No. 20-10059

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE ANIBOWEI,

Plaintiff-Appellant,

v.

MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; WILLIAM P. BARR, U. S. ATTORNEY GENERAL; CHAD F. WOLF, ACTING SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; MATTHEW T. ALBENCE, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; DAVID P. PEKOSKE, Administrator of the Transportation Security Administration, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRANSPORTATION SECURITY ADMINISTRATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas | No. 3:16-cv-03495-D

BRIEF OF THE R STREET INSTITUTE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT GEORGE ANIBOWEI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A), *amici curiae* the R Street Institute and the Cato Institute state that they have no parent corporations and that no publicly held corporation holds 10% of more of either entity's stock.

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INTEREST OF AMICI CURIAE[1]

The R Street Institute is a non-profit, non-partisan public policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth.

The R Street Institute and Arthur Rizer, Director of Criminal Justice and Civil Liberty Policy at the R Street Institute, are interested in this case because of the significant constitutional and privacy-related issues implicated by the government's conduct. Specifically, they are concerned that the government's policy of permitting border agents to search the digital content of the cell phones of travelers at the border without even reasonable suspicion violates the bedrock constitutional guarantee of freedom from unreasonable searches and seizures. Indeed, detaining travelers at the border, particularly citizens, until they acquiesce to unlawful searches is inimical to the values of a free society. Moreover, as a free-market and limited-government "think tank," the R Street Institute believes in ensuring that the power of government is strictly circumscribed to the limits enumerated in the Constitution—the contract

[1] No party's counsel authored this *amici curiae* brief in whole or in part, and no party, party's counsel, or any other person contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this *amicus* brief.

between the people and the government. Here, the government is acting outside of that contract and has adopted a policy that poses a grave threat to the civil liberties of the people.

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. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato holds conferences; publishes books, studies, and the annual Cato Supreme Court Review; and files *amicus* briefs.

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 emphasize the principle that the Fourth Amendment does not lose all vitality at the border. There is no historical or legal basis for government officers searching and seizing the private papers of travelers at the border. And such government conduct is all the more

dangerous and hostile to individual freedom when, as a practical matter, travelers carry all or nearly all of their personal papers with them at all times on their electronic devices.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government's policies authorize border agents to search and seize the contents of cell phones and other electronic devices at the border without even reasonable suspicion. Under this policy, all persons crossing the border, including all international air travelers, are stripped of their privacy rights in the digital contents of their devices. All of their personal information—correspondence, financial transactions, medical history, sexual proclivities, and, in this case, documents protected by the attorney-client privilege—is subject to search, copying, and indefinite retention by the government. And failure to cooperate with the government's prying into the deep recesses of one's personal devices may result in denial of entry—or reentry—for both noncitizen and citizen alike.

The government grounds its policies in the border-search exception to the warrant requirement of the Fourth Amendment. But that exception is not so capacious. It has only two purposes recognized by the Supreme Court—regulating the collection of customs duties and preventing the smuggling of contraband. The Supreme Court has never extended the exception to the search and seizure of private papers, which have traditionally been afforded the highest level of Fourth Amendment protection.

Nor should it. Searching and copying the digital contents of an electronic device will not aid the government in collecting unpaid taxes, nor will it prevent the

smuggling of drugs, firearms, and other contraband. But it will violate the privacy interests of ordinary citizens who—quite reasonably—do not expect that crossing the border may require that they share their most intimate secrets with the federal government even if they are not suspected of having committed any crime.

In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court held that the government must obtain a warrant supported by probable cause before it may conduct a search of the digital data stored on cell phones. The government cannot circumvent *Riley* by invoking the border-search exception to the warrant requirement, because that exception applies only in the limited circumstances where the government has reasonable suspicion that an individual is evading customs duties or smuggling contraband into the country. But, apart from narrow categories of information not at issue here, digital data stored on cell phones does not constitute dutiable items or contraband. And here, because the government was not purporting to search for dutiable items or contraband when it repeatedly searched and seized the data on Mr. Anibowei's phones, it violated his Fourth Amendment rights.

