

No. 26-208

IN THE
Supreme Court of the United States

GEORGE ANIBOWEL,
Petitioner,

v.

TODD BLANCHE, ATTORNEY GENERAL, ET AL.,
Respondents.

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

**BRIEF OF THE CATO INSTITUTE AND
FREEDOM OF THE PRESS FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

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 Project on Criminal Justice, founded in 1999, focuses on the proper role of law enforcement in a free society, the protection of constitutional and statutory safeguards, and accountability for the exercise of government power.

Cato has a longstanding interest in preserving the Fourth Amendment as a meaningful safeguard against the erosion of individual liberty that occurs hand-in-hand with the expansion of government power. Cato's interest is especially strong where, as here, a narrow constitutional exception has expanded beyond its original rationale and now threatens to swallow the protection it was meant only to qualify. The Government's authority at the border serves recognized but defined purposes: controlling who and what may enter the country. But the border is not a constitutional void in which the Fourth Amendment ceases to operate. Allowing the border-search exception to extend to years of private correspondence, notes, photographs, and contacts merely because they happen to be stored on a device carried across the border risks recreating in digital form one of the very

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund its preparation or submission. Counsel for all parties were timely notified under Rule 37.2 of *amici*'s intent to file this brief.

abuses the Fourth Amendment was adopted to prevent: exploratory searches untethered to particularized suspicion. Preserving the boundary between the Government's limited authority to police the border and a general power to search the digital lives of all those who cross it lies at the heart of Cato's interest in this case.

Freedom of the Press Foundation ("FPF") is a non-partisan, nonprofit organization founded in 2012 to protect, defend, and empower public-interest journalism. FPF develops secure communications tools used by investigative news organizations, trains journalists to protect themselves and their sources in the digital age, documents press-freedom violations throughout the United States, and advocates for the rights of journalists and whistleblowers.

FPF has a strong interest in ensuring that international travel does not become an occasion for unchecked government access to journalists' sources, communications, and unpublished work. Journalists routinely carry on their phones the materials of their profession—the identities of sources, confidential communications, notes, photographs, drafts, and other records of their newsgathering. Government access to those materials can compromise not only the journalists who are searched, but also their sources who may never have crossed the border at all. And the prospect of such access can itself alter how journalists communicate, safeguard sensitive information, and conduct their reporting. FPF therefore has a direct interest in preventing border-search authority from expanding in ways that chill newsgathering and

undermine the confidentiality on which a free press depends.

SUMMARY OF THE ARGUMENT

The Fourth Amendment expressly protects “papers” because government access to private writings presents a distinctive danger. Among the abuses the Fourth Amendment was adopted to protect against were general searches that allowed officials to rummage through private papers kept in the home for evidence of conduct, associations, and beliefs. Today, much of the private information once dispersed among physical papers is concentrated on a single device; nonconsensual access to a modern cell phone can expose years of correspondence, photographs, notes, contacts, and other private data. The resulting intrusion can reveal some of the most intimate details of a person’s life on a scale the Founders could scarcely have imagined. Yet today, the border-search exception is routinely invoked to access that information, without the safeguards the Fourth Amendment would ordinarily require elsewhere.

International travel is now routine, and travelers ordinarily carry their phones wherever they go. If crossing the border gives the government access to information it could not otherwise search without judicial authorization, the crossing itself becomes an investigative opportunity. Investigators seeking access to a target’s digital life can wait for international travel and invoke the border-search exception to obtain what the Fourth Amendment would otherwise place beyond their reach. The concern is therefore structural, not merely a matter of an occasional of-

ficer's improper motive. A rule that makes routine international travel an occasion to bypass ordinary Fourth Amendment requirements risks transforming an exception justified by the government's interests at the border into a general-purpose investigative tool.

That risk is not confined to ordinary criminal investigations. Once the border provides access to private information that the government could not ordinarily inspect without a warrant, officials may invoke the exception whenever a traveler's information is of governmental interest. The concern is especially acute for journalists, whose devices may contain source identities, unpublished reporting, interview notes, photographs, drafts, and communications with editors and colleagues. A journalist reporting on government misconduct, criticizing an agency, or communicating with sources of interest to officials may therefore carry precisely the information officials have reason to seek, and international travel can provide an opportunity to obtain it without the judicial authorization ordinarily required.

Warrantless access to a journalist's device creates privacy harms that extend well beyond the person searched. Sources may hesitate to speak or share documents if a reporter's international travel could expose confidential communications. Journalists, in turn, may avoid storing sensitive information locally, retaining source identities, or traveling with interview recordings, notes, photographs, or other reporting materials. And that chilling effect arises from

nothing more than the prospect that ordinary international travel may expose confidential information to warrantless governmental access.

Beyond those privacy harms and chilling effects, the border-search exception may also distort how travelers choose to protect sensitive information in the first place. A traveler can reduce the risk of a border search by removing sensitive material from a device, storing it remotely, and retrieving it after clearing the border. The practical effect is that information may receive greater protection from government inspection when its owner has made it less private, by relinquishing exclusive possession and control. That is a remarkable inversion under a Constitution that expressly protects “papers.”

ARGUMENT

I. HISTORY SUPPORTS A LIMITED CUSTOMS EXCEPTION

The historical foundation of the border-search exception was narrow and specific: enforcing the Nation’s customs laws. In one of its earliest enactments, the First Congress imposed duties on imported goods that it declared “necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures.” *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 411-12 (1928) (quoting Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24). Later that same month, Congress supplied the means of enforcing those duties, granting customs officers “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.” *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (quoting Act of July 31, 1789, c. 5, 1 Stat. 29, 43). Less than two months later, the same Congress proposed the Fourth Amendment. *Id.* at 616-17. *Ramsey* treated the near-contemporaneity of these events as powerful evidence that warrantless searches at the border were understood from the Founding as consistent with the Fourth Amendment. *Id.* at 617.

But the customs authority the First Congress thought necessary to enact into law was a clearly defined one. Warrantless searches permitted under the statute were limited to those serving the traditional customs purposes of “regulat[ing] the collection of duties and [] prevent[ing] the introduction of contraband into this country.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *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.”). And the statute itself drew an important boundary around the reach of the warrantless search authority it was granting. While customs officers could search vessels for concealed dutiable goods without a warrant, to search a dwelling, store, building, or other place for the very same goods, they were required to obtain one. *See Ramsey*, 431 U.S. at 616.

Those limits accorded with the Founding generation’s deep distrust of any general search authority that left ordinary officers with sweeping discretion

over where, what, and whom to search. Indeed, a central purpose of the Fourth Amendment was to restrain the new government from exercising the generalized and discretionary search powers that the colonists had experienced under British rule. As this Court explained in *Stanford v. Texas*, “[v]ivid in the memory” of those who adopted the Fourth Amendment’s protections were the writs of assistance, which had given British customs officials “blanket authority to search where they pleased” for goods imported in violation of the British tax laws. 379 U.S. 476, 481 (1965). The same type of unbridled discretion had also characterized the general warrants used in England; the writs of assistance “left customs officials completely free to search any place” where they believed smuggled goods might be found, while general warrants left executing officials to decide “which persons should be arrested and which places should be searched.” *Steagald v. United States*, 451 U.S. 204, 220 (1981). The “central objectionable feature of both” was that they “provided no judicial check” on the executing officers’ determination that a particular intrusion was justified. *Id.*; see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 591 (1999) (describing the Founding-era “widespread opposition to allowing officers to exercise discretionary search authority”). James Otis captured that danger in his famous speech characterizing the writs as “the worst instrument of arbitrary power” ever found in English law and denouncing them for placing “the liberty of every man in the hands of every petty officer.” *Stanford*, 379 U.S. at 481. Otis’s challenge to the writs became a defining episode in colo-

nial resistance to British rule; John Adams later recalled that “[t]hen and there the child Independence was born.” *Id.* at 481-82.

The Founding generation’s objections to general warrants extended directly to discretionary government searches of private papers. *Entick v. Carrington* provides the classic example. There, officers acting under a general warrant entered the home of a government critic who had authored a dissenting publication, forced open his desks and boxes, and searched his private papers for evidence of seditious libel. See *Stanford*, 379 U.S. at 483-84; *Boyd v. United States*, 116 U.S. 616, 626-30 (1886). In holding the search unlawful, Lord Camden emphasized the intensely private character of the writings themselves. Papers were among their owner’s “dearest property,” would “hardly bear an inspection,” and their “secret nature” made the government’s intrusion especially grave. *Boyd*, 116 U.S. at 627-28 (describing a power that would allow for their search as “subversive of all the comforts of society”). The historical objection thus encompassed more than physical entry into the home; it extended to the government’s exposure of the private writings and secrets secured therein.

That protection, moreover, was not merely derivative of the home in which those private writings were ordinarily kept. In *Ex parte Jackson*, this Court held that sealed letters placed in the mails remained “as fully guarded from examination and inspection” as if retained by the sender. 96 U.S. 727, 733 (1878). The Fourth Amendment protected such papers “wherever they may be,” the Court explained, and no government officials could “invade the secrecy” of a private

correspondence without a warrant merely because its owner had entrusted it to the mails. *Id.*

Later cases reaffirmed the special constitutional status of private writings. In *Stanford*, the Court invalidated a warrant for materials concerning the Communist Party of Texas, which had empowered officers to spend hours searching a home, during which they seized roughly 2,000 books, papers, and other materials. 379 U.S. at 477-80. Drawing directly on *Entick* and the history of general warrants, the Court held that the Fourth Amendment's particularity requirement demands "the most scrupulous exactitude" when the objects of the search are books sought for "the ideas which they contain." *Id.* at 485. *Zurcher v. Stanford Daily* later reiterated that point, explaining that *Stanford* condemned any such search that permitted officers to "rummage among and make judgments about books and papers," characterizing it as "the functional equivalent of a general warrant." 436 U.S. 547, 564 (1978). Where constitutionally protected materials are involved, *Zurcher* explained, "the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Id.* The Court's cases thus repeatedly connect the protection of writings to the same historical principle that condemned the general warrants and writs of assistance: private information should not be exposed according to the unchecked discretion of the officer conducting the search.

To this day, this Court has never held that the border-search exception permits government agents to read a traveler's private papers without a warrant. And when the Court confronted the closest analogue

in *Ramsey*, it carefully confined its decision to the specific circumstances at issue in that case. Although it upheld the warrantless opening of international mail to determine whether that mail contained merchandise or contraband, the regulatory regime before the Court “flatly prohibit[ed], under all circumstances, the reading of correspondence absent a search warrant.” 431 U.S. at 623. The Court repeatedly emphasized that limitation: “the reading of any correspondence inside the envelopes [was] forbidden,” *id.* at 624, and the “specter” of “wholesale, secret examination” of international letter mail was “simply not presented” because “the reading of letters [was] totally interdicted by regulation,” *id.* at 612 n.8. Thus, the broad language of *Ramsey* concerning the border-search exception arose in a case in which warrantless government examination of private writings sent across the border was expressly outside the issue before the Court.

II. THE BORDER-SEARCH EXCEPTION CREATES INCENTIVES FOR SEARCHES HAVING LITTLE TO DO WITH THE BORDER

A. Expansive Border-Search Authority Encourages Use of the Exception as an Investigative Shortcut

The application of the border-search exception to the contents of modern cell phones sits uneasily against that historical backdrop. At the Founding, customs-search authority operated primarily at the margins of ordinary civic life, focusing on vessels, cargo, and dutiable goods. *See, e.g., Ramsey*, 431 U.S. at 616-17 (describing the 1789 statute’s warrantless

authority to search ships and vessels for concealed “goods, wares or merchandise subject to duty,” while a warrant was required to search a dwelling, store, building, or other place); *Carroll v. United States*, 267 U.S. 132, 150-53 (1925) (discussing the Founding-era distinction between goods concealed in dwellings and goods “in course of transportation” in movable vessels). Today, international travel is routine, bringing the border-search authority to bear directly on millions of ordinary citizens. In June 2025 alone, U.S. citizens made more than 11.4 million international departures. See, e.g., Int’l Trade Admin., U.S. Dep’t of Com., *June 2025 Total International Travel Volume to and from the United States*, <https://www.trade.gov/feature-article/june-2025-total-international-travel-volume> (last visited Sept. 14, 2026). At the same time, the private archive that once remained secured within the confines of one’s home now travels in its owner’s pocket. As *Riley v. California* recognized, a modern phone can contain years of correspondence, photographs, financial information, browsing history, and other records of private life—so much information that a phone search will ordinarily expose “far more than the most exhaustive search of a house.” 573 U.S. 373, 393-97 (2014).

Those changes do more than expand the practical reach of the border-search exception; they alter the incentives facing government investigators. A constitutional rule that exposes otherwise protected information to warrantless search at the border encourages use of the border-search exception as a vehicle for generalized law-enforcement searches. If investigators suspect wrongdoing but lack probable cause for

a search, they can alert border officials to their target, await the target's next border crossing, and invoke the border-search exception to obtain access to information the Fourth Amendment would otherwise have held beyond their reach. The underlying investigation may be the same. The information sought may be the same. And nothing about the travel itself need be suspicious. Yet the routine act of crossing the border—an act millions of Americans undertake each month—can expose the target's private life to a sweeping warrantless search that the investigation itself could not justify. That danger is not hypothetical. Investigators have repeatedly used anticipated border crossings to obtain evidence for investigations unrelated to border-control purposes, and many of the resulting searches have been blessed by lower courts.

In *United States v. Gurr*, for example, the FBI was already investigating Gurr for fraud involving a federal credit union in American Samoa, when, in December 1999, he flew from American Samoa to Hawaii. 471 F.3d 144, 147 (D.C. Cir. 2006). Upon his arrival at the Honolulu International Airport, U.S. Customs and Border Protection (CBP) officers seized and searched his luggage without a warrant, and discovered financial records relevant to the fraud investigation. *Id.* FBI agents were present at the airport, CBP officers consulted the FBI about whether the financial records should be retained, and the documents were turned over to the FBI after they were seized. *Id.* at 148-49.

Gurr argued that this coordination “transformed the inspection from a permissible border action into ‘an FBI fishing expedition’” for evidence of an existing

criminal case. *Id.* at 148. The D.C. Circuit disagreed. Although the court acknowledged the district court's finding that there was "some evidence" of FBI involvement, it nevertheless held that the search remained valid. *Id.* at 149-50. In so doing, the court rejected Gurr's argument that the search became unconstitutional either through the FBI's involvement, or because the seized financial records were useful to the FBI's preexisting fraud investigation. *Id.*

United States v. Levy went further. Levy was already the target of a federal investigation into stock-manipulation schemes when he returned to Miami from a business trip to Panama. 803 F.3d 120, 121 (2d Cir. 2015). Acting on information supplied by the DEA task force conducting that investigation, CBP officers detained Levy and searched his luggage. Their attention focused on "a spiral-bound notebook that contained eighteen pages of Levy's handwritten notes on various subjects, including travel information, business contacts, bank and trading account data, and limited details of Levy's personal affairs." *Id.* A CPB officer read that notebook and photocopied its contents, before returning it to Levy and allowing him to leave. *Id.* Less than seventy-two hours later, Levy was indicted. Prosecutors later used the photocopied notebook at trial to link Levy to illegal trades and alleged co-conspirators. *Id.* at 122.

The Second Circuit upheld the search even though the suspected criminal activity was unrelated to the matters CPB ordinarily investigates. *Id.* at 124. The court held that the search was no less valid because another federal agency had supplied the information

that prompted it. *Id.* at 123. Indeed, the court emphasized that federal agencies are expected to share information, prompting it to declare that such inter-agency cooperation should “be commended, not condemned.” *Id.* The result was that a traveler’s routine return from a business trip permitted officers to read and copy private handwritten papers for use as evidence in an unrelated securities-fraud investigation without first obtaining a warrant.

The same dynamic now reaches the far greater store of private information contained on modern cell phones. In *United States v. Eta*, the FBI had been investigated Eta for cyber fraud and money laundering for more than a year before learning that he would return to the United States from Nigeria. 180 F.4th 936, 940 (7th Cir. 2026). In response to learning of Eta’s upcoming travel, an FBI agent asked CBP to search Eta’s electronic devices when he arrived. *Id.* When Eta landed, CBP officers manually searched three of his phones while both the FBI agent and a Postal Inspector observed and documented evidence relevant to their investigation. *Id.* After discovering incriminating material, the agents asked the FBI’s Computer Analysis and Response Team to begin imaging the devices—“extracting all data from” them. *Id.* Only when that process “took longer than expected” did the agents seize the phones and seek a warrant. *Id.*

The Seventh Circuit upheld the warrantless phone searches, finding “no constitutional infirmity” in the FBI’s advance coordination with CBP. *Id.* at 944. More striking still, Eta had relied on the CBP officer’s testimony that “the purpose of searching Eta’s devices

was to assist the FBI's investigation." *Id.* at 944-45. But the court deemed that purpose irrelevant: Fourth Amendment reasonableness turns on objective circumstances, and, in the court's view, the relevant circumstance was straightforward: "Eta was at the border." *Id.* at 945. His presence there alone meant that no warrant, probable cause, or individualized suspicion was required. *Id.* at 945-46; *see also United States v. Vallerius*, No. 17-CR-20648 (EGT), 2018 WL 2325729, at *1-3, *7 (S.D. Fla. May 1, 2018), *report and recommendation adopted*, 2018 WL 2324059 (S.D. Fla. May 22, 2018) (denying suppression where agents investigating narcotics and money laundering learned that the target would travel to the United States, arranged in advance for him to be referred to secondary inspection, obtained passwords to his electronic devices, and searched his laptop before later obtaining a warrant); *United States v. Bongiovanni*, No. 19-CR-227, 2022 WL 17481884 (W.D.N.Y. Aug. 5, 2022), *report and recommendation adopted*, 2022 WL 17139489 (W.D.N.Y. Nov. 22, 2022) (holding warrantless phone search unconstitutional for lack of reasonable suspicion, but declining suppression under good-faith exception, where agent for the Department of Homeland Security asked CBP officers to flag the target of a domestic investigation who was set to return from a family vacation for a secondary inspection and a "phone dump," and CBP officer testified that nothing about target, his family, their conduct, or their travel otherwise would have prompted secondary inspection).

In each of these cases, the border crossing supplied what the investigation lacked: authority to search without a warrant

B. The Same Investigative Opportunity Threatens Journalists, Sources, and Newsgathering

While the cases above involve searches undertaken to advance criminal investigations, the structural concern is broader. Once the border becomes an opportunity to obtain private information without the safeguards that would apply elsewhere, government officials have reason to use that opportunity whenever a traveler's records may be of interest—not only as evidence of crime, but as a source of information more generally.

That concern is especially acute where the information sought is itself the product of constitutionally protected newsgathering. It is well-established that the First Amendment's protections are not confined to the publication of news, reporting, and commentary after the information has already been gathered. *Branzburg v. Hayes* recognized that “news gathering is not without its First Amendment protections,” explaining that “without some protection for seeking out the news, freedom of the press could be eviscerated.” 408 U.S. 665, 681, 707 (1972). And *Zurcher v. Stanford Daily* emphasized the corresponding Fourth Amendment concern. Although the Court in *Zurcher* declined to exempt the press from otherwise valid search warrants, it stressed that “unrestricted power of search and seizure could also be an instrument for stifling liberty of expression,” and held that where First Amendment-protected materials are implicated,

Fourth Amendment requirements must be applied with “scrupulous exactitude” so as to leave as little as possible to the “discretion or whim” of officers in the field. 436 U.S. at 564 (quotation omitted).

Those protections reflect practical realities. News-gathering frequently depends on confidential relationships with sources who will speak only if they trust that a journalist can protect their identities and communications. Those relationships, in turn, generate records of the very confidences the journalist has undertaken to protect—source names, confidential messages, interview recordings, unpublished photographs, and drafts from which source-identifying information has not yet been removed. Today, much of that information is likely to reside on the journalist’s phone, which may serve at once as a recorder, camera, notebook, archive, and communications hub. Warrantless inspection of that device can expose not only the journalist’s private life, but also the identities, communications, and activities of sources who may never have crossed the border themselves.

Again, experience confirms the concern. The Committee to Protect Journalists and Reporters Without Borders identified 37 journalists who reported invasive secondary screening at U.S. borders between 2006 and June 2018; 20 reported warrantless searches of their electronic devices. See Committee to Protect Journalists & Reporters Without Borders, *Nothing to Declare: Why U.S. Border Agency’s Vast Stop and Search Powers Undermine Press Freedom* (Oct. 22, 2018) [hereinafter *Nothing to Declare*]. Journalists interviewed for the report described the searches as affecting their ability to protect sources

and changing how they planned future reporting trips and international travel. *Id.*

Laura Poitras, a founding and current member of FPF's board of directors, provides a stark example. In 2006, the FBI opened an investigation into whether Poitras—a journalist and documentary filmmaker—had prior knowledge of an ambush on U.S. forces in Iraq. Shortly thereafter, border officials began detaining and questioning her upon her returns from international travel. From July 2006 through April 2012, Poitras was detained, questioned, and searched every time she entered the United States—nearly forty times in all; on roughly ten occasions, agents also copied her reporter's notebooks or materials from her wallet and pockets. *Poitras v. U.S. Dep't of Homeland Sec.*, 303 F. Supp. 3d 136, 143-45 (D.D.C. 2018); see also Compl. ¶¶ 3, 9-25, *Poitras v. U.S. Dep't of Homeland Sec.*, No. 1:15-cv-01091 (D.D.C. July 13, 2015), ECF No. 1. One encounter was particularly intrusive. Returning from Yemen to New York in August 2010, Poitras was detained upon arrival at JFK, where border agents took her cellphone, laptop, video camera, and raw footage, retaining them for 41 days. See Compl. ¶ 23, *Poitras*, No. 1:15-cv-01091.

The effects of these searches extended well beyond the encounters themselves. Poitras told CPJ that she stopped traveling with electronic devices and raw footage, and began devoting substantial time and resources to digital security. *Nothing to Declare*, *supra*. She ultimately moved outside the United States for two years while editing *Citizenfour*, her documentary about Edward Snowden and NSA surveillance, and *Risk*, her documentary about Julian Assange and

WikiLeaks. *Id.*; Sara Rafsky, *Increased Risks for Filmmakers and Sources in Documentaries' Golden Age*, Committee to Protect Journalists (July 17, 2015) (reporting that Poitras moved to Berlin as part of a commitment to her sources to edit outside the United States).

Isma'il Kushkush illustrates the cumulative effect of repeated border searches. Between 2016 and 2017, officers searched his phones three times, accessing journalistic work product, photographs, and contact lists, while also repeatedly questioning him about his reporting. *See* Am. Compl. ¶¶ 46, 105-19, *Alasaad v. Duke*, No. 1:17-cv-11730-DJC (D. Mass. Sept. 13, 2017), ECF No. 7. The prospect of another search altered how he approached newsgathering. In 2016, Kushkush told the Committee to Protect Journalists that he found himself asking whether to interview someone if the interview might later become “problematic at the border,” and worried that access to his information and contacts could effectively make him “a source for law enforcement.” Alexandra Ellerbeck, *Security Risk For Sources as US Border Agents Stop and Search Journalists*, Committee to Protect Journalists (Dec. 9, 2016). Three years later, he explained that the experience continued to affect his work: he no longer traveled with everything he otherwise would have carried, “especially interview recordings,” for fear that the materials would be taken from him. Avi Asher-Schapiro, *Q&A: Isma'il Kushkush and Sophia Cope on U.S. Court Ruling Against Warrantless Border Search*, Committee to Protect Journalists (Dec. 17, 2019).

Seth Harp's experience illustrates how readily border authority can expose the substance of journalism itself. The Rolling Stone reporter was detained for approximately four hours after returning from a reporting trip to Mexico. Seth Harp, *I'm a Journalist but I Didn't Fully Realize the Terrible Power of U.S. Border Officials Until They Violated My Rights and Privacy*, The Intercept (June 22, 2019), <https://the-intercept.com/2019/06/22/cbp-border-searches-journalists/>. Officers required him to unlock his phone and laptop and spent hours examining photographs, videos, emails, business correspondence, browsing history, text messages, and encrypted communications on WhatsApp, Signal, and Telegram while questioning him about his reporting, editors, colleagues, and political views. *Id.* No warrant was ever obtained.

Zainab Merchant's experience illustrates another troubling possibility. Merchant was the founder and editor of an online media organization and had publicly written about her treatment during an earlier encounter with border officials. *See Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 WL 2170323, at *7 (D. Mass. May 9, 2018). In March 2017, after visiting family in Toronto, Merchant was referred to secondary inspection at U.S. customs preclearance, before her flight home. *Id.* CBP officers demanded access to her phone and laptop, searched those devices outside her presence, and questioned her about her religious affiliation and her blog. *Id.* According to an administrative complaint later filed on her behalf, the questioning specifically included an article Merchant had written criticizing CBP's treatment of her during an

earlier border encounter; as one officer complained, the article made CBP officers sound “evil.” Letter from Hugh Handeyside et al., ACLU Found., to John V. Kelly, Acting Inspector Gen., U.S. Dep’t of Homeland Sec., et al., at 3 (Aug. 14, 2018). Whatever motivated that particular search, the episode illustrates the structural danger: broad border-search authority can give the very agency that a journalist has criticized warrantless access to her private communications and associations merely because she crosses the border.

That exposure does not end with the journalist; it extends to sources who rely on journalists to protect their identities and communications. The possibility that a reporter’s later international travel may expose source names, messages, notes, or interview recordings can undermine that assurance of confidentiality. The risk is especially serious for sources inside government, or others challenging government conduct, whose livelihoods or liberty may depend on remaining anonymous. A source may understandably decline to speak if confidentiality can be defeated not through a warrant based on probable cause, or even a subpoena subject to judicial challenge, but simply because the reporter later crosses a border carrying a phone.

That chilling effect is not speculative. Journalists subjected to warrantless border searches have changed both their reporting and travel practices to protect sensitive source information. Those precautions have included wiping devices, declining to carry sensitive materials, and even avoiding travel altogether for fear that information concerning sources or

other third parties could be exposed. *See, e.g., Nothing to Declare, supra.*

Taken together, the criminal-investigation cases and journalists' experiences reveal the broader effect of an expansive border-search rule. It encourages government officials to exploit the border as an investigative opportunity, while forcing travelers carrying sensitive information to plan around the risk of warrantless inspection. The result is behavioral distortion on both sides: officials change how they investigate, and travelers change how they protect information that would ordinarily receive the Fourth Amendment's strongest protections.

III. DIGITAL BORDER SEARCHES INVERT THE TRADITIONAL RELATIONSHIP BETWEEN PRIVACY AND POSSESSION

The border-search rule produces a particularly perverse result for those who take the greatest care to preserve the secrecy of their private information. Historically, there was an important distinction between relinquishing possession of private papers and relinquishing their secrecy. *Ex parte Jackson* made that distinction explicit. The Court distinguished matter “intended to be kept free from inspection,” such as letters and sealed packages, from material “purposely left in a condition to be examined.” 96 U.S. at 733. A sender who placed a sealed letter in the mail surrendered physical custody, but not confidentiality: the papers remained “closed against inspection.” *Id.* And because that secrecy had been preserved, the Court held that the papers remained “as fully guarded from

examination and inspection” as if the sender had retained them at home. *Id.* The Fourth Amendment protected them “wherever they may be.” *Id.*

