No.

In the Supreme Court of the United States

GEORGE ANIBOWEI, PETITIONER,

v.

ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

DUSTIN RYNDERS
TRAVIS FIFE
KASSANDRA GONZALEZ
DANIEL HATOUM
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741

NICOLE L. MASIELLO
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
STEPHEN K. WIRTH
JAYCE LANE BORN
SEAN A. MIRSKI
DANA OR
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

QUESTION PRESENTED

This case presents a sharp, recognized, and enduring circuit conflict regarding the application of the Fourth Amendment to cellphone searches at the United States border. This question is of significant importance, evident from the United States' petition to this Court for review in *United States v. Cano*, No. 20-1043.

Petitioner, a Texas immigration attorney, has faced repeated searches of his cellphone without a warrant. Border agents searched his phone every time he traveled internationally for several years, no fewer than four times while this lawsuit was pending. The first search was a "forensic" search in which government agents downloaded and kept the data on his phone, including communications protected by the attorney-client privilege. Later searches were "manual" searches in which government agents scrolled through text messages, emails, and other private information on the phone by hand. This pattern of searches has compelled petitioner to refrain from carrying his work phone during international travel for over four years now.

Four years ago, petitioner sought a preliminary injunction that would accomplish two key objectives: (1) prohibit the defendants from conducting additional warrantless searches of his cellphone, and (2) mandate the destruction of the data unlawfully extracted from the phone. The district court denied the motion, and the Fifth Circuit affirmed. The question presented is:

Whether the Fourth Amendment's protection against unreasonable searches and seizures entitles petitioner to a preliminary injunction against additional warrantless searches of his cellphone when he crosses the United States border.

PARTIES TO THE PROCEEDING

Petitioner is George Anibowei.

Respondents are Mark A. Morgan, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; Merrick Garland, U.S. Attorney General; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; David Pekoske, in his official capacity as Administrator of the Transportation Security Administration; United States Department of Homeland Security; United States Customs and Border Protection; United States Immigration and Customs Enforcement; Transportation Security Administration.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Anibowei v. Lynch, No. 3:16-cv-03495 (Mar. 5, 2020)

United States Court of Appeals (5th Cir.):

Anibowei v. Morgan, No. 20-10059 (June 19, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Constitutional Provisions

Statutes

Other Authorities

Other Authorities—Continued Page(s)

Other Authorities—Continued Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 70 F.4th 898. The opinion of the district court denying the motion for preliminary injunction (Pet. App. 14a-22a) is unreported but available at 2020 WL 208818. The opinion of the district court dismissing petitioner's complaint with leave to replead (Pet. App. 23a-41a) is unreported but available at 2019 WL 623090. The supplemental findings, conclusions, and recommendation of the magistrate judge that the complaint be dismissed with prejudice (Pet. App. 42a-53a) is unreported but available at 2018 WL 7959104. The opinion of the district court adopting the magistrate judge's recommendation to dismiss in part and re-referring in part (Pet. App. 54a-59a) is unreported but available at 2018 WL 1477242. The findings, conclusions, and recommendation of the magistrate judge that the complaint be dismissed with prejudice in part and without prejudice in part (Pet. App. 60a-78a) is unreported but available at 2017 WL 9802735.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2023. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment states in relevant part: "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."

STATEMENT OF THE CASE

This case presents a square and intractable conflict over a significant Fourth Amendment question: Whether warrants are presumptively required to search cellphones at the border.

Petitioner is a Dallas-based immigration attorney whose cellphone was warrantlessly searched every time he crossed the United States border for several years, at least five times in total. During one of these searches, government agents downloaded and kept all the information on his cellphone, including attorney-client communications protected by the attorney-client privilege.

In the proceedings below, the Fifth Circuit affirmed the district court's denial of petitioner's request for a preliminary injunction to prohibit additional warrantless searches of his cellphone during the pendency of this lawsuit and to require expungement of the information downloaded from his cellphone.

This case readily satisfies all the traditional criteria for granting review. The courts of appeals are divided 5-2 over whether warrants are ever required at the border before performing "manual" cellphone searches. Five circuit courts of appeals—the First, Fifth, Eighth, Tenth, and Eleventh—have held that warrants are never required to search cellphones "manually." Two others, the Fourth and Ninth, have instead taken the position that warrants are generally required even for manual cellphone searches unless the search is for contraband (Ninth) or evidence of a border-nexus crime (Fourth).

The Circuits are also split along a roughly similar 2-4-1 line on the question whether and when reasonable suspicion is required for the Government to perform a so-called "forensic" search of a phone at the border. That circuit conflict is widely recognized and is deeply

entrenched.[1] The Fourth and Ninth Circuits require warrants for forensic cellphone searches unless government agents have reasonable suspicion the phone contains either contraband (Ninth) or a border-nexus crime (Fourth). Four others have held that warrants are never required because reasonable suspicion of any kind of criminal activity is sufficient to justify a forensic search of a phone (First, Fifth, Eighth, Tenth). Finally, on the opposite end of the spectrum, the Eleventh Circuit maintains that neither a warrant nor reasonable suspicion is required to conduct a forensic cellphone search at the border.

---

[1] Bingzi Hu, *Border Search in the Digital Era: Refashioning the Routine vs. Nonroutine Distinction for Electronic Device Searches*, 49 Am. J. Crim. L. 177, 181-83 (2022); Ashley Veronica Hart, *Electronic Searches at the Border: Reasonable Suspicion or None at All? The Circuit Split and Potential Impact on Higher Education*, 54 Suffolk U. L. Rev. 371, 373 (2021); Rebecca Hill, *Data at the Border: Resolving the Circuit Split and Proposing New Procedural Standards for Warrantless Border Searches of Cell Phones*, 49 Cap. U. L. Rev. 179, 194-95 (2021); Chloe Meade, *The Border Search Exception in the Modern Era: An Exploration of Tensions between Congress, the Supreme Court, and the Circuits*, 26 B.U. J. Sci. & Tech. L. 189, 193 (2020); Sean O'Grady, *All Watched Over by Machines of Loving Grace: Border Searches of Electronic Devices in the Digital Age*, 87 Fordham L. Rev. 2255, 2273 (2019); Caroline V. McCaffrey, *Fairly Exposed: A Proposal to Improve the Reasonableness Standard for Digital Forensic Searches at the Border*, 80 La. L. Rev. 201, 214 (2019); Kathryn Neubauer, *Unlock Your Phone and Let Me Read All Your Personal Content, Please: The First and Fifth Amendments and Border Searches of Electronic Devices*, 92 S. Cal. L. Rev. 1273, 1290 (2019); Gina R. Bohannon, *Cell Phones and the Border Search Exception: Circuits Split over the Line between Sovereignty and Privacy*, 78 Md. L. Rev. 563, 578 (2019); Maddalena DeSimone, *Can We Curate It: Why Luggage and Smartphones Merit Different Treatment at the United States Border*, 2019 Colum. Bus. L. Rev. 696, 713-14 (2019).

