**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

GHASSAN ALASAAD, NADIA ALASAAD, SUHAIB ALLABABIDI, SIDD BIKKANNAVAR, JÉRÉMIE DUPIN, AARON GACH, ISMAIL ABDEL-RASOUL a.k.a. ISMA'IL KUSHKUSH, DIANE MAYE, ZAINAB MERCHANT, MOHAMMED AKRAM SHIBLY, and MATTHEW WRIGHT,

*Plaintiffs*,

v.

KIRSTJEN NIELSEN, Secretary of the U.S. Department of Homeland Security, in her official capacity; KEVIN MCALEENAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; and THOMAS HOMAN, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity,

*Defendants*.

Civil Action No. 17-11730 (DJC)

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER**
**AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS**

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

## INTRODUCTION

Law enforcement officers seized and searched the smartphones and laptops of the plaintiffs in this case as they reentered the United States following business or personal travel. Simply because these searches occurred at the border, the government maintains that it did not need a warrant, probable cause, or reasonable suspicion of any kind to scrutinize the entire library of files carried by these travelers on their electronic devices. The government rests this startling claim on the border search doctrine, a "historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained." *United States v. Ramsey*, 431 U.S. 606, 621 (1977). Yet the border search doctrine, rooted in the need to inspect "persons and property crossing into this country," *id.* at 616, has always been constrained in scope by the physical realities limiting the items carried by travelers. The government now seeks to expand that doctrine to permit something vastly different: trawling through the contents of modern digital devices for the information they contain, allowing border agents to examine whatever documents and view whatever images they please. Significantly, however, there is no historical tradition of empowering border agents to read the personal papers of international travelers without a warrant or individual suspicion, much less

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

to methodically scrutinize the massive number of papers that contemporary travelers carry on their electronic devices. By exploiting border searches to rummage at will through the records stored on those devices, the government is defying more than two centuries of search and seizure doctrine, granting itself one of the very powers that the Fourth Amendment was meant to foreclose—the power to indiscriminately search and seize the "papers" of the people.

The Founders' commitment to the security of personal papers helped motivate the adoption of the Fourth Amendment. Indeed, "[p]rotection of private papers from governmental search and seizure is a principle that was recognized in England well before our Constitution was framed." Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 Harv. C.R.-C.L. L. Rev. 461, 463 (1981). The protection of papers, like the closely related prohibition on "general warrants," was one of the twin pillars of the search and seizure doctrine that emerged in eighteenth-century English common law—a development celebrated by the American colonists who were then being subjected to oppressive searches by British authorities. The Fourth Amendment's aim was to enshrine in America's founding charter these common law protections, which safeguarded "two independent rights: a prohibition against general warrants and a limitation on seizures of papers." Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 912 (1985). The Founders thus identified "papers" for protection in the Amendment's text—a choice reflecting the importance of papers as distinct from the "effects" already covered. In short, "the Founders understood the seizure of papers to be an outrageous abuse distinct from general warrants" and "regarded papers as deserving greater protection than other effects." Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 52, 99 (2013).

In keeping with the Fourth Amendment's text and history, personal papers have long been

accorded broad protection from search and seizure. The Supreme Court has repeatedly "held that documents enjoy[] special protection under the fourth amendment," and "more than a dozen decisions over the course of a century reiterated that an individual's private papers were absolutely exempt from seizure," even under a warrant. Schnapper, *supra*, at 869-70. Although changes in the 1960s and 1970s narrowed this "nearly absolute" rule, they did not undermine the principle that "private papers should be accorded special solicitude in fourth amendment protection." James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 Ind. L.J. 55, 56, 70 (1977). Thus, whenever a court must assess the reasonableness of a type of search, or gauge its level of intrusion on "dignity and privacy interests," *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), faithfulness to the Fourth Amendment demands greater protection for personal papers than for other objects and effects.

Today, personal papers increasingly take the form of digital files. Based on technology "inconceivable just a few decades ago," cell phones, laptops, and other electronic devices hold "in digital form many sensitive records previously found in the home." *Riley v. California*, 134 S. Ct. 2473, 2484, 2491 (2014). Indeed, a modern electronic device is a library of one's digital papers—a vast archive of private writings and personal correspondence; financial, medical, and educational records; books and articles being read; personal photographs, videos, and voice recordings; and more, including records created with software "apps" that can manage "detailed information about all aspects of a person's life." *Id*. at 2490. Using these new technologies, "private beliefs, thoughts, emotions, and sensations may be memorialized in electronic documents" that embody "snapshots of the self just as paper documents once did for our nation's forefathers." John W. Nelson, *Border Confidential: Why Searches of Laptop Computers at the Border Should Require Reasonable Suspicion*, 31 Am. J. Trial Advoc. 137, 145 (2007). Consistent with the Fourth Amendment's

special regard for personal papers, the border search doctrine cannot be expanded to permit unfettered government scrutiny of the contents of every international traveler's electronic devices.

## ARGUMENT

### I. The Fourth Amendment Demands Greater Protection for Personal Papers than for Other Effects

#### A. Searches of Personal Papers Were at the Core of the Historical Struggle that Produced the Fourth Amendment and Informs Its Meaning

The Fourth Amendment, which "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," *Kyllo v. United States*, 533 U.S. 27, 40 (2001), "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*, 134 S. Ct. at 2494. The Amendment was meant to embody principles set forth in a series of "English court decisions . . . handed down . . . prior to the American Revolution," involving "efforts by the English government to apprehend the authors and publishers of allegedly libelous publications." Schnapper, *supra*, at 875-76.

Two of those decisions stand out—"the landmark cases of *Wilkes v. Wood* and *Entick v. Carrington*," in which "the battle for individual liberty and privacy was finally won." *Stanford v. Texas*, 379 U.S. 476, 483 (1965). The cases addressed "two distinct issues: first, the validity of general warrants, and second, the absolute immunity of certain property," namely "private papers," from search or seizure "even with a valid warrant." Schnapper, *supra*, at 876-77. Both decisions helped establish the privileged status of papers against unreasonable search and seizure.

John Wilkes was a member of Parliament and publisher of a newspaper that was critical of the ruling government. One particularly bold issue, the *North Briton No. 45*, was deemed seditious libel by the secretary of state, who issued a warrant to "seize and arrest" everyone connected with

it, "together with their papers." Dripps, *supra*, at 62. Under this general warrant, "Wilkes' house was searched, and his papers were indiscriminately seized." *Boyd v. United States*, 116 U.S. 616, 626 (1886). Suing the perpetrators, Wilkes protested that his "papers had undergone the inspection of very improper persons to examine his private concerns," and that "of all offences that of a seizure of papers was the least capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made." *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1166, 1154 (C.P. 1763). Upholding the verdicts, the court declared the general warrant authorizing the searches "contrary to the fundamental principles of the constitution." *Id*. at 1167.

Wilkes's fellow publisher John Entick endured similar treatment and also sued the culprits, leading to a decision that was a "wellspring of the rights now protected by the Fourth Amendment." *Stanford*, 379 U.S. at 484. Unlike in *Wilkes* and similar cases, the warrant at issue "named Entick as the suspect whose possessions were to be seized." Schnapper, *supra*, at 881. Entick maintained that *no* warrant could authorize seizing "all [his] papers and books" without conviction of a crime, objecting that the defendants "read over, pried into and examined all [his] private papers, books, etc. . . . whereby [his] secret affairs . . . became wrongfully discovered." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1030, 1064 (C.P. 1765). Condemning the search, the court held that the power to effect such an "execution upon all the party's papers" was unknown to English common law. *Id*. at 1064. "Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed . . . the secret nature of those goods will be an aggravation of the trespass." *Id*. at 1066. Thus, "the *Entick* court invalidated the seizure not because the court regarded the underlying warrant as a general warrant,

but because the seizure violated the distinct prohibition on seizures of papers." Schnapper, *supra*, at 874. Indeed, the *State Trials* reporter of 1780 captioned *Wilkes* as "The Case of General Warrants" and *Entick* as "The Case of Seizure of Papers." 19 How. St. Tr. at 1029, 1153. Its annotation described "the chief point adjudged" in *Entick* to be that "a warrant to search for and seize the papers of the accused, in the case of a seditious libel, is contrary to law." *Id*. at 1029.

The government's actions also ignited a fierce public debate, in which critics "condemned the distinct but related evils of general warrants and warrants for papers," describing seizures of papers as "an abuse distinct from, but intrinsically resembling . . . general warrants." Dripps, *supra*, at 61, 104. The most widely circulated pamphlet argued that general warrants were illegal and that "a Particular, or any Warrant, for seizing papers, is likewise, as the law now stands, good in no case whatever," and would subject all "correspondences, friendships, papers, and studies" to "the will and pleasure" of government officials. Father of Candor, *A Letter Concerning Libels, Warrants and the Seizure of Papers* 65-66, 48 (2d ed. 1764). The debate subsided only after the House of Commons issued resolutions in 1766 pronouncing general warrants unlawful and declaring separately that "the seizing or taking away the papers, of . . . the supposed author, printer, or publisher, of a libel, is illegal." 16 Parl. Hist. Eng. 209 (1766).

These matters were widely covered by newspapers in the colonies, where Americans were aggrieved by the general warrants known as writs of assistance, and the reaction "was intense, prolonged, and overwhelmingly sympathetic to Wilkes." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 538 (2009). Entick's case was also "undoubtedly familiar" to "every American statesman," and its propositions "were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd*, 116 U.S. at 626-27.

After Independence, protections against the searches of papers were woven into the fabric of American law. Because the states generally adopted English common law, "any judge or justice of the peace considering issuing a warrant to seize papers who looked up the law would learn that, under *Entick*, such a warrant was unknown to the common law." Dripps, *supra*, at 75. Some Founding-era legal manuals "expressly prohibit[ed] warrants for papers," and "[n]one suggest[ed] common law authority to issue warrants for papers." *Id*. at 76. Only one known attempt was made to provide such authority—a Pennsylvania bill that failed after it was attacked in the press as "contrary to common law." *Id*. at 77-78. The constitutions of Massachusetts, New Hampshire, Pennsylvania, and Vermont went further, expressly protecting security in one's "papers." *Id*. at 80.

When the Constitutional Convention later sent its proposal to the states for ratification, many statesmen feared that this new and more powerful federal government would erode the common law protections inherited from England. Antifederalists thus "extracted promises that the Constitution would be amended to include a bill of rights in return for their support of ratification," including "specific protections against unreasonable searches and seizures." Schnapper, *supra*, at 914-15. The ratification messages of the reluctant states Virginia, New York, and North Carolina all listed the security of papers among the protections sought. Dripps, *supra*, at 80.

Ultimately, therefore, the Fourth Amendment reflected the Founders' decision to "secur[e] to the American people . . . those safeguards which had grown up in England to protect the people from unreasonable searches and seizures . . . by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers." *Weeks v. United States*, 232 U.S. 383, 390 (1914). The emphasis on protecting "papers" in the text of the Fourth Amendment was no accident: safeguarding personal papers was at the heart of what the Founders sought to achieve.

### B. Personal Papers Have Traditionally Received Heightened Protection Under the Fourth Amendment

In the antebellum period, the Supreme Court rendered few Fourth Amendment opinions, but state decisions reflected the continued acceptance of *Entick* and its common law prohibition on seizing personal papers. *See* Dripps, *supra*, at 84-85 (discussing cases). And at the federal level, the national government enacted no legislation authorizing the search or seizure of such papers.

Significantly, Congress never authorized the seizure or inspection of personal papers at the border. An early federal statute regulating the collection of duties authorized government agents, without a warrant, "to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed," and to search for those items. Act of July 31, 1789, § 24, 1 Stat. 29, 43. This statute, and its enactment by the same Congress that proposed the Fourth Amendment, is the primary evidence of a traditional exception to the warrant requirement for border searches. *See Ramsey*, 431 U.S. at 616. But notably, the Act did not authorize the search or seizure of any papers, only "goods, wares or merchandise," a formulation the Act repeats 63 times. Moreover, Congress's earlier legislation specifying which "goods, wares and merchandise" were subject to import duties included no written materials among the dozens of items and products listed. Act of July 4, 1789, § 1, 1 Stat. 24; *cf. id.* at 26 (listing "all *blank* books" (emphasis added)); *see* Act of Aug. 4, 1790, § 31, 1 Stat. 145, 164 (authorizing inspectors to demand the manifests of ships and vessels but no other records or papers). There is no historical tradition, therefore, of empowering customs agents to examine the personal papers of international travelers—only a tradition of searching for and seizing impersonal goods lacking the privacy interests that one's papers were recognized to implicate.

Indeed, "[t]he first federal statute authorizing warrants to seize papers was a Civil War revenue measure," prompted by the evasion of duties needed to fund the war. Dripps, *supra*, at 85.

As modified, it authorized courts in forfeiture proceedings to order the production of "any business book, invoice, or paper" that might "tend to prove any allegation made by the United States." *Boyd*, 116 U.S. at 619-20. Striking down this law as unconstitutional, the Supreme Court held that "compelled seizures of papers were *categorically* illegal." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 728 n.514 (1999). Drawing heavily on *Entick*, the Court described that case's holding as "settled from that time to this" and "one of the landmarks of English liberty . . . . welcomed and applauded by the lovers of liberty in the colonies." *Boyd*, 116 U.S. at 626. Under *Entick*, and thus under the Fourth Amendment, the government could seek items that were stolen, "liable to duties," or "unlawful for a person to have in his possession," but such efforts were "totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained." *Id.* at 623-24.

By limiting the *types* of property that could be seized, even with a warrant, "to those in which the government ha[d] a possessory interest," McKenna, *supra*, at 58, the Court effectively shielded "private books and papers" from searches unless they were themselves the fruits or instrumentalities of crime, which the government had a right to confiscate; papers sought merely for evidentiary value were immune. *Boyd*, 116 U.S. at 623-24. Persisting for eight decades, this rule made personal papers largely free from search and seizure. Bradley, *supra*, at 461.

Not until 1967 did the Court discard this "mere evidence" rule, which had grown unworkable after being extended beyond papers, *see Gouled v. United States*, 255 U.S. 298 (1921), substituting the Warrant Clause's procedural safeguards for limits on the types of things that could be seized, *Warden v. Hayden*, 387 U.S. 294, 304-05 (1967). Even then, the Court emphasized that the items of clothing at issue there were not "communicative" in nature, reserving the question whether there are items "whose very nature precludes them from being the object of a reasonable

search and seizure." *Id*. at 302-03. Since then, the Court has "consistently and explicitly" declined to resolve that question. Bradley, *supra*, at 494; *see, e.g.*, *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976) ("Special problems of privacy which might be presented by subpoena of a personal diary are not involved here." (citation omitted)); *cf*. *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.").

While these developments established that papers, like the home, are not categorically exempt from searches that promote "the State's interest in enforcing the criminal law and recovering evidence," *Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978), they did not erase the core tenet that personal papers deserve heightened Fourth Amendment protection whenever courts are called upon to evaluate reasonableness or assess the significance of a privacy invasion. As discussed below, the Justices continued to highlight the special place of personal papers under the Amendment and to acknowledge the unique intrusions on privacy that occur when the contents of those papers are exposed to the government—intrusions akin to those recently discussed in *Riley*.

## II. Border Searches of Personal Papers Stored on Electronic Devices Cannot Be Equated with Searches of Physical Objects Contained in a Traveler's Luggage

Although "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border," exempting "[r]outine searches of the persons and effects of entrants" from the usual requirements of individualized suspicion and a warrant, that exemption does not stretch beyond "routine" border searches. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538-39, 541 n.4 (1985). Whether a search qualifies as routine "often depends on the 'degree of invasiveness or intrusiveness associated with' the search," *United States v. Molina-Gómez*, 781 F.3d 13, 19 (1st Cir. 2015) (quoting *United States v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988)), and the Supreme Court has made clear that intrusions on "dignity and privacy interests" can take

border searches out of the "routine" category, *Flores-Montano*, 541 U.S. at 152; *see Braks*, 842 F.2d at 511-13 (listing "reasonable expectations of privacy" among the factors to be considered).

Moreover, no exception to the warrant requirement may be expanded so as to "untether the rule from the justifications underlying the . . . exception." *Arizona v. Gant*, 556 U.S. 332, 343 (2009); *accord Riley*, 134 S. Ct. at 2485. A rule can become untethered from its justifications when extending it to a new context "undervalues the privacy interests at stake" and "creates a serious and recurring threat to the privacy of countless individuals." *Gant*, 556 U.S. at 344-45; *see Riley*, 134 S. Ct. at 2484-85 (rejecting extension of rule governing "physical objects" to "digital content," due in part to the heightened "privacy interests" in the latter); *id*. at 2488 ("when privacy-related concerns are weighty enough a search may require a warrant" (quotation marks omitted)).

While the Supreme Court has identified some practices that go beyond "routine" border searches, *see, e.g.*, *Montoya de Hernandez*, 473 U.S. at 541 & n.4, it has never implied that those practices exhaust the list. Nor has the Court suggested that only searches affecting a person's body can intrude upon "dignity and privacy," *Flores-Montano*, 541 U.S. at 152, enough to exceed the limits of a routine search.[2] Indeed, the Amendment's history belies that rule, because the abuses to which it was a reaction centered on seizing papers from the home. *See* Part I, *supra*.

Significantly, the Supreme Court has never held that the border search exception permits government agents to read the contents of personal papers. Indeed, when the Court sanctioned the opening of letter-class mail at the border, it repeatedly stressed that its holding would *not* allow officials to read the contents of mail, but only to search for drugs or other contraband inside

[2] Although the Court in *Flores-Montano* upheld a suspicionless search of a fuel tank at the border, it did so because the defendant had no "privacy interest in his fuel tank," which "should be solely a repository for fuel." 541 U.S. at 154; *see id*. at 152 ("Complex balancing tests . . . have no place in border searches *of vehicles*." (emphasis added)); *New York v. Class*, 475 U.S. 106, 112-13 (1986) (diminished expectation of privacy in vehicles). Its holding was no broader than that.

envelopes. As the Court noted, the statute authorizing the searches required "reasonable cause" to believe that customs laws were being violated "prior to the opening of envelopes," and "postal regulations flatly prohibit[ed], under all circumstances, the reading of correspondence absent a search warrant." *Ramsey*, 431 U.S. at 623. That fact, reiterated numerous times, was critical.[3]

Even if the border search doctrine permitted government agents to read the limited number of physical papers transported by an international traveler—a question the Supreme Court has not answered—this would resemble the power of police officers to examine an arrestee's "billfold and address book," "wallet," or "purse." *Riley*, 134 S. Ct. at 2488. The intrusion on privacy and dignity would be cabined by the "physical realities" limiting the range of paper documents most travelers carry. *Id*. at 2489. But in light of the "vast quantities of personal information" stored on electronic devices, the Court has repudiated "mechanical application" of such traditional exemptions from the warrant requirement to the digital world. *Id*. at 2484-85. The possibility of finding some bank statements in a piece of luggage "does not justify a search of every bank statement from the last five years," and "the fact that a search in the pre-digital era could have turned up a photograph or two . . . does not justify a search of thousands of photos in a digital gallery." *Id*. at 2493. Simply put, unfettered power to browse through a person's entire library of digital papers—not to mention seize and retain that library indefinitely and subject it to sophisticated computer analysis—cannot

[3] *See id*. at 624 ("the reading of any correspondence inside the envelopes is forbidden"); *id*. ("envelopes are opened at the border only when the customs officers have reason to believe they contain other than correspondence, while the reading of any correspondence inside the envelopes is forbidden"); *id*. 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 (denying that "the door will be open to the wholesale, secret examination of all incoming international letter mail," since "the reading of letters is totally interdicted by regulation"); *id*. at 625 & n.* (Powell, J., concurring) (noting that "postal regulations flatly prohibit the reading of 'any correspondence'" and joining the holding "[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").

be crammed within the traditional border search exception.

Nor can it be reconciled with the Fourth Amendment's special regard for personal papers. The Amendment's history compels this conclusion, as do two features of personal papers that heighten the intrusion on privacy and dignity when they are searched *en masse* without restriction.

First, the "protection of an individual's private papers goes to the very core of the fourth amendment right of privacy," given the inherently "personal, private nature of such papers." McKenna, *supra*, at 68. An individual's "right of personal security," the Supreme Court has said, "involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value." *Sinclair v. United States*, 279 U.S. 263, 292-93 (1929). Indeed, "[a]n individual's books and papers are generally little more than an extension of his person." *Fisher*, 425 U.S. at 420 (Brennan, J., concurring in the judgment); *cf. City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."). That is certainly the case for "truly private papers or communications, such as a personal diary or family correspondence," which "lie at the core of First and Fourth Amendment interests." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 529 n.27 (1977) (Burger, C.J., dissenting); *see id.* at 484 (White, J., concurring) (distinguishing "purely private materials, such as diaries, recordings of family conversations, [and] private correspondence," from mere "property"). "A search for private papers may be no more physically intrusive than a search for a gun, but the psychological intrusion is far greater, because the searcher is invading not only the subject's house but his or her thoughts." Bradley, *supra*, at 483.

Second, because papers must be read or examined to be identified, the authority to hunt for

a particular type of document in a given location necessarily includes a license to review *all* of the documents stored in that location. Thus, a search of papers inevitably "partakes of the same generality characteristic of the sweeping exploratