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989). And *Entick* reveals the special reverence that English law accorded to private papers at the Founding. *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting).

Wilkes and *Entick* both addressed searches of papers authorized by general warrants rather than the warrantless searches that the Department of Homeland Security now conducts at the border. But the principal concern about general warrants—that they gave government agents boundless discretion—applies with equal force to warrantless searches. Under the "principles of common law," "[i]t is not fit, that the receiving or judging of the information [regarding cause to search] should be left to the discretion of the officer," as opposed to a neutral magistrate "giv[ing] certain directions to the officer." *Leach* v. *Money*, 19 How. St. Tr. 1001, 1027 (K.B. 1765). If anything, warrantless searches represent an even more severe

affront to liberty than searches backed by unduly broad warrants.

From its earliest Fourth Amendment cases, this Court has also rejected any notion that the constitutional protections for papers vanish outside the home. In a case involving the inspection of mail, this Court explained that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, *wherever they may be*." *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (emphasis added). Such papers "can only be opened and examined under like warrant . . . as is required when papers are subjected to search in one's own household." *Id.*; *accord Olmstead* v. *United States*, 277 U.S. 438, 464 (1928). And in *Boyd*, this Court embraced *Wilkes* and *Entick* in condemning a court order requiring an importer to produce a customs invoice for government inspection. 116 U.S. at 625-30. The Fourth Amendment, this Court explained, prevents warrantless "invasions" by the government of the "privacies of life," even absent "the breaking of [a person's] doors" or "the rummaging of his drawers." *Id.* at 630.

2. Despite the strong protection given papers at the Founding, the government has persuaded the lower courts that its agents may search papers, printed and electronic alike, without a warrant at the border. *E.g.*, *United States* v. *Seljan*, 547 F.3d 993, 1002 (9th Cir. 2008) (en banc) (sealed letters); *United States* v. *Touset*, 890 F.3d 1227, 1232-37 (11th Cir. 2018) (electronic devices). But the border-search exception has never extended beyond a search for contraband and dutiable items to, as here, the *Entick*-style ransacking of private papers. Pet. 8-9.

The border-search exception traces its roots to the Collection Act of 1789, ch. 5, 1 Stat. 29. There, the First Congress gave customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed." § 24, 1 Stat. at 43. Congress also immunized the officials from tort actions, but only to the extent they acted "in virtue of the powers given by this act, or by virtue of a warrant granted by any judge or justice." § 27, 1 Stat. at 43-44. In the first case recognizing the border-search exception, this Court explained that similar English statutes authorized the seizure of "stolen goods" and "goods forfeited for a breach of the revenue laws," and it viewed the Collection Act as further proof that the First Congress "did not regard searches and seizures of this kind as 'unreasonable.'" *Boyd*, 116 U.S. at 623 & n.†. The Court since *Boyd* has never identified any other historical support for the border-search exception. *E.g.*, *United States* v. *Ramsey*, 431 U.S. 606, 616-17 (1977); *see also* Note, *The Border Search Muddle*, 132 Harv. L. Rev. 2278, 2289-90 (2019).

The Collection Act did not authorize customs officials to make sweeping, suspicionless searches of the sort the federal government regularly conducts today. Its plain terms permitted searches only when there was "reason to suspect any goods, wares or merchandise subject to duty shall be concealed." § 24, 1 Stat. 43. The statute therefore required reasonable suspicion not merely of crime generally, but of smuggling in violation of the revenue laws. *See United States* v. *Molina-Isidoro*, 884 F.3d 287, 295 & n.4 (5th Cir. 2018) (Costa, J., specially concurring). Yet private papers have never been "goods, wares or merchandise subject to duty." One early revenue statute, for

example, listed only "blank books," and not written materials or other private papers, among the dozens of categories of dutiable items. Tariff Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 24-26. Even today, the successor to the Collection Act requires customs officials to have reason to "suspect there is *merchandise* which is subject to duty, or shall have been introduced into the United States in any manner contrary to law." 19 U.S.C. § 482(a) (emphasis added).