This Court should reverse the district court's order denying Mr. Anibowei's motion for summary judgment and decline to extend the border-search exception to this new electronic frontier.

ARGUMENT

I. The Border-Search Exception Was Not Historically Understood to Authorize Suspicionless Searches of Private Papers

The Fourth Amendment generally requires a warrant supported by probable cause before the government may conduct a search of "persons, houses, papers, [or] effects." U.S. Const. amend. IV. The Supreme Court has recognized several limited exceptions to this warrant requirement. One is the border-search exception.

A. Private Papers Were Historically Excluded from the Federal Government's Customs Power at the Border

The historical root of the border-search exception is the Collection Act of 1789, which vested customs officials with "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." Ch. 5, § 24, 1 Stat. 43 (emphasis added). The Supreme Court has regarded this statute, passed by the same Congress that proposed the Fourth Amendment, as founding-era evidence that the Fourth Amendment does not require warrants supported by probable cause for searches performed at the border. *E.g.*, *United States v. Ramsey*, 431 U.S 606, 616 (1977).

But the Collection Act did not authorize the search and seizure of anything and everything at the border. Although the statute recognized the federal government's "plenary customs power" with respect to "goods, wares, or merchandise subject to duty," it did not authorize government agents to search and

seize private papers at the border. Private papers have never been "goods, wares, or merchandise subject to duty." For example, in a 1789 statute specifying which items and products were subject to import duties, Congress listed only "blank books," and did not include written materials among the dozens of categories of dutiable items. Tariff Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24–26.

The origins of the Fourth Amendment explain this exclusion of private papers from the statutory categories of dutiable items. The Fourth Amendment "was 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. Such practices had been curbed in England in two landmark cases, *Wilkes v. Wood*, 19 How St. Tr. 1153 (C.P. 1763), and *Entick v. Carrington*, 19 How St. Tr. 1029 (C.P. 1765). Both cases grew out of the government's search and seizure of papers belonging to publishers of a radical newspaper. The publishers successfully sued the royal messengers who ransacked their homes and carted away all of their personal papers for trespass. These cases were well known and celebrated in the American colonies. William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning (602–1791), at 538–39, 574–75 (2009).

Entick in particular—a "monument of English freedom" that has been cited by the Supreme Court more than 50 times—was "undoubtedly" "in the minds of

those who framed the fourth amendment to the constitution." *Boyd v. United States*, 116 U.S. 616, 626–27 (1886). *Entick* held that there was no legal justification for the warrantless and indiscriminate search and seizure of papers, which are a person's "dearest property." 19 How St. Tr. at 1064–66. The court specifically rejected the argument that the seizure of papers bears "a resemblance . . . to the known case of search and seizure for stolen goods," which required a battery of procedural safeguards, including the owner's oath that the goods were stolen and stored in a particular place, not to mention his exposure to liability if he was proven wrong. *Id.* at 1066–67. The Collection Act, consistent with *Entick*, authorized searches and seizures of goods subject to the protection of reasonable suspicion, and it made no provision whatsoever for the search and seizure of private papers.

Nothing from the founding era, including the Collection Act, suggests that the Framers intended to displace the venerated rule of *Entick* and authorize warrantless and suspicionless searches and seizures of private papers anywhere, including at the border.

B. The Supreme Court Has Never Sanctioned the Suspicionless Search or Seizure of Private Papers at the Border

The few Supreme Court decisions addressing the border-search exception underscore the exception's historical purposes—the collection of duties and the seizure of contraband. None of those decisions suggests that the exception is so sweeping or absolute as to authorize law enforcement officers to engage in

warrantless and even suspicionless searches and seizures of private papers. To the contrary, the cases expressly distinguish between potential contraband, which is subject to search and seizure, and private papers, which are not.

