No. 24-302

In the Supreme Court of the United States

MARCOS MENDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Only through arbitrary distinction does the Government reconcile the Circuits' treatment of border cell phone searches with this Court's instructions about cell phone data in *Riley* and *Carpenter*. The Government says *Riley* and *Carpenter* were "narrow" decisions that lose force beyond their specific context. *Riley* and *Carpenter* may have rejected mechanical application of precedent to cell phone data, but were not border cases and so a smattering of antiquated border precedent should control here. Although a person may retain an expectation of privacy in his or her cell phone data incident to arrest, the expectation of privacy at the border is just "less." And not to worry—this case started with an agent only "manually" searching the digital contents of Mr. Mendez's phone before the Government moved on to a "forensic" search to extract metadata and preserve evidence for prosecution.

The Government's equanimity belies an unavoidable tumult in border search doctrine. Rote application of border precedent cannot be squared with *Riley* and *Carpenter*. While *Riley* and *Carpenter* were not border cases, this Court surely meant what it said when it told lower courts to eschew uncritical extension of existing precedent to cell phone data and not treat cell phone data like an ordinary physical object. *Riley* instructs that this false equivalence is akin to comparing "a ride on horseback" with "a flight to the moon." 573 U.S at 393. Contrary to the Government's assertions of uniformity, confronting these unambiguous directions from

Riley and *Carpenter* has vexed the lower courts to unprincipled divergence.

At the extreme, courts like the Eleventh Circuit disregard *Riley* and *Carpenter* entirely on the grounds that they do not apply to border searches, and reject any limits on the Government's ability to audit a traveler's digital life. While other courts like the Fifth and Ninth Circuits acknowledge cell phone data is unique, they adopt an insidious compromise that requires no suspicion for the "manual" examination of cell phone data and only reasonable suspicion for a "forensic" investigation. This is despite *Riley* describing a manual cell phone search as more intrusive than "the most exhaustive search of a house." Courts like the First, Seventh, and Eighth Circuits disagree that *Riley* and *Carpenter* have any import at the border, but glom on to the "manual" v. "forensic" distinction in justifying their results. The Fourth Circuit stands alone in suggesting that *Riley* may require a higher level of suspicion.

Beneath the Government's portrayal of unity also lies another Circuit split often forgotten in the morass. The scope of the border exception must remain tethered to the reasons for it, yet the Circuits diverge regarding the purpose and scope of an electronic border search. The Ninth Circuit holds that the border exception limits a search to digital contraband, while the First and Fourth Circuits permit a broader search for border-related crime and the Second, Seventh, and Eighth Circuits allow the type of general law-enforcement search eventually conducted on Mr. Mendez's phone here. Unresolved is whether the border exception is limited to preventing the entry of unwanted persons and

effects or instead may be used as a tool for prosecution.

Thus has the dinning of border dogma undermined the consistency of Fourth Amendment jurisprudence. After more than a decade of wrestling with these issues, it is clear the lower courts will not arrive at more principled results without guidance from this Court. The Government's kick-the-can-down-the-road strategy has only widened the chasm among courts and threatened to relegate *Riley*, *Carpenter*, and the very considerations inspiring the Amendment to exception-specific obscurity. Without action from this Court, lower courts will continue to follow the casuistry which permits the Government to "manually" invade the privacies of intra-border life with neither a warrant nor any suspicion. They will waste time trying to enforce a meaningless boundary between "manual" and "forensic" searches rather than applying the clear, categorical rules the Fourth Amendment commands. And they will, assured by an unwary incantation of national security, continue to surrender to petty customs and border officers the same arbitrary search authority that birthed the child Independence. The Court should grant certiorari to harmonize Fourth Amendment search doctrine and restore that level of privacy that existed at the Amendment's adoption.

I. The Government Disregards the Conflict With *Riley* and *Carpenter*

The Government erroneously contends the Seventh Circuit opinion does not conflict with a decision of this Court. Gov't Brief at 6. While attempting to cabin this Court's holdings specifically addressing cell phone data in *Riley* and *Carpenter*, the Government endorses the Seventh Circuit's broad extension of border precedent

to justify suspicionless electronic device searches. The Government's dissembling aside, there remains a fundamental conflict between the Seventh Circuit opinion and this Court's instructions in *Riley* and *Carpenter*.

The Government seizes upon *Riley's* statement that "other case-specific exceptions may still justify a warrantless search of a particular phone." Gov't Brief at 9, *quoting Riley*, 573 U.S. at 401-02; App.9a. The Government claims this "emphasized the narrow scope of [*Riley's*] holding." *Id.* The Seventh Circuit likewise found this statement showed "*Riley* itself anticipated" applying the border exception to cell phone searches. App.9a. This stretches the language of *Riley* too far. *Riley* discussed "other case-specific" exceptions in response to the Government arguing exigent circumstances —like the detonation of a bomb—that could justify the warrantless search of a phone. *Riley*, 573 U.S. at 402. The Court raised "case-specific exceptions" to assuage the Government's concern regarding "fact-specific threats" that may arise in particular cases incident to arrest; it was not referring to more general exceptions (like the border exception) that apply beyond the circumstances of particular cases. *Id.* at 401-02. *Riley* in no way anticipated applying the border exception here.

While reading too much into *Riley's* reference to "case-specific exceptions," the Government and the Seventh Circuit disregard this Court's clear instructions about cell phone data. Although neither *Riley* nor *Carpenter* is a border case, they surely establish that cell phones are unique and that existing precedent should not be mechanically applied to the search of digital data. *Riley*, 573 U.S. at 386; *Carpenter*, 585

U.S. at 318 ("When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents.").

Rather than follow these instructions, the Government and Seventh Circuit find support for electronic border searches in an 18th-century statute granting customs officers the power to conduct warrantless searches of ships. Gov't Brief at 9; App.5a. They assume warrantless cell phone searches are permissible simply "by virtue of the fact that they occur at the border." Gov't Brief at 7; App.6a. But this is exactly the type of mechanical reasoning that *Riley* and *Carpenter* reject. While the border exception may have an historical pedigree, so too was the authority of police to search a person and his pockets incident to arrest in *Riley* "always recognized under English and American law." 573 U.S. at 382, *quoting Weeks v. United States*, 232 U.S. 383, 392 (1914). That existing precedent authorizes the warrantless search of physical objects does not mean that the Government may proceed warrantless into a person's cell phone data. *Id.* at 386

Like the Seventh Circuit, the Government says that "the expectation of privacy is less at the border than it is in the interior." Gov't Brief at 12, *quoting United States v. Flores-Montano*, 541 U.S. 149, 154 (2004). But again no attention is paid to *Riley*. The search-incident-to-arrest exception likewise rests upon an arrestee's reduced expectation of privacy while in police custody, yet *Riley* made clear that diminished privacy interests do not mean the Fourth Amendment "falls out of the picture entirely." 573 U.S. at 392. "To the contrary, when privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy. . . ." *Id.* No

satisfactory explanation has been offered as to why an arrestee who is in police custody—because there is probable cause to believe he or she committed a crime—has a greater expectation of privacy in his or her cell phone than an ordinary traveler passing through customs. The Government argues that travelers can leave their phones at home, Gov't Brief at 12-13, but this too ignores *Riley*. 573 U.S. at 385, 403 (likening cell phones to a "feature of human anatomy;" "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.").

The Government argues that, unlike in *Riley*, applying the border exception to cell phone data serves the government's interest in interdicting digital contraband such a child pornography, pirated intellectual property, or highly classified technical information. Gov't Brief at 11. The Seventh Circuit adopted a similar rationale. App. 10a-11a. But neither appreciates the Government's interest is diminished by the fact that criminals can distribute digital contraband without ever physically crossing a border. *United States v. Vergara*, 884 F.3d 1309, 1317 (11th Cir. 2018) (J. Pryor, dissenting) ("Unlike physical contraband, electronic contraband is borderless and can be accessed and viewed in the United States without ever having crossed a physical border."). There has been no showing that applying the border exception to cell phone data interrupts the flow of digital contraband in any significant way, or that the Government's interest is powerful enough to summarily dismiss the privacy interests detailed in *Riley* and *Carpenter*. The Court should grant certiorari to resolve the conflict with *Riley* and *Carpenter*.