Further percolation would be futile: the arguments have now been thoroughly vetted in the lower courts, and the courts have arrived at rooted and irreconcilable positions. The remaining circuits are left merely to pick sides in this fractured circuit conflict. Moreover, the fact that the two circuits that form the territorial southern border of the United States (the Fifth and Ninth)—where hundreds of thousands of border crossings by citizens carrying cellphones happen *each day*—have now adopted diametrically opposite rules makes this Court's review especially urgent.

The question presented raises legal and practical issues of surpassing importance, and its correct disposition is critical to the privacy interests of every U.S. citizen who travels internationally. This Court held in *Riley v. California*, 573 U.S. 373 (2014), and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that cellphones are unique and fundamentally different than other effects routinely carried on the person. The requirement that government agents articulate probable cause and secure a warrant before searching them would merely restore the level of privacy U.S. citizens already had during border-crossings for hundreds of years before the advent of cellphones. And in circumstances where an exigency exists—like a national security threat—the warrant requirement can and would give way. But the fact that national security interests are sometimes heightened at the border does not justify a blanket across-the-board waiver of the warrant requirement for every cellphone that crosses the United States border each day at every port of entry.

Further, the privacy and expressive interests at stake in this case are exceptional. Because this case presents an optimal vehicle for resolving this important question of federal law, the petition should be granted.

1. The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Ordinarily, government searches by law enforcement officers require a warrant supported by probable cause. *Riley*, 573 U.S. at 382*; Arizona v. Gant*, 556 U.S. 332, 338 (2009); *see also Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

a. There are exceptions to the warrant requirement, however. One exception is the "border search" exception. *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004); *United States v. Molina-Isidoro*, 884 F.3d 287, 290 (5th Cir. 2018).

This Court has "stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.'" *Flores-Montano*, 541 U.S. at 152-53 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)). The Court has observed that "[t]h[e] longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself." *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

But the border exception is not unlimited. The Court has held that a person's "Fourth Amendment rights" must still be balanced "against the sovereign's interests at the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). For example, the Court has recognized that intrusive non-routine border searches must be "justified" by "reasonabl[e] susp[icion]." *Id.* at 541.[2]

---

[2] Some courts of appeals (e.g., the Fourth and Ninth) have taken the position that "forensic" searches of cellphones (that is, when the

The Court has never addressed the application of the border-search exception to searches of data or information carried by a traveler. The three important border search cases the Court has decided in the last half-century all involved searches or seizures intended to prevent contraband *physical* items (specifically, illegal drugs) from being smuggled into the country. In *Ramsey*, the Court held that customs agents may, with "reasonable cause," warrantlessly open sealed mail to determine whether the envelope contains drugs. 431 U.S. at 622-24. But the Court explicitly left unresolved the question whether border agents can warrantlessly open an envelope to read a letter inside. *See id.* at 622-24 & n.18. In *Montoya de Hernandez*, the Court held that border agents may, without a warrant, temporarily seize a traveler at the border based on reasonable suspicion "that the traveler is smuggling contraband in her alimentary canal." 473 U.S. at 541. Finally, in *Flores-Montano*, the Court held that border agents may remove and search a vehicle's gas tank to search for drugs without reasonable suspicion. 541 U.S. at 154-55.

c. The Court has further advised that when a modern innovation gives law enforcement the ability to obtain personal information formerly beyond its reach, that "practical" reality requires courts to assess the legality of the search not only in light of prior caselaw but, more generally, in terms of the timeless concerns underlying the Fourth Amendment. *See Carpenter*, 138 S. Ct. at 2214

Government downloads and retains all the data on the phone for further searches and inspection with digital tools) are intrusive non-routine border searches that require reasonable suspicion under *Montoya de Hernandez*, 473 U.S. at 541. Manual cellphone searches (that is, searches by a government agent scrolling through messages, photos, and other data on the phone by hand), in contrast, have not been treated by any courts of appeals as intrusive non-routine border searches.

(cell-site location data); *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (infrared imaging); *Katz v. United States*, 389 U.S. 347, 352-53 (1967) (listening in on telephone calls). "[I]t would be foolish," the Court has said, to contend that the Fourth Amendment cannot take account of "the advance of technology." *Kyllo*, 533 U.S. at 33-34.

The Court has thus held that when it comes to cellphones, courts must determine anew whether traditional exceptions to the warrant requirement should be extended to them. Indeed, in *Riley*, in considering the longstanding warrant exception permitting warrantless searches pursuant to a lawful arrest, the Court did not automatically extend the exception to searches of cellphones' digital data. It instead analyzed whether the logic behind the warrant exception applied to cellphone searches. 573 U.S. at 386. In doing so, the Court made clear its awareness that cellphones are materially different from the other types of objects a person might carry: They contain huge quantities of highly personal data that could not previously have been contained in a pocketable object, *id.* at 393, and, unlike many other containers people carry, carrying a cellphone is not optional—rather, it is indispensable to participation in modern society, *id.* at 395-96.

Ultimately the Court in *Riley* declined to extend the search-incident-to-arrest exception to cellphones. *Id.* at 386. The Court held that a "cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: [a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Id.* at 396-97. The Court found that this extraordinary privacy intrusion outweighed the Government interests advanced by the search-incident-to-arrest exception—protection of officer safety and

preservation of evidence. *See id.* at 386-91. Those interests, the Court recognized, could be advanced equally by simply seizing the phone and securing a warrant to search it. *See id.* at 391. The Government had argued a cellphone was "materially indistinguishable" from any other container a person might carry with him, but to the Court, that was "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Id.* at 393.