The Court drew this distinction in its very first case addressing the border-search exception, *Boyd v. United* States, 116 U.S. 616 (1886). *Boyd* concerned the constitutionality of a law compelling importers to turn over their private books and papers at the government's request for use in civil and criminal proceedings. *Id.* at 619–20. The Court drew a bright constitutional line between dutiable items that may be searched and seized and private papers that may not: "The 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 the information therein contained." *Id.* at 623.

Whereas the search and seizure of dutiable goods had been "authorized by the common law" for centuries and by federal statutes "from the commencement of the government," the search and seizure of private papers without a warrant had never been authorized by Congress and, in fact, ran counter to the animating purposes of the Revolution. *Id.* The Court distinguished the Collection Act of 1789, which reflected the government's interest in collecting taxes on "excisable or dutiable articles," from an attempt "to extort from the party his private books and papers to

make him liable for a penalty." *Id.* at 623–24. The Court also recounted the "then recent history of the controversies on the subject" of unreasonable searches and seizures, including the cases of *Wilkes* and *Entick*, explaining that *Entick* in particular proscribed "'the invasion of th[e] sacred right'" "'of personal security, personal liberty, and private liberty'" through the search and seizure of private papers. *Id.* at 625–30. The Court then asked a rhetorical question that applies with equal force to this case: "Could the men who proposed those amendments, in the light of Lord CAMDEN's opinion [in *Entick*], have put their hands to" the challenged statute? *Id.* at 630. The answer, of course, was no: "The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." *Id.* The Supreme 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.[2]

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[2] *Boyd* has been narrowed since it was decided, chiefly by *Warden v. Hayden*, 387 U.S. 294 (1967). In that case, the Court decided that evidence seized by police officers under an exception to the warrant requirement was admissible even if it was not itself contraband or an instrumentality of a crime. *Id*. at 300–01. Here, the only exception to the warrant requirement that could make the search and seizure of Mr. Anibowei's digital property lawful is the border-search exception. And *Boyd* rejected the idea that indiscriminate searches of private papers, even at the border, was lawful without a warrant. *Boyd* thus

The Court drew this same distinction between potential contraband and private papers in subsequent cases. For example, in *Carroll v. United States*, 267 U.S. 132 (1925), the Court distinguished the seizure of goods that might be contraband from the seizure of private papers that have no intrinsic (or taxable) value. *Id*. at 147–49. The nature of the goods at issue in *Carroll*—bottles of contraband liquor—made that case different from prior cases protecting personal papers from disclosure. *Id.* (distinguishing *Weeks v. United States*, 232 U.S. 383 (1915), and *Gouled v. United States*, 255 U.S. 298 (1921)). *Carroll* was different for another reason as well: The contraband was being transported in a moving vehicle, making it impractical to demand that law enforcement secure a warrant. The Court explained that the similar risk of a vessel sailing away animated founding-era legislation, including the Collection Act of 1789; a warrant was required to search for goods "when concealed in a dwelling house or similar place," but not for "like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.* at 151–53.

The Court has repeatedly 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 into this country." *United*

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remains good law insofar as it underscores the limited purposes of border searches.

States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); *see also United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123, 125 (1973) ("Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry"); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality) (inspection of luggage at border "is an old practice and is intimately associated with excluding illegal articles from the country"). The Court has never sanctioned the search and seizure of private papers, rather than potential contraband, absent reasonable suspicion.

In fact, the Court has specifically avoided such an extension of the border-search exception. In *United States v. Ramsey*, 431 U.S. 606 (1977), which concerned the opening of letter-class mail containing heroin, the Court emphasized that its decision authorized border officials at most to determine whether envelopes contained contraband, not to read mail. An applicable statute prohibited—and still prohibits—the search of mail even for that purpose absent "reasonable cause to suspect there is merchandise which was imported contrary to law," and postal regulations "flatly prohibit[ed]"—and still prohibit—"under all circumstances, the reading of correspondence absent a search warrant." *Id*. at 611, 623. Given this statutory and regulatory background, the Court declined to address whether opening correspondence that officials know to be correspondence—and not contraband masquerading as correspondence—would violate the Fourth Amendment or First

Amendment. *See, e.g.*, *id.* at 624 & n.18 (declining to decide if the "full panoply of Fourth Amendment requirements" would be needed "in the absence of the regulatory restrictions"); *id.* at 612 n.8 (rejecting contention that "the door will be open to the wholesale, secret examination of all incoming international letter mail," because "the reading of letters is totally interdicted by regulation"). *Ramsey* thus follows the traditional rule that *containers* may be searched for potential contraband; it does not authorize the search and seizure of *private papers*.