II. The Government Disregards the Conflict Among the Circuits

The Government erroneously argues the Seventh Circuit opinion does not conflict with the decision of any other Circuit. Gov't Brief at 6. On the contrary, the Seventh Circuit opinion conflicts with other Circuits regarding how to apply the privacy interests articulated in *Riley* at the border and the scope of search permitted under the border exception.

At the threshold, the Circuits disagree on the weight to accord *Riley* at the border. The Seventh Circuit proclaimed that "*Riley* and *Carpenter* had nothing to do with the border context," App.8a, and was nonplussed by *Riley's* privacy concerns, App.12a-13a. The Seventh Circuit followed the First Circuit in dismissing *Riley* as a non-border case and upholding "manual" as opposed to "forensic" searches based on the general reduced expectation of privacy at the border. App.13a, *citing Alasaad v. Mayorkas*, 988 F.3d 8, 18 (1st Cir. 2021) (privacy concerns "tempered by the fact that the searches are taking place at the border"). Similarly, the Eleventh Circuit holds that *Riley* "does not apply" at the border and no suspicion is required for any type of electronic border search. *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018).

By contrast, the Fifth and Ninth Circuits recognize the unique privacy interests announced in *Riley*, but find that "manual" searches are not intrusive enough to require suspicion. *United States v. Cano*, 934 F.3d 1002, 1014-16 (9th Cir. 2019); *United States v. Castillo*, 70 F.4th 894, 897-98 (5th Cir. 2023). The Fourth Circuit, meanwhile, has left open the possibility that probable cause is required, while avoiding the issue under the good faith exception. *United States v. Kolsuz*,

890 F.3d 133, 145-48 (4th Cir. 2018). The Circuits need guidance on how *Riley* applies at the border.

The Circuits also need guidance on the scope of the border exception. The Ninth Circuit believes the border exception exists to prevent the entry of contraband, and accordingly holds that a border search is lawful only if it is aimed at discovering contraband. *Cano*, 934 F.3d at 1018. The First and Fourth Circuits believe the border exception also encompasses efforts to look for evidence of border-related crimes. *Alasaad*, 988 F.3d at 20; *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019). And the Eighth Circuit follows the Second Circuit in permitting border agents to investigate criminal activity generally. *United States v. Xiang*, 67 F.4th 895, 900 (8th Cir. 2023), *quoting United States v. Levy*, 803 F.3d 120, 124 (2d Cir. 2015).

This case brings this conflict to the fore. The Seventh Circuit upheld the subsequent forensic searches of Mr. Mendez's phone under the border exception, finding they did not possibly require more than reasonable suspicion. App.14a. These searches had nothing to do with interdicting contraband and, ordinarily, a warrant is required to search for evidence of criminal wrongdoing. *Riley*, 573 U.S. at 382. The Court should grant certiorari to resolve whether the border exception authorizes such warrantless law-enforcement searches.

III. This Court Should Address the Circuit's "Manual" v. "Forensic" Distinction

The Government argues this case does not implicate the Circuit split with respect to "forensic" as opposed to "manual" cell phone searches. Gov't Brief at 16. Yet, this "manual" v. "forensic" distinction is at the core of the Seventh Circuit and other Circuit

opinions upholding border cell phone searches on the basis that they are just "manual" and "routine." This Court should grant certiorari to rid lower courts of the notion that the manual search of the digital contents of a cell phone—the same type of search involved in *Riley*—is now a routine matter.

The manual v. forensic distinction originated in 2013 in the Ninth Circuit's opinion in *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), which required reasonable suspicion for a "forensic" search, but not for a manual "quick look." Courts since then have glommed on to this distinction, claiming that manual searches are routine matters "practically limited in intrusiveness" by the fact that the customs agent "must physically scroll through the device." App.13a; *see also Castillo*, 70 F.4th at 897 ("[b]asic border searches . . . require an officer to manually traverse the contents of the traveler's electronic device, limiting in practice the quantity of information available"), *quoting Alasaad*, 988 F.3d at 18.