2. This case arises at the intersection of the cellphone search and border-search lines of authority, and it asks the Court to decide whether warrants are generally required to search the cellphones that U.S. citizens carry across our borders many times each day, absent a circumstance-specific exception like exigency.

Petitioner George Anibowei is a U.S. citizen, licensed attorney in Dallas, Texas, and frequent traveler. Pet. App. 139a-140a. Many of his clients are immigrants in removal proceedings adverse to DHS, and he regularly uses his cellphone to engage in sensitive and confidential communications with his clients. Both his work and personal cellphones contain confidential client communications. Pet. App. 145a. In a typical year, petitioner makes several trips to Nigeria to visit family and friends. Pet. App. 140a. He also regularly travels elsewhere in Africa and is a frequent tourist in Europe and the Caribbean. Pet. App. 140a. And he intends to continue traveling internationally. Pet. App. 147a. But between 2014 and the filing of his motion for a preliminary injunction in this case, government agents subjected petitioner to extensive secondary screening every time he traveled internationally. Pet. App. 143a-44a, 146a.

On October 10, 2016, border agents at the Dallas-Fort Worth International Airport seized petitioner's cellphone as he was returning home from a weekend visiting a friend

in Toronto. Pet. App. 85a-86a, 144a. Acting without a warrant, the agents performed a forensic search of the phone. Pet. App. 85a-86a. The Government still has the data from that search. Pet. App. 81a-82a.

In the years since the October 10, 2016 search, border agents have seized petitioner's phone without a warrant four additional times. Pet. App. 123a, 148a. Each time, petitioner saw an agent search his text messages and other communications. Pet. App. 123a, 146a.

The search that occurred in February 2017 as petitioner was returning from visiting his family and friends in Nigeria was typical of these searches. Pet. App. 146a. Upon returning to Dallas-Fort Worth International Airport, petitioner was placed in secondary inspection. There, border agents searched petitioner's luggage thoroughly and asked to see his phone. Pet. App. 146a. An agent then performed an extensive warrantless manual search of petitioner's phone in front of him. Pet. App. 146a. During this search, the agent had access to not only petitioner's text messages and encrypted communications, but also his email. Pet. App. 146a.

These searches took from two to five hours each time they were performed. Pet. App. 142a-144a. One two-hour search delayed the entire flight by two hours; a five-hour search caused him to miss a flight altogether. Pet. App. 142a. Petitioner tells friends scheduled to meet him at the airport to come two or three hours after his scheduled arrival time because he knows he will be put into inspection. Pet. App. 144a.

3.a. On December 23, 2016, petitioner brought a *pro se* lawsuit alleging that the October 2016 warrantless search and continued retention and dissemination of information taken from his phone violated his First and Fourth Amendment rights. Pet. App. 3a, 43a, 24a. He

alleged that he intended to continue traveling internationally but, based on his experiences, he reasonably believed that border agents would again search his phone without a warrant at ports of entry. Pet. App. 44a, 61a-63a, 147a. Petitioner thus sought a declaratory judgment that the searches were unconstitutional; an injunction ordering the Government to return or destroy all data obtained from his cellphone; and an injunction directing the Government to disclose whether it shared his data with other agencies or third parties. Pet. App. 43a-44a.

b. Over the course of the next two years, petitioner's case ping-ponged between the magistrate judge and the district judge. Finally, on February 14, 2019, the district court dismissed petitioner's complaint without prejudice, finding that, as pleaded, it was barred by principles of sovereign immunity. Pet. App. 23a-36a. At the same time, the district court "observe[d] that the merits issue in this case … is an important one" and noted that the circuits were split on the issue. The district court thus invited petitioner to re-plead his claims to afford the court "certainty concerning its own jurisdiction" before it "decide[d] this weighty question." Pet. App. 40a.

c. Petitioner retained counsel and filed a verified amended complaint on March 14, 2019. Pet. App. 117a-159a. One month later, he moved for partial summary judgment or, in the alternative, a preliminary injunction. The district court denied petitioner's motion nine months later, on January 14, 2020. Pet. App. 14a-22a. The district court accepted as undisputed that Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) policies authorized warrantless cellphone searches and that border agents searched petitioner's cellphone without a warrant on multiple occasions and retained the data on it. Pet. App. 17a-18a. The district court nonetheless denied petitioner summary

judgment because no controlling precedent from this Court or the Fifth Circuit squarely holds that warrants are required to search cellphones at the border. Pet. App. 19a-20a. The district court also refused to issue a preliminary injunction, holding that petitioner had failed to "satisf[y] each of the four essential elements for obtaining such relief." Pet. App. 20a. The district court did not, however, analyze the preliminary-injunction factors individually or specify which factor petitioner had failed to satisfy. Pet. App. 20a-21a.

d. Petitioner appealed, and oral argument was held on December 3, 2020. Two and a half years later, on June 19, 2023, the Fifth Circuit affirmed the district court's denial of petitioner's motion for preliminary injunction, concluding that petitioner had "failed to establish a substantial threat that he w[ould] suffer irreparable injury if an injunction [were] not granted." Pet. App. 6a.[3]

First, the Fifth Circuit held that petitioner had not offered sufficient evidence to establish that the Government's continued possession of his data from the October 2016 forensic search caused him irreparable harm. Pet. App. 7a-10a. The court explained that "[g]overnment retention of unlawfully seized property is not sufficient, standing alone, to establish irreparable injury." Pet. App. 7a. Instead, the court continued, the party challenging the retention "must specifically show how the government's retention of [the] seized information causes … harm." Pet. App. 8a. The Fifth Circuit further held that, even if the retention of privileged information could constitute such harm, petitioner had not offered sufficient evidence to establish that the Government had copied and retained privileged

[3] The district court stayed the district court case over petitioner's objection pending the outcome of the appeal. *See* D. Ct. Dkt. 105; *see also* D. Ct. Dkt. 103 (opposing stay).

information during the October 2016 search. Pet. App. 9a-10a.