In a concurring opinion, Justice Powell reiterated that "postal regulations flatly prohibit the reading of 'any correspondence'" and joined the majority's opinion "[o]n the understanding that the precedential effect of today's decision does not go beyond the validity of mail searches . . . pursuant to the statute" requiring reasonable suspicion. *Id.* at 625 (Powell, J., concurring).

In sum, neither the statute giving rise to the border-search exception nor the cases applying the exception support the contention that government officials have boundless license to search and seize private papers that they know to be private papers.

II. The Suspicionless Searches of Mr. Anibowei's Cell Phone Data Are Not Tethered to Any Purpose Underlying the Border-Search Exception

In *Riley v. California*, the Supreme Court applied the Fourth Amendment's traditional protections for private papers to digital data stored on cell phones. After *Riley*, it is clear that the government must generally obtain a warrant supported by

probable cause if it wishes to search the data contained on a cell phone. The border-search exception does not permit the government to circumvent *Riley*. As explained above, the exception merely allows the government, when armed with reasonable suspicion, to conduct searches of the data stored on cell phones in one of two limited, historically recognized circumstances—when necessary either to regulate the collection of duties or to prevent the introduction of contraband. But because this case involves neither circumstance, the government may not rely on the border-search exception to maintain its policy of conducting warrantless and even suspicionless searches of the data on travelers' cell phones at the border.

A. The Fourth Amendment Protects Digital Data Stored on Cell Phones from Unreasonable Searches

In *Riley*, the Court held that "officers must generally secure a warrant before conducting" "searches of data on cell phones." 573 U.S. at 386. The Court rejected the government's argument that the search-incident-to-arrest exception allowed it to dispense with obtaining a warrant before searching the defendants' cell phones because application of that exception to the warrant requirement "would 'untether the rule from the justifications underlying the [] exception.'" *Id.* at 385–86. The Court reasoned that officer safety would not be advanced by warrantless searches of cell phones, because "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Id.* at 386. Similarly, the goal of "preventing the destruction of evidence" could not

support exempting those searches of cell phones from the Fourth Amendment's warrant requirement because "there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone" once officers have secured it. *Id.* at 388–89. Because these two justifications were not tethered to the search-incident-to-arrest exception in the case of warrantless searches of cell phones, the Court concluded that the significant privacy interests implicated by cell phones—which "contain[] in digital form many sensitive records previously found in the home" and "a broad array of private information never found in a home in any form"—outweighed any governmental interests. *Id.* at 391–98. The Court's "answer to the question of what police must do before searching a cell phone seized incident to an arrest [was] accordingly simple—get a warrant." *Id.* at 403.

B. Suspicionless Searches of Cell Phones Are Permitted Only When Necessary to Regulate the Collection of Duties or Prevent the Introduction of Contraband

At least two circuit courts since *Riley* have held that "the Government must have individualized suspicion of an offense that bears some nexus to the border-search exception's purposes" in order to search a cell phone's data without a warrant. *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019); *see also United States v. Cano*, 934 F.3d 1002, 1013–1017 (9th Cir. 2019) (similar but limited to searching for digital contraband on the phone). This Court should hold the same here.