The Collection Act's focus on dutiable items tracks its predecessor English laws. Parliament imposed taxes on American imports, such as (notoriously) tea. English agents enforced these laws by searching ships' cargo. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 988-89 (2016). But Americans loudly "criticized customs officers who searched ship cabins to find personal food or liquor stores meant for the ships' crews." *Id.* at 989. Personal papers aren't dutiable items either. So while a captain coming into port would expect customs officials to inspect his imports, he would have been shocked if they leafed through his log or demanded his first mate's diary.

Every single border-search case decided by this Court has involved searches for smuggled goods or contraband. *E.g.*, *United States* v. *Flores-Montano*, 541 U.S. 149, 155-56 (2004); *Ramsey*, 431 U.S. at 624-25. And if history teaches us anything, it is that there is a world of difference between contraband and private papers. This Court has said as much, explaining in *Boyd* that "[t]he search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining

information therein contained." 116 U.S. at 623. This Court thus rejected the indiscriminate search and seizure of private papers, as distinct from the search for and seizure of goods that might be contraband.

This Court drew this same distinction between potential contraband and private papers in later cases. In *Carroll*, for example, it distinguished the seizure of goods that might be contraband from the seizure of private papers that have no intrinsic (or taxable) value. 267 U.S. at 147-49. The nature of the goods at issue in *Carroll*—bottles of (then-prohibited) liquor—made that case different from prior cases protecting personal papers from disclosure. *Id.* This Court has since underscored that the purpose of the border-search exception is not to rummage through private papers, but "to regulate the collection of duties and to prevent the introduction of contraband." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985). The Court has never approved the warrantless search and seizure of private papers, rather than dutiable items or contraband, absent exigent circumstances.

In fact, the only time this Court confronted the intersection of border searches and papers, it took pains to distinguish searches of envelopes for contraband from searches of the papers contained within the envelopes. This Court held in *Ramsey* that the border-search exception allowed customs officials to search envelopes for heroin as "'necessary to prevent smuggling and to prevent prohibited articles from entry.'" 431 U.S. at 619. At the same time, this Court noted that the applicable statute and regulation allowed officials to open letters only when they "have reason to believe they contain other than correspondence, while the reading of any correspondence inside the

envelopes is forbidden" without a warrant. *Id.* at 623-24. Justice Powell joined the majority opinion only on the understanding that the decision did "not go beyond the validity of mail searches at the border pursuant to the statute" allowing contraband searches. *Id.* at 625 (concurring opinion).

* * *

The historical record could hardly be more one-sided. This Court's earliest Fourth Amendment precedent, like the English authorities from which it drew, recognized that private papers are entitled to the greatest measure of constitutional protection. And nothing in the history of the border-search exception, which consistently recognized only the government's ability to search for smuggled goods or contraband, suggests any right of the government to seize and examine a traveler's most private papers.

B. This Court's Precedent Confirms That Warrantless Cell-Phone Searches Violate the Fourth Amendment.

This Court's case law on these points is in accord. In *Riley*, this Court held that warrantless searches of cell phones and the extensive information they contain raise unique Fourth Amendment concerns that do not yield simply because an exception to the warrant requirement is in play. The logic of *Riley* and similar cases establishes that warrantless searches of cell phones at the border generally violate the Fourth Amendment's core protections.

1. *Riley* presented the question whether officers could search digital information on an arrestee's cell phone. 573 U.S. at 378. The government defended such searches by invoking the historical exception to the warrant requirement for searches incident to

arrests. *Id.* at 382. The Court rejected that argument—and its reasons for doing so should resolve this case.

The Court explained that where Founding-era history leaves room for doubt about whether an investigative practice comports with the Fourth Amendment, courts must assess "the degree to which [the practice] intrudes upon an individual's privacy" and "the degree to which it is needed for the promotion of legitimate governmental interests." *Riley*, 573 U.S. at 385. Applying that framework, *Riley* held that the government could not use the search-incident-to-arrest exception as a free pass to examine the digital contents of arrestees' cell phones without a warrant.

The Court recognized that, "in both a quantitative and a qualitative sense," cell phones "implicate privacy concerns far beyond those implicated by" any other items that may be found in an arrestee's pocket. *Riley*, 573 U.S. at 393. Even in 2014, cell phones were more properly labeled "minicomputers" of "immense storage capacity," capable of holding a dizzying variety of messages, pictures, and records. *Id.* at 393-94. The "many distinct types of information" that smartphones contain implicate fundamental privacy interests not just because of what they reveal directly, but also because of what they "reveal . . . in combination," allowing "[t]he sum of an individual's private life" to be easily "reconstructed." *Id.* at 394.