Second, the Fifth Circuit held that petitioner had not offered sufficient evidence to establish that he was likely to suffer irreparable injury in the form of future unlawful searches. Pet. App. 10a. The court noted that petitioner's future-harm argument relied "on his contention that a warrantless search of a cell phone at the border is unconstitutional," and it observed that the Fifth Circuit "has never recognized a warrant requirement for any border search." Pet. App. 10a. Even assuming that such a requirement existed, however, the Fifth Circuit held that "the district court did not abuse its discretion in determining that [petitioner's] evidence [wa]s insufficient to establish it [wa]s likely that he w[ould] be subject to a warrantless search in the future." Pet. App. 11a. While recognizing that petitioner "ha[d] demonstrated that the ICE and CBP policies authorize warrantless searches" and that he had been subject to a "pattern" of such searches, the court concluded that this evidence, without more, was insufficient to establish a likelihood of future harm absent a preliminary injunction. Pet. App. 11a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER A SIGNIFICANT QUESTION

This case involves an "entrenched circuit conflict on an important and recurring Fourth Amendment issue" "with considerable practical importance for border officials' inspection of the hundreds of millions of travelers at U.S. ports of entry each year." Petition for Writ of Certiorari at 13, 22, *United States v. Cano* (No. 20-1043) (*"Cano* Pet."). That conflict is at once square, acknowledged, entrenched, and widespread: The courts of appeals have repeatedly recognized the conflict, rejected each other's positions, and fractured into multiple firmly

opposed factions. There is a 5-2 conflict over whether warrants are ever required to manually search cellphones at the border, and a 2-4-1 conflict over the level and nature of reasonable suspicion required to forensically search cellphones at the border without a warrant. The stark division over this fundamental question is untenable: It "confuses and disrupts the day-to-day work of border officials who, nationwide, inspect hundreds of millions of arriving travelers and examine tens of thousands of electronic devices each year." *Cano* Pet. 13. The uncertainty over this area is palpable, generating opinions taking no fewer than five incompatible positions.[4]

Individuals entering the United States face enormously disparate Fourth Amendment protections based only on their port of entry. And now that the split has reached seven circuits, with all sides firmly set on their respective rules, the hope of the split resolving itself has vanished. The conflict is mature and ready for this Court's review. Definitive guidance over whether warrants are generally required to search cellphones at the U.S. border is overdue.

1. The Fifth Circuit has held that neither warrants nor reasonable suspicion are required to manually search cellphones at the border regardless of the subject matter

---

[4] *See United States v. Cano*, 934 F.3d 1002, 1007 (9th Cir. 2019) (a cell phone search is permissible without a warrant where it seeks digital contraband); *Aigbekaen*, 943 F.3d at 721 (a cell phone search is permissible where it seeks evidence of a crime that has a nexus to the purpose of the border-search exception); *Alasaad v. Mayorkas*, 988 F.3d 8, 21 (1st Cir. 2021) (reasonable suspicion of any crime is fine); *United States v. Williams*, 942 F.3d 1187, 1191 (10th Cir. 2019) (agreed); *United States v. Xiang*, 67 F.4th 895, 899-902 (8th Cir. 2023) (same); *United States v. Touset*, 890 F.3d 1227, 1229 (11th Cir. 2018) (wrong—no suspicion is required); *United States v. Kolsuz*, 890 F.3d 133, 148 (4th Cir. 2018) (Wilkinson, J., concurring in the judgment) (Congress should decide).

of the search or the justification for it. In *United States v. Castillo*, 70 F.4th 894 (5th Cir. 2023), an opinion released the same day as the decision below, the Fifth Circuit held that "no individualized suspicion is required for the government to undertake a manual border search of a cell phone." *Id.* at 895. The Court recognized that "[t]he circuits are divided" over the application of the border-search exception to forensic searches of cellphones. *Id.* But, after concluding (incorrectly, *see* pp. 14-18, *infra*) that no circuits require warrants or reasonable suspicion for manual cellphone searches at the border, the Fifth Circuit "adopt[ed] that consensus." *Id.*

More recently, the Fifth Circuit declined to extend *Riley*'s warrant requirement to forensic cellphone searches as well. In *Malik v. Department of Homeland Security*, No. 22-10772, 2023 WL 5211651 (5th Cir. Aug. 15, 2023), the court explained that its "precedent does not currently require a warrant for cell-phone searches at the border," *id.* at *7; that individualized suspicion need not be present for manual searches, *id.* at *5; and that reasonable suspicion, and not probable cause, is the proper standard for forensic searches, *id.* The court noted (incorrectly, *see* pp. 14-18, *infra*) that, for forensic searches, the circuits "differed *only* as to whether reasonable suspicion is required"—i.e., that none require a warrant for such searches at the border. *Id.* at *7.

2.a. The law in the Fifth Circuit directly conflicts with settled law in the Ninth Circuit. In *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019), the Ninth Circuit held that warrants are required to search cellphones at the border—forensically *or manually*—unless the search is directed at the interdiction of digital contraband. *Id.* at 1007 (holding "cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband"); *see also Cano* Pet. 6-12 (summarizing *Cano* and its holding). The Ninth Circuit

specifically held in *Cano* that the permissible scope of warrantless border searches is limited to contraband; border agents cannot otherwise conduct warrantless searches of cellphones at the border, even for evidence of past or future border-related crimes. *Cano*, 934 F.3d at 1018, 1020.

In *Cano*, the defendant was arrested for carrying cocaine at a port of entry between the United States and Mexico. *Id.* at 1008. Following his arrest, a border agent seized his cellphone and performed both manual and forensic searches. *Id.* at 1008-09. The defendant was ultimately indicted for importing cocaine. *Id.* at 1009. Before trial, he moved to suppress any evidence obtained from the warrantless searches, and the district court denied the motion. *Id.*

The court of appeals reversed and vacated defendant's conviction. *Id.* at 1007. The Ninth Circuit concluded that the border searches of the defendant's cellphone in *Cano* "violated the Fourth Amendment" because it "exceeded the permissible scope of a border search." *Id.* at 1007; *id.* at 1016-22. The Ninth Circuit held that the border-search doctrine does not encompass "searches for evidence that would aid in prosecuting past and preventing future border-related crimes." *Id.* at 1016-17. Instead, the court held, "the border search exception authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband." *Id.* at 1018. The court reasoned that "detection of … contraband is the strongest historic rationale for the border-search exception" and that searches of electronic devices at the border therefore "cannot be 'justified'" unless "limited in scope to a search for digital contraband" on the device itself. *Id.* at 1007, 1018-19.