Whereas lower courts deem this type of search to be a routine matter requiring no suspicion, *Riley* explained that a manual cell phone search "would typically expose to the government far more than the most exhaustive search of a house." 573 U.S. at 396. There is nothing "routine" about a government agent "manually" searching the contents of a person's cell phone and all the privacies of life that it contains, just as there is nothing ordinary about the Government "manually" searching a home. *Id.* at 396. A manual search may be limited by an officer's time constraints and curiosity, but bureaucratic ennui is no substitute for the Fourth Amendment. Rather than serving as a reason to deny certiorari, the manual v. forensic distinc-

tion in the lower courts demonstrates why this Court's guidance is necessary. *See United States v. Sultanov*, No. 22-CR-149 (NRM), 2024 WL 3520443, at *21 (E.D.N.Y. July 24, 2024) ("*Riley* did not turn on the method used to search a cell phone's contents").

IV. The Government Erroneously Claims Historical Support for Electronic Border Searches

The Government accuses Petitioner of dismissing the border exception's history, but avoids the critical examination of history set forth in Part II of the Petition. Gov't Brief at 10. The Government never explains why petty customs officers have an unconstrained power to rummage through a traveler's private life when it was precisely this type of abuse by petty customs officers that inspired the Fourth Amendment. *See* Petition at 19.

The Government criticizes Petitioner for pointing out the first customs statute did not authorize the search of "papers." Gov't Brief at 10. The Government says *United States v. Ramsey*, 431 U.S. 606 (1977) demonstrates the Government's authority to search papers at the border. *Id.* Yet, *Ramsey* highlights the lack of historical support for the Government's position. It was not until 1866 that Congress authorized the opening of international mail, and then only when there was "reasonable cause to suspect" contraband. *Ramsey*, 431 U.S. at 611, *quoting* Act of July 18, 1866, 14 Stat. 178, sec. 3. And while Congress permitted the opening of mail based on reasonable suspicion, applicable postal regulations later "flatly prohibit[ed], under all circumstances, the reading of correspondence absent a search warrant." *Id.* at 623, *citing* 19 C.F.R. § 145.3. The good sense of preceding generations is now lost

upon the Government, which sees no difference between its previous non-substantive review of individual mail and its newly-claimed right to read the library of correspondence and other data stored on a cell phone. The Court should reject this distortion of history.

V. The Government Erroneously Argues the Presence of Reasonable Suspicion

The Government argues this case is an unsuitable vehicle for deciding, in the alternative, whether at least reasonable suspicion is required for the border search of a cell phone, because reasonable suspicion existed here. Gov't Brief at 15. Reasonable suspicion requires a "particularized and objective basis for suspecting the particular person" of smuggling contraband. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541-42 (1985). The Government indisputably lacked information that Mr. Mendez was actively smuggling contraband at the time of its initial search. App.71a-72a. The Government nevertheless argues reasonable suspicion existed based on: (1) Mr. Mendez's arrest and conviction five years prior; (2) statement two years prior that his electronics were stolen in Mexico; and (3) his traveling from a potential "source" country. Gov't Brief at 15. The Government also says that Mr. Mendez was "evasive" during questioning, Gov't Brief at 16, but Mr. Mendez simply used words to the effect of "He was a U.S. citizen. We should just be letting him go," App.50-51a. While the Government argues Mr. Mendez "fit the profile of a child-pornography offender," Gov't Brief at 15-16, nebulous assumptions lacking any current indication of nefarious activity are insufficient to establish reasonable suspicion. *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (no reasonable suspicion to stop traveler who fit "drug-courier profile"

by arriving from a place of origin of cocaine, early in the morning, with no luggage, and appeared to be concealing the fact that he was traveling with a companion).

CONCLUSION

The petition for a writ of certiorari should be granted.

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