As in *Riley*, application of the "border search" exception to cell phones in this case would "untether" the border-search exception from its justifications. The twin governmental interests supporting the border-search exception are "to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537; *see also United States v. Wanjiku*, 919 F.3d 472, 480 (7th Cir. 2019) ("The Court has linked this longstanding, congressionally-granted, search-and-seizure authority to two main purposes: to allow the regulation of the collection of duties, and to prevent the introduction of contraband into this country."). But neither rationale applies here.[3]

The government's decision to perform repeated, suspicionless searches of the digital files on the cell phones of citizens like Mr. Anibowei is plainly unrelated to regulating the collection of duties. The digital files on Mr. Anibowei's work and personal cell phones, for example—which include communications and documents protected by the attorney-client privilege and work-product doctrine—are not

[3] The Government might contend that suspicionless searches of cell phones at the border are necessary to prevent the destruction of evidence. But preventing the destruction of evidence is not one of the recognized purposes of the border-search exception. Therefore, "th[is] broader concern[] about the loss of evidence [is] distinct from" the border-search exception's focus on collecting duties and preventing the introduction of contraband into the country. *Riley*, 573 U.S. at 389. Even if this were one of the animating rationales for the border-search exception, this concern is misplaced. As the Supreme Court explained in *Riley*, "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* at 388.

subject to import or export duties, as those files, and the cell phones themselves, are either "articles for personal . . . use" that Mr. Anibowei took abroad with him or "[v]alued at not more than $2,500." 19 C.F.R. § 148.23(a)(1), (c)(1). And to the extent that the government believes that a traveler is concealing software or other data that could arguably be subject to duties on his or her phone, the government can "secure[] [that] cell phone" and obtain a warrant, which may take "less than 15 minutes" in some jurisdictions. *Riley*, 573 U.S at 388, 401. Thus, "[o]nce law enforcement officers have secured a cell phone, there is no longer any risk that" the traveler will smuggle data into the United States without paying the required duties, if any. *Id.* at 388.

Nor does preventing the introduction of "contraband" into the United States support conferring broad authority on the government to conduct suspicionless searches of individuals at the border. The digital information stored on cell phones like Mr. Anibowei's—and especially Mr. Anibowei's privileged communications with his clients—does not fit within any recognized definition of "contraband." "Contraband is of two types: contraband *per se* and derivative contraband." *Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)). The first category, contraband *per se*, "consists of objects which are 'intrinsically illegal in character,' 'the possession of which, without more, constitutes a crime.'" *Id.* (quoting *One 1958*

Plymouth Sedan, 380 U.S. at 699–700). The archetypal example of contraband *per se* is narcotics. *Id.* at 304–05. Derivative contraband, by contrast, "includes items which are not inherently unlawful but which may become unlawful because of the use to which they are put—for example, an automobile used in a bank robbery." *Id.* at 305.

Neither type of contraband is at issue here. Cell phones and the data stored on them, far from illegal, "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." *Riley*, 573 U.S. at 385. Indeed "it is the person who is not carrying a cell phone, with all that it contains, who is the exception." *Id.* at 395. Modern cell phones, moreover, have "immense storage capacity" and often contain "[t]he sum of an individual's private life." *Id.* at 393–394. Although cell phones contain vast troves of private information, the overwhelming majority of that data could not possibly qualify as "*intrinsically* illegal in character." *Cooper*, 904 F.2d at 304 (emphasis added). For example, the average cell phone has storage capacity for "millions of pages of text, thousands of pictures, or hundreds of videos." *Riley*, 573 U.S at 394. "Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." *Id.* And while it is conceivable that some of these types of data could "become unlawful because of the use to which they are

put," *Cooper*, 904 F.2d at 304, nothing in this case suggests that the data on Mr. Anibowei's cell phone—which includes privileged communications with clients who are currently *adverse* to the very agencies that are defendants in this lawsuit—was being used for illegal purposes or in an unlawful manner.

To be sure, there are certain narrow classes of digital data that mighty qualify as contraband *per se* and could justify a warrantless search of the data on a traveler's cell phone at the border. The most prominent example of such illegal data is child pornography, which this Court has described as contraband. *United States v. Smith*, 739 F.3d 843, 846 (5th Cir. 2014). But *none* of the post-*Riley* cases addressing the border-search exception authorizes the government to perform a suspicionless "strip search" of the data stored on the cell phones of those entering or exiting the country for concealed child pornography. *See Cano*, 934 F.3d at 1015 (likening a forensic examination of a computer to a "computer strip search"). To the contrary, in each case the government had at least a reasonable suspicion that the defendant was attempting to reenter the country in possession of child pornography. Customs and Border Protection officers identified suspicious conduct on the part of those defendants—including prior convictions for similar crimes, travel locations that were popular for sex tourism, and questionable monetary transfers to foreign countries—*before* searching the data on their phones and even before those individuals arrived at the border. *Wanjiku*, 919 F.3d at 474–75; *United States v.*

Touset, 890 F.3d 1227, 1230 (11th Cir. 2018); *United States v. Vergara*, 884 F.3d 1309, 1313 (11th Cir. 2018) (Pryor, J., dissenting).[4]

In this case, the government could not contend that its policy of permitting indiscriminate, suspicionless searches of the data on the cell phones of travelers at the border is justified by the need to interdict child pornography. There is simply no evidence to suggest that a significant number of travelers are concealing child pornography on their phones as they cross the border. Likewise, there is no evidence that those in possession of child pornography regularly attempt to smuggle child pornography on phones across the border. In fact, it appears that most child pornography trafficking occurs over the Internet, not through physical smuggling across the border. U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention & Interdiction: A Report to Congress 71–73 (2016). By

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[4] The same was true in two other post-*Riley* circuit court cases that did not involve child pornography: Warrantless searches of the data on the defendants' cell phones were supported by reasonable suspicion of criminal activity. In *United States v. Kolsuz*, the defendant had twice previously attempted to export firearms, and when the government apprehended him a third time for the same offense, it was reasonably likely that the search of his phone would reveal "not only evidence of the export violation the[] [officers] had already detected, but also 'information related to other ongoing attempts to export illegally various firearms parts.'" 890 F.3d 133, 138–39, 143 (4th Cir. 2018). Similarly, in *United States v. Molina-Isidoro*, the government had *probable cause* to support the search of the data on the defendant's cell phone, because the officers found her in possession of large quantities of methamphetamine while attempting to cross the border and there was a "fair probability that the phone contained communications" about her drug trafficking activities. 884 F.3d 287, 291–92 (5th Cir. 2018).

contrast, in *United States v. Flores-Montano*, the Supreme Court upheld a suspicionless search of the fuel tank of an automobile crossing the border in part because of the frequency with which "smugglers . . . attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank." 541 U.S. 149, 153 (2004) (observing that "gas drug tank seizures have accounted for … approximately 25%" of "vehicle drugs seizures at the southern California ports of entry"). Here, there is no historically rooted justification for the government to treat ordinary travelers as possible child pornographers or drug smugglers for no reason other than that they own cell phones.

The government is much more likely to use suspicionless searches for general law-enforcement purposes than for the purpose of interdicting contraband. And courts have never endorsed suspicionless searches aimed at the mere gathering of evidence. To the contrary, they have underscored the need to ensure that suspicionless searches, including border searches, are "not subverted into a general search for evidence of crime"; courts must guard against the "vast potential for abuse" that accompanies "the power to intrude into the privacy of ordinary citizens" without a "warrant or particularized suspicion." *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998).

Searches of common hiding places for physical contraband are in keeping with the longstanding purposes and applications of the border-search exception. But

indiscriminately rummaging through the private papers contained in digital devices threatens to turn every international traveler into a John Wilkes or a John Entick. The Fourth Amendment may not have the same vitality at the border as in the interior of the country, but it cannot be a dead letter either.

CONCLUSION

This Court should reverse the district court's summary judgment, and hold that the government's repeated, suspicionless searches of Mr. Anibowei's cell phone violated the Fourth Amendment.

DATE: June 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 5,117 words.

Dated: June 8, 2020

s/ *William F. Cole*
William F. Cole

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 8, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 8, 2020

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