Even more troubling from a privacy perspective was that the government would be able to secure this windfall with practically every arrest. The centrality of cell phones to modern life means that people cannot realistically decline to "carry a cache of sensitive personal information with them as they [go] about their day" in the way they could previously leave medical

records, love letters, club memberships, photo albums, and other private papers at home. *Riley*, 573 U.S. at 395-96. As this Court put it, cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. The choice to carry a phone containing one's most private thoughts and communications is no choice at all.

This Court had no trouble mapping these privacy interests onto Fourth Amendment doctrine. Compared to traditional searches incident to arrest, cell-phone searches are immeasurably more invasive, "typically expos[ing] to the government far *more* than the most exhaustive search of a house." *Riley*, 573 U.S. at 396.

Moreover, those privacy interests do not "fall[] out of the picture" merely because "an arrestee has diminished privacy interests." *Riley*, 573 U.S. at 392. "To the contrary, when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding [such] diminished expectations of privacy.'" *Id.* And when it comes to cell phones, the privacy interests at stake "dwarf those" in its prior cases permitting officers to examine the contents of arrestees' pockets. *Id.* at 398.

Finally, the Court reasoned that the interests on the government's side, though valid, could not overcome the incomparable privacy interests implicated by cell-phone searches. When it came to officer safety, the balance the Court's search-incident-to-arrest cases struck "in the context of physical objects" made little sense "with respect to digital content on cell phones": although officers "remain free to examine the physical aspects of a phone" for "potential physical threats," "data on the phone can endanger no one."

Riley, 573 U.S. at 386-87. And as for evidence preservation, the Court explained that the government's concerns were overstated and capable of being addressed in more targeted ways. Those interests did not "justify dispensing with the warrant requirement across the board," but rather would be "better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." *Id.* at 388.

2. *Riley* makes clear that warrantless searches and seizures of cell phones are generally unlawful even when performed at the border. The privacy interests implicated by cell-phone searches are even more substantial today than when *Riley* was decided, and the interests underlying the border-search exception cannot justify such dramatic government invasions of private papers.

a. *Riley* recognized that advancements in cell-phone technology would "only continue . . . in the future." 573 U.S. at 385, 394. In the near-decade since, the growth in the amount and variety of information a cell-phone search can uncover has proved that prediction true. American created 13 times as much mobile data in 2021 (53.4 trillion megabytes) as in 2014 (4.1 trillion). Richter, *Americans Keep Calling and Texting as Data Use Explodes*, Statista (Apr. 3, 2023), https://tinyurl.com/37kh7etn. Smartphone ownership has grown, too, rising from about 50% of the adult population in 2014 to 85% in 2021. *Mobile Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://tinyurl.com/4yprs4v3. And experts predict still further growth in mobile data traffic in the coming years. *Mobile Data Traffic Outlook*, Ericsson, https://tinyurl.com/mpezskan (accessed Sept. 27, 2023).

As before, this growth is not merely quantitative. The types of information that can be gleaned from a person's cell phone have continued to expand, particularly as mobile apps have displaced traditional web browsers. Dolan, *How Mobile Users Spend Their Time on Their Smartphones in 2023*, Insider Intel. (Jan. 14, 2023), https://tinyurl.com/yw8bmh2f. Gone are the days when cell phones were tools merely for talking, texting, and taking pictures. Today, they are how people shop, bank, invest, consume media, seek medical attention, consult mental-health professionals, read the news, plan trips, look for work, pay their bills, hire help, and search for romance. *Leading Smartphone Users Activities Worldwide from July 2022 to June 2023*, Statista, https://tinyurl.com/vfxbkpz (accessed Sept. 27, 2023). That makes the smartphone in a person's pocket a portal into virtually every aspect of what this Court has called "the privacies of life." *Riley*, 573 U.S. at 403 (quoting *Boyd*, 116 U.S. at 630).