Modern cloud storage can involve a different tradeoff. Moving private information to the cloud often means entrusting it to a third-party provider that retains some ability to access its contents. The Electronic Frontier Foundation cautions that cloud data may be accessible to governments through legal process and to hackers, and explains that most cloud services can themselves read the data stored with them. *See Elec. Frontier Found., Digital Privacy at the U.S. Border: Protecting the Data on Your Devices* (2017) [hereinafter *Digital Privacy*]. Cloud storage providers’ own policies bear that out. Dropbox states that its personnel may access users’ file contents in specified circumstances; Google states that it processes Drive content and may access private content when required by law; and under Apple’s default iCloud protection, Apple retains the encryption keys for iCloud Drive. *See* Dropbox, *Who Can See the Stuff in My Dropbox Account?*, Dropbox Help (updated Sept. 17, 2024), <https://help.dropbox.com/security/file-access>; Google, *How Drive Protects Your Privacy & Keeps You in Control*, Google Drive Help, <https://support.google.com/drive/answer/10375054?hl=en> (last visited Sept. 18, 2026); Apple, *iCloud Data Security Overview*, Apple Support (Jan. 8, 2026), <https://support.apple.com/en-us/102651>. Unlike the sealed letter in *Jackson*, then, transferring information to the cloud often involves surrendering not only possession, but also some of the secrecy that exclusive control ordinarily preserves.

The modern border-search regime nevertheless can make that surrender more protective against government inspection. CBP's current policy limits an electronic-device search to "an examination of information that is resident upon the device at the time it is presented for inspection." U.S. Customs & Border Prot., CBP Directive No. 3340-049B, *Border Search of Electronic Devices at Ports of Entry* 5, https://www.cbp.gov/sites/default/files/2026-01/cbp_directive_3340-049b_jan_2026_508.pdf (last visited Sept. 17, 2026). Officers may not use the device to access information "solely stored remotely," and must disable network connections before conducting the search. *Id.* A sensitive document kept only on a traveler's phone may therefore be available for warrantless inspection, while the same document may fall beyond border officers' reach once entrusted to a third-party cloud provider—even though that provider may itself be able to access its contents. The document is no less sensitive. The traveler's privacy interest in it has not changed. And it may be downloaded to the same phone moments after the traveler clears inspection. What changes is who possesses—and potentially who else can access—the information at the moment of the crossing.

That distinction alters the choices facing anyone who wishes to keep sensitive information secret. Outside the border context, the natural way to limit access is to retain exclusive control of private materials rather than entrusting them to a third party. A journalist protecting a confidential source or a lawyer safeguarding privileged communications may have particularly strong reasons to do so. At the border,

however, that very precaution can expose the information to broad, discretionary inspection, unconstrained by the ordinary requirement of probable cause.

The practical consequence is significant enough that organizations advising journalists now recommend moving sensitive information off their devices before traveling. FPF advises journalists to prepare their devices for international travel by uploading information to cloud providers in advance, rather than storing it locally on their device, noting that border officers do not have authority to access cloud content. Freedom of the Press Found., *Preparing devices for travel through a US border* (June 12, 2025). The Committee to Protect Journalists advises journalists to “[b]ackup, delete, or remove access to any information” they would not want others to obtain and, if they need access while traveling, to consider backing it up “to a cloud account not linked to [their] devices.” Comm. to Protect Journalists, *CPJ Safety Advisory: Traveling to the US* (Apr. 17, 2025). And the Electronic Frontier Foundation also recommends that travelers “shift content from devices to cloud services” to minimize the information in their possession at border crossings. *Digital Privacy, supra*.

The result is striking: avoiding government intrusion may require surrendering some of the secrecy the information-holder seeks to preserve.

CONCLUSION

Review is warranted to ensure that the border-search exception does not invert the very privacy principles the Fourth Amendment was adopted to protect.

The petition should be granted.

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Respectfully submitted,

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