The Ninth Circuit emphasized that, under its interpretation of the Fourth Amendment, "the proper

scope of a border search" does not "include the power to search for *evidence* of contraband that is *not* present at the border" or for "evidence of past or future border-related" criminal activity. *Id.* at 1018. The court acknowledged that one consequence of drawing such a line in this context would be that "the detection-of-contraband justification would rarely seem to apply to an electronic search of a cell phone outside the context of child pornography." *Id.* at 1021 n.13.

The Ninth Circuit recognized that its digital-contraband-only limitation was narrower than, and in conflict with, the position of every other circuit that had considered the application of the border search doctrine to cellphone searches, including the Fourth Circuit. *See id.* at 1015-17 & n.8.

The Ninth Circuit denied the United States' petition for rehearing *en banc*. *United States v. Cano*, 973 F.3d 966 (9th Cir. 2020). Judge Bennett, joined by five other judges, issued a lengthy dissent. *Id.* at 967-77 (Bennett, J., dissenting from the denial of rehearing en banc). The United States filed a petition for a writ of certiorari with this Court, which the Court denied. *Cano* Pet. (No. 20-1043)

b. The law in the Fifth Circuit also directly conflicts with settled law in the Fourth Circuit. In *United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019), the Fourth Circuit held that warrants are required to search cellphones at the border unless the search relates to an "offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband." *Id.* at 721.

In *Aigbekaen*, the U.S. Department of Homeland Security (DHS) asked CBP officers to seize the

defendant's electronic devices upon his arrival at John F. Kennedy International Airport from an international flight, based on information indicating that the defendant was engaged in sex trafficking. *Id.* at 718. Acting without a warrant, the border officials seized the defendant's cellphone, laptop, and iPod. *Id.* DHS officials performed a forensic search of each device, which revealed evidence of sex trafficking, and the defendant was ultimately indicted on related charges. *Id.* Prior to trial, the defendant moved to suppress any evidence recovered from the warrantless forensic searches as unconstitutional under the Fourth Amendment. *Id.* The district court denied the suppression motion, concluding that the searches were constitutional. *Id.* at 719.

Building on prior Fourth Circuit precedent, the Fourth Circuit held that a warrantless forensic search under the border-search exception requires "individualized suspicion of an offense that bears some nexus" to the exception's purpose. *Id.* at 721. The Fourth Circuit "conclude[d] that the warrantless forensic searches of [the defendant's] devices … lacked the requisite nexus to the recognized historic rationales justifying the border search exception." *Id.* The court acknowledged that the border officers had probable cause to suspect that the defendant "had previously committed grave *domestic* crimes" when he landed at the airport, but "no reasonable basis to suspect that [those] crimes had any … transnational component." *Id.*

The Fourth Circuit further rejected the notion that non-routine, intrusive forensic searches "are reasonable simply by virtue of the fact that they occur at the border." *Id.* at 722 (quotation marks omitted). The court noted that, in the context of such searches, the Supreme Court "has explicitly struck a balance between the interests of the Government and the privacy of the individual." *Id.* (quotation marks omitted). As such, the court explained,

"a nonroutine search's *location* is not dispositive of whether the border search exception applies; rather, it is the search's relation to the Government's *sovereign interests* that is paramount." *Id.*

Notwithstanding its holding that the search violated the Fourth Amendment, the Fourth Circuit affirmed the denial of the defendant's suppression motion under the good faith exception to the warrant requirement, which holds that "'a search conducted in reasonable reliance on binding precedent [is] not subject to the exclusionary rule,' as that rule is designed 'to deter *future* Fourth Amendment violations.'" *Id.* at 725 (quoting *Davis v. United States*, 564 U.S. 229, 236-37 (2011)).

Judge Richardson concurred in the judgment. *Id.* at 726-34 (Richardson, J., concurring in the judgment).

3. In direct conflict with the Fourth and Ninth Circuits, the First, Eighth, Tenth, and Eleventh Circuits, like the Fifth Circuit, have held that warrants are generally not required to conduct cellphone searches at the border.

a. Under settled law in the First Circuit, warrants are never required to conduct a cellphone search at the border. In *Alasaad v. Mayorkas*, 988 F.3d 8 (1st Cir. 2021), the First Circuit held that warrantless cellphone searches—both forensic and manual—are always permitted at the border. *Id.* at 18. In doing so, the First Circuit specifically rejected the argument that warrants should be required where the search lacks a nexus with a border crime. *Id.* at 19-20.

In *Alasaad*, ten U.S. citizens and one lawful permanent resident whose electronic devices had been subject to warrantless search at the U.S. border brought a civil suit alleging that they were unlawfully searched in violation of the Fourth Amendment pursuant to the same ICE and CBP policies that are at issue in this case—which

permit border agents to engage in suspicionless manual searches, and to engage in forensic searches as long as they have reasonable suspicion or where there is a "national security concern." *Id.* at 12-14. The plaintiffs sought declaratory and injunctive relief, including an order directing the Government to expunge "all information gathered from, or copies made of, the contents of Plaintiffs' electronic devices." *Id.* The parties cross-moved for summary judgment, and the district court held that the challenged policies for both manual and forensic searches violated the Fourth Amendment. *Id.* at 15-16.

The First Circuit affirmed in part and vacated in part, holding that the policies comply with the Fourth Amendment. *Id.* at 12, 23. The court first held that neither manual nor forensic searches of electronic devices at the border require a warrant. *Id.* at 16-17. The court further rejected the plaintiffs' claim that manual searches of cellphones require reasonable suspicion. *See id.* at 12, 18. The First Circuit also rejected the Ninth Circuit's "narrow" view that the border-search exception is limited to searches for contraband, finding that it "fail[ed] to appreciate the full range of justifications for the … exception beyond the prevention of contraband itself entering the country." *Id.* at 21. Accordingly, the court held, forensic border searches of electronic devices "may be used to search for contraband, evidence of contraband, or for evidence of activity in violation of the laws enforced or administered by [border officials]." *Id.*

b. The Tenth Circuit has similarly concluded that warrants are never required to conduct a cellphone search at the border. In *United States v. Williams*, 942 F.3d 1187 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 235 (2020), the Tenth Circuit upheld a forensic search of a cellphone that was based on reasonable suspicion but specifically "decline[d]" to hold that even reasonable suspicion is

required for "searches of personal electronic devices at the border." *Id.* at 1190.

In *Williams*, a Homeland Security Special Agent seized the defendant's electronic devices upon his arrival at Denver International Airport and performed a forensic search of the defendant's laptop on suspicion that the defendant was engaged in criminal activity. *See id.* at 1189-90. An initial review of the forensic search yielded child pornography, and the Government obtained a search warrant authorizing a full forensic search. *Id.* at 1190. The defendant was subsequently indicted on child-pornography charges. *Id.* The defendant "moved to suppress the evidence obtained from his laptop on grounds that it was tainted by the [initial] search conducted prior to the issuance of a search warrant." *Id.* The district court denied the motion. *Id.*

The Tenth Circuit affirmed. *Id.* at 1191. The Tenth Circuit concluded that "reasonable suspicion is sufficient to justify a border search of personal electronic devices." *Id.* at 1190. Finding that the government officials had reasonable suspicion of "some criminal activity" before searching the defendant's electronic devices, the court thus concluded that the defendant's "own arguments preclude[d] him from prevailing." *Id.* at 1190-91. In so holding, the Tenth Circuit rejected the argument that the officer's suspicion needed to be "particularized" to crimes within the purview of border officers. *Id.* at 1191.

c. The Eighth Circuit has also held that warrants are never required to conduct a cellphone search at the border. In *United States v. Xiang*, 67 F.4th 895 (8th Cir. 2023), the Eighth Circuit "agree[d]" that the Government need not "obtain a warrant to conduct a routine border search of electronic devices" and that even as to non-routine border searches, "requiring some level of reasonable, individualized suspicion" of some crime, "but

not probable cause or a warrant," "is an appropriate standard." *Id.* at 901.

In *Xiang*, the Chinese-citizen defendant was a former U.S. Monsanto employee who federal agents suspected was engaged in economic espionage on behalf of a Chinese competitor. *Id.* at 897-99. Agents therefore initiated a "national security investigation involving potential theft of trade secrets." *Id.* at 898. After learning that the defendant "planned to travel to Shanghai on a one-way ticket without his family," federal agents intercepted him at the Chicago O'Hare International Airport prior to his departure. *Id.* at 898-99. CBP seized a cellphone, laptop computer, SD card, and a SIM card from his baggage for a secondary inspection and eventually forensically searched the devices. *Id.* at 899. Investigators discovered "six documents believed to be Monsanto trade secrets or intellectual property." *Id.* The district court denied the defendant's motion to suppress and the Eighth Circuit affirmed. *Id.* at 899, 903.

The Eighth Circuit rejected the defendant's "primary argument on appeal" "that the government needed a warrant to search his electronic devices 'because the forensic search did not fall within the Fourth Amendment border-search exception.'" *Id.* 899-00. The court explained that "[n]o Circuit has held that the government must obtain a warrant to conduct a routine border search of electronic devices," and the "First Circuit had already "carefully explained why [defendant's] broad argument 'rests on a misapprehension of the applicability' of *Riley*." *Id.* at 900 (quoting *Alasaad*, 988 F.3d at 16-19). The Eighth Circuit then stated simply: "We agree." *Id.*

The Eighth Circuit also rejected the defendant's argument, based on *Cano* and *Aigbekaen*, that the search violated the Fourth Amendment because it was "not tethered to any border search justifications" and thus fell

outside the border-search exception. *Id.* at 900. The Eighth Circuit sided instead with the First Circuit's holding in *Alasaad*, concluding that "searches for mere evidence of criminal activity" fall squarely within the border-search exception to the warrant requirement. *Id.*

Finally, the Eighth Circuit held that border agents need only have reasonable suspicion of criminal activity to justify a warrantless forensic search. *Id.* at 900-03.

d. The Eleventh Circuit has adopted the position furthest from the Fourth and Ninth Circuits, holding that warrants are never required to conduct a cellphone search at the border and also that reasonable suspicion is never required to conduct a cellphone search at the border, no matter how intrusive. The Eleventh Circuit first rejected a warrant requirement in *United States v. Vergara*, 884 F.3d 1309, 1311 (11th Cir. 2018), over a vigorous dissent by Judge Jill Pryor. It then rejected even a reasonable suspicion standard in *United States v. Touset*, 890 F.3d 1227, 1232-33 (11th Cir. 2018).

In *Vergara*, a divided panel of the Eleventh Circuit held that "border searches never require a warrant or probable cause." 884 F.3d at 1311. The court therefore rejected the defendant's argument that the trial court should have suppressed child pornography discovered during warrantless forensic searches of his phones at the border. *Id.* at 1312-13. This Court's decision in *Riley* did "not change this rule," the panel majority reasoned, because the Court there stated that "'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.'" *Id.* (quoting *Riley*, 573 U.S. at 401-02).

Judge Jill Pryor dissented. *See id.* at 1313-19 (Pryor, J., dissenting). Judge Pryor would have held that, following *Riley*, border agents must secure a warrant

supported by probable cause to engage in a forensic search of a cellphone at the border. *See id.* at 1318-19.

Shortly after *Vergara*, a divided panel of the Eleventh Circuit concluded that "the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border." *Touset*, 890 F.3d at 1231.

In *Touset*, border agents seized the defendant's electronic devices upon his arrival at the Hartsfield-Jackson Atlanta International Airport on an international flight, after receiving information that suggested the defendant was involved with child pornography. *Id.* at 1230. A border agent performed a manual search of the defendant's cellphones and camera but, finding nothing, returned the devices to the defendant. *Id.* Forensic searches of the defendant's two laptops and two external hard drives, however, revealed child pornography. *Id.* A grand jury indicted the defendant on three counts related to child pornography, and the defendant moved to suppress evidence obtained from the forensic searches of his electronic devices. *Id.* at 1231. The district court denied the motion, finding that reasonable suspicion justified the searches. *Id.*

The Eleventh Circuit affirmed. *Id.* at 1229. The court "s[aw] no reason why the Fourth Amendment would require suspicion for a forensic search of an electronic device when it imposes no such requirement for a search of other personal property." *Id.* at 1233. In so holding, the Eleventh Circuit expressly rejected the argument that "electronic devices should receive special treatment because so many people now own them or because they can store vast quantities of records or effects." *Id.*

The court acknowledged that its holding conflicted with the Fourth and Ninth Circuits' holdings "that the Fourth Amendment requires at least reasonable suspicion for forensic searches of electronic devices at the

border," but it explained that it was "unpersuaded" by that view. *Id.* at 1234.

Judge Corrigan (M.D. Fla., by designation) did not join the panel majority's holding that no suspicion is required. *See id.* at 1238 (Corrigan, J., concurring in part and concurring in the judgment). Judge Corrigan found the Government's position "that border agents need no justification whatsoever to detain (in this case for seventeen days) and forensically search electronic devices of any American citizen returning from abroad" presented a "difficult question, one not addressed by the Supreme Court or (until today) any appellate court." *Id.* at 1238-39. Judge Corrigan concurred because, in his view, reasonable suspicion of criminal conduct is sufficient to permit a forensic cellphone search at the border, and border agents had it in the case.

4. A recent decision by Judge Rakoff in the Southern District of New York, taking a different approach from "any circuit court to consider the question," further establishes the need for this Court's review of the question presented. *United States v. Smith*, No. 22-CR-352, 2023 WL 3358357, at *11 (S.D.N.Y. May 11, 2023).

In *Smith*, after considering every circuit's existing approach to warrantless border searches, *id.* at *7-11, Judge Rakoff held that the correct rule is "somewhat more protective than the approach of any circuit court to consider the question"—namely, that "phone searches at the border generally require warrants outside exigent circumstances," *id.* at *11.

Smith involved a warrantless forensic search of a defendant's cellphone seized by border agents as he returned to Newark Liberty International Airport from Jamaica. *Id.* at *1-3. The search arose out of an investigation into the defendant's alleged role in a conspiracy to control New York area emergency

mitigation services. *Id.* at *2. Agents found evidence of defendant's criminal conduct from searches of the phone. *Id.* at *3. At his criminal trial, the defendant moved to suppress the evidence. *Id.* at *3-4.

The court ultimately denied the motion to suppress, finding "that the good faith exception doubly applie[d]." *Id.* at *16. But the court nonetheless held that phone searches at the border generally require warrants. *Id.* at *11.

Following the framework this Court set out in *Riley*, the court held that to determine whether the warrant requirement generally applies, a court should "assess[], on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at *7 (quoting *Riley*, 573 U.S. at 385). And "[a]pplying this balancing framework to phone searches at the border yields the same result as in *Riley*." *Id.* "None of the rationales supporting the border search exception justifies applying it to searches of digital information contained on a traveler's cell phone, and the magnitude of the privacy invasion caused by such searches dwarfs that historically posed by border searches and would allow the Government to extend its border search authority well beyond the border itself." *Id.*

The court recognized the "the Government has a very strong interest in preventing unwanted persons or items from entering the country." *Id.* "But despite the strength of this interest, it is hard to see how it applies to searches of the digital data contained on a traveler's cell phone." *Id.* at *8. While the Government has a "strong interest in searching persons or physical objects at the border, any corresponding interest in searching the digital data 'contained' on a particular physical device located at the border is relatively weak." *Id.* And "against this relatively

weak governmental interest a citizen's privacy interests in her cell phone data at the time she presents herself at a U.S. border" are particularly strong. *Id.* On cellphones, the court noted, "nearly all travelers carry with them, in addition to any physical items, a digital record of more information than could likely be found through a thorough search of that person's home, car, office, mail, and phone, financial and medical records, and more besides." *Id.* "No traveler would reasonably expect to forfeit privacy interests in all this simply by carrying a cell phone when returning home from an international trip." *Id.* Thus, a "straightforward" application of "the logic and analysis of *Riley* to the border context" "yields [the conclusion that] the border search exception cannot support its extension to warrantless cell phone searches at the border." *Id.* at *8-9.

* * * * *

The conflict over the application of the warrant requirement to cellphone searches at the border is square and intractable. It has generated a 5-2 circuit split with respect to manual searches and a 2-4-1 split with respect to forensic searches. And rather than trending toward consensus, Judge Rakoff's recent decision shows that the division of authority is likely only to grow starker and more entrenched. The United States already sought this Court's review of the question presented in *Cano*, explaining in detail the special need for national uniformity in the application of Fourth Amendment rules to the United States border. No bloc in this conflict will change enough to resolve the split; to the contrary, any further changes are bound only to exacerbate confusion and conflict between and within the circuits. This question cries out for the Court's review.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

1. The legal and practical importance of the question presented is undeniable. The circuit conflict has now reached seven circuits, with courts resolutely disagreeing over the proper rule. And the question presented affects tens of thousands of individuals each year who collectively make hundreds of millions of border crossings. It is essential that individuals, border agents, and courts have clear rules governing when law enforcement officials are permitted to search the data stored on cellphones at the border. *See Cano* Pet. 25-27.

As it now stands, individuals have different protections from warrantless cellphone searches based on nothing more than the fortuity of where they happen to cross the United States border. As the United States informed this Court in *Cano*, the circuit split is so entrenched that there is no hope of this issue resolving itself. *Cano* Pet. 27. Each side of the split has staked out its position, and the competing arguments have been thoroughly examined. "This Court's review is necessary … to restore nationwide consistency in the standards governing searches of electronic devices at the border." *Id.*

a. The sheer number of individuals affected by the Fourth Amendment rules governing cellphone searches confirms the issue's importance. As the United States informed the Court in *Cano*, "[i]n fiscal year 2019, border officials processed more than 410 million travelers at air, land, and sea ports of entry." *Cano* Pet. 25 (citing CBP, DHS, *CBP Trade and Travel Report, Fiscal Year 2019*, at 2 (Jan. 2020), https://go.usa.gov/xApNG). In that same period, "border officials conducted approximately 40,913 border searches of electronic devices." *Id.*

b. Review is also essential because the privacy interests at stake are substantial. Modern digital devices "differ in both a quantitative and a qualitative sense from other objects" that people once traveled with. *Riley*, 573 U.S. at 393. Today's smartphones are capable of storing "millions of pages of text, thousands of pictures, or hundreds of videos," *id.* at 394, among an ever-expanding list of things. Digital devices can reveal "nearly every aspect" of a person's life—"from the mundane to the intimate." *Id.* at 395. Not only do these devices collect "in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record," they also can contain data that "date back to the purchase of the phone, or even earlier." *Id.* at 394.

Profound harms can thus result from cellphone searches. The phone may contain pictures of a Muslim woman without her headscarf. *Alasaad v. Nielsen*, No. 17-cv-11730, 2018 WL 2170323, at *20 (D. Mass. May 9, 2018). Or it may contain a recording of a person's deepest thoughts conveyed to a therapist, so a search "invad[es] not only the subject's house but his or her thoughts as well." Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 Harv. C.R.-C.L. L. Rev. 461, 483 (1981). As this Court put it, searching a digital device "would typically expose to the government far *more* than the most exhaustive search of a house." *Riley*, 573 U.S. at 396.

The ubiquity of cellphones heightens these concerns. Cellphones 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.* at 385. Since *Riley*, they have only become more universal. Virtually every American adult (95%) owns some kind of cellphone; 75% own a smartphone. Pet. App. 121a, 126a-127a, 129a.

"[I]t is neither realistic nor reasonable to expect the average traveler to leave his digital devices at home when traveling." *United States v. Kolsuz*, 890 F.3d 133, 145 (4th Cir. 2018); *see United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013). People "compulsively carry cell phones with them all the time." *Carpenter*, 138 S. Ct. at 2218. "According to one poll, 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." *Riley*, 573 U.S. at 395. Mobile devices "serve as digital umbilical cords to what travelers leave behind at home or at work, indispensable travel accessories in their own right, and safety nets to protect against the risks of traveling abroad." *United States v. Saboonchi*, 990 F. Supp. 2d 536, 557-58 (D. Md. 2014).

2. This case is an ideal vehicle to resolve the question presented. The question presented was raised and litigated at every stage of this case, and there are no plausible obstacles to resolving it in this Court.

a. This case comes to the Court in a preliminary injunction posture, but that does not affect its appropriateness for review. The Court routinely reviews cases in a preliminary injunction posture where the petition meets the Court's criteria for review. *See Dep't of Educ. v. Brown*, 143 S. Ct. 2343 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

b. The Fifth Circuit's holding that petitioner failed to establish a likelihood of irreparable harm (Pet. App. 10a-11a) is indefensible and no barrier to the Court's review of the merits of the Fourth Amendment question in this case. This Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def.*

Council, Inc., 555 U.S. 7, 22 (2008). Here, the undisputed record—five warrantless searches in an unbroken pattern spanning multiple years—*obviously* establishes the requisite threat that petitioner would "likely" be subject to future unconstitutional searches. Indeed, it is practically a certainty.

At minimum, the fact that the Government's pattern of unconstitutional warrantless searches has forced petitioner to stop carrying his work cellphone when he travels internationally establishes irreparable harm. Petitioner's reasonable measures to avoid exposing attorney-client privileged information to unconstitutional warrantless searches has resulted in the loss of the most basic and important of First Amendment freedoms: the unfettered ability to speak with his clients. *See Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 305 (1965) (holding that even *de minimis* government interference with free communication violates the First Amendment). And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Fifth Circuit's holding that petitioner failed to establish a likelihood of irreparable harm is thus patently erroneous.

c. Unlike many other cases involving border searches of electronic devices, the posture and facts of this case would allow this Court to reach the merits of the claim involved. The vast majority of border-search cases involve suppression motions in the context of criminal prosecutions. *See, e.g.*, *Castillo*, 70 F.4th at 896 (motion to suppress in child pornography prosecution). In those cases, the "good faith" exception means that criminal defendants often cannot win the case on the merits even if there was a constitutional violation. *See, e.g.*, *Aigbekaen*,

943 F.3d at 725; *Molina-Isidoro*, 884 F.3d at 290; *Smith*, 2023 WL 3358357, at *12-16. This, by contrast, is a civil case in which the only relief sought in this Court is a preliminary injunction against future warrantless searches.[5]

d. This case is also a superior vehicle to other cases where the Court has previously been asked to weigh in on the application of the border-search exception (like *United States v. Cano*, No. 20-1043, and *Merchant v. Mayorkas*, No. 20-1505) because the only question presented here is the narrow question whether the *Riley* rule extends to the border. The question is therefore clear and would permit the Court to resolve an important aspect of this issue—whether warrants are generally required for searches of cellphones at the border—without requiring it to also resolve what level of suspicion, if any, is necessary to engage in cellphone searches at the border were the Court to reject petitioner's proposed warrant rule.

3. There are no obstacles to review and determination of the question presented in this case. Petitioner's motion for preliminary injunction squarely presents the question whether warrants are generally required to search cellphones at the border. The issue was pressed in the district court and the court of appeals. This case is a

[5] The prospective relief sought in this case also permits the Court to avoid standing and remedy issues relating to the expungement remedy that may pose an obstacle to review of the Fourth Amendment question in other cases. *See Malik*, 2023 WL 5211651, at *5 (grappling with the questions whether expungement is an appropriate remedy for a Fourth Amendment violation; and whether an appellant whose own litigation hold is the cause of his data's retention has standing to seek expungement, or whether his injury is "self-inflicted").

perfect vehicle to resolve this question on which the United States recently sought the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DUSTIN RYNDERS
TRAVIS FIFE
KASSANDRA GONZALEZ
DANIEL HATOUM
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741

NICOLE L. MASIELLO
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
STEPHEN K. WIRTH
JAYCE LANE BORN
SEAN A. MIRSKI
DANA OR
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

AUGUST 2023