Another of this Court's recent cases illustrates the effects of this dramatic ongoing growth in cell-phone usage. When this Court decided *Carpenter* in 2018, there were "396 million cell phone service accounts" for "a Nation of 326 million people." 138 S. Ct. at 2211. The issue there was the government's collection of extensive cell-site records that gave it an "all-encompassing record of the holder's whereabouts." *Id.* at 2214, 2217. In holding that such pervasive access constituted the sort of "too permeating police surveillance" that the Fourth Amendment forbids without a warrant, *id.* at 2214 (quoting *United States* v. *Di Re*, 332 U.S. 581, 595 (1948)), this Court explained that permitting warrantless access to weeks of cell-site data would permit government officials to reconstruct a suspect's movement "into private residences,

doctor's offices, political headquarters," and other places that are "potentially revealing," *id.* at 2218.

The concerns implicated by searches of the digital *contents* of cell phones are graver still. By sweeping the contents of a cell phone, the government can determine not just where a suspect has been, but what he did and said there; not just who a person's doctor is, but the medical issues motivating his visits; not just which political party of which the suspect is a member, but what he thinks of the party's leadership. The Fourth Amendment does not permit such "an unrestrained search for evidence of criminal activity." *Riley*, 573 U.S. at 403.

And just as it did in *Riley*, the uniquely "pervasive and insistent" role of cell phones in today's world, 573 U.S. at 385, counsels firmly against permitting warrantless cell-phone searches of everyone at the Nation's borders. It is not a realistic option for travelers to leave their cell phones at home. (In fact, the typical air traveler these days uses his phone to download and display his boarding pass.) So if warrantless searches of cell phones at the border were permitted, the price of traveling would be giving the government essentially complete access to every aspect of private life. Worse, modern technology allows agents at the border to quickly scan and retain all of the data on a cell phone, *e.g.*, Pet. 9, meaning agents can in a matter of moments obtain enough evidence to, "in combination," reconstruct a person's whole private being, *Riley*, 573 U.S. at 394. This Court has always steadfastly declined to leave people so "at the mercy of advancing technology." *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo* v. *United States*, 533 U.S. 27, 35 (2001)). Border searches should be no exception.

To be sure, "the expectation of privacy is less at the border than in the interior." *Alasaad* v. *Mayorkas*, 988 F.3d 8, 16-17 (1st Cir. 2021) (cleaned up). But the same principle underlies the search-incident-to-arrest exception. Warrantless searches of an arrestee "are justified in part by 'reduced expectations of privacy caused by the arrest.'" *Riley*, 573 U.S. at 392. And as *Riley* explained, the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely"; a warrant may still be required whenever "privacy-related concerns are weighty enough." *Id.*

b. Here, as in *Riley*, the government interests underlying the exception do not categorically override the grave privacy concerns implicated by warrantless cell-phone searches. And, again as in *Riley*, those interests would be better addressed, as needed, through case-specific exceptions to the warrant requirement.

Border searches are permitted so that agents can determine whether travelers are "entitled to come in" and assess whether their "belongings [are] effects which may be lawfully brought in." *Carroll*, 267 U.S. at 154. That is why officers "remain free to examine the physical aspects of a phone" at the border just as when searching an arrestee. *Riley*, 573 U.S. at 387. But the same conclusion cannot hold for "digital data" on a smartphone. *Id.* at 393. General interests in "protecting national security" or "disrupting efforts to export or import contraband," *United States* v. *Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019), can no more justify untethered searches through the vast universe of private cell-phone data than the general interest in preventing crime could permit "officers to rummage through homes in an unrestrained search for evidence of criminal activity," *Riley*, 573 U.S. at

403. Any other rule would subvert individual liberty, subject travelers to unprecedented prying from public officials, and defy the core principles underlying the Fourth Amendment.

II. Review Should Be Granted Now.

Searches of electronic devices carried by international travelers are extremely common. Customs and Border Protection reports that its officers have conducted 227,135 such searches since 2018. *CBP Enforcement Statistics Fiscal Year 2023: Border Searches of Electronic Devices*, U.S. Customs & Border Prot., https://tinyurl.com/4f8asnbt (accessed Sept. 27, 2023). And those searches are virtually limitless in their potential scope: CBP encourages its agents to search not only all "of the information stored on the device," but also whatever information is "accessible through the device's operating system or through other software, tools, or applications." U.S. Customs & Border Prot., CBP Directive No. 3340-049A, Border Search of Electronic Devices ¶ 5.1.2 (2018), https://tinyurl.com/3bbn5at6.

Cases involving challenges to the constitutionality of those searches are also extremely common. In some cases, defendants caught at the border carrying evidence of a crime on their phones seek to suppress that evidence and, later, overturn their convictions; in others, like this one, innocent travelers sue government officials for warrantless snooping. At least seven circuits have now issued decisions addressing under what circumstances electronic devices are subject to search at the border. *See* Pet. 13-24.

The decisions are remarkably fractured. Some circuits have adopted the government's maximalist position, holding that border searches are always

reasonable even if the government lacks reasonable suspicion. *E.g.*, *United States* v. *Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018). Others have held that border agents may always conduct "manual" searches (thumbing through the digital contents of an unlocked phone) but need reasonable suspicion for "forensic" searches (copying all the data from the phone and thoroughly searching it using a computer). *United States* v. *Cano*, 934 F.3d 1002, 1016 (9th Cir. 2019); *see United States* v. *Xiang*, 67 F.4th 895, 901 (8th Cir. 2023) (suggesting constitutional difference between manual and forensic searches). Some circuits have also reasoned that all searches, "whether manual or forensic, must be limited in scope to a search for digital contraband," *Cano*, 934 F.3d at 1007; others have instead required "some nexus to . . . protecting national security, collecting duties, blocking the entry of unwanted persons, *or* disrupting efforts to export or import contraband," *United States* v. *Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019) (emphasis added); and still others have rejected the need for any such nexus, *United States* v. *Williams*, 942 F.3d 1187, 1191 (10th Cir. 2019). Given the depth and variety of these conflicts, there is no chance the lower courts will coalesce around a single rule.

As a result, what should be a uniform national policy delineating the government's border-search powers is instead a fractured system of arbitrary geography. A journalist crossing the border to Mexico in Douglas, Arizona (in the Ninth Circuit) has fundamentally different rights than one crossing in nearby Antelope Wells, New Mexico (in the Tenth). And a study-abroad student returning to the United States will have different rights depending on whether his connecting flight lands at Reagan (in the Fourth Circuit) or Logan (in the First).

This Court's review is also needed because the lower courts have persistently focused on the wrong issues. Their central preoccupation appears to be the distinction between manual and forensic searches. But that distinction is not grounded in the historical purposes of the Fourth Amendment's protection of private papers. It is also incompatible with *Riley*, where this Court rejected the government's fallback position that officers should be able to perform limited searches of cell phones whenever they arrest a person. 573 U.S. at 399-400. Simply put, the Fourth Amendment's protections are not conditional or limited; there is no warrant exception for a quick rummaging, as opposed to a thorough examination.

The lower courts also have lost sight of the fact that these cases are about *papers*. The conclusion that cell phones deserve little or no protection at the border often rests on a comparison to run-of-the-mill property—say, "a backpack," *Xiang*, 67 F.4th at 902, or "a recreational vehicle filled with personal effects," *Touset*, 890 F.3d at 1233. As the Eleventh Circuit put it, "[a] forensic search of an electronic device is not like a strip search or an x-ray"; it's just "a search of property." *Id.* at 1234. But the point of *Riley* is that a cellphone search is so much more. Cell phones carry far more information—and far more revealing information—than traditional physical objects, and searching them therefore threatens privacy rights in a way that searching luggage, a gas tank, or even a person does not. *United States* v. *Vergara*, 884 F.3d 1309, 1315-16 (11th Cir. 2018) (J. Pryor, J., dissenting).

The Court should address this important and frequently litigated issue now. The courts of appeals will not come to a consistent and correct answer on their

own; not only are they deeply divided, but they also have been looking for guidance in all the wrong places. At this point, the only path forward—to alleviate the lower courts' confusion, establish an administrable rule, and protect travelers' constitutional rights—is for this Court to grant review and set forth a uniform rule that applies at all ports of entry and reflects the inescapable facts that the Constitution provides special protection to papers and that, unlike in the rest of human history, just about everyone now travels with *all* of his papers at all times.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 2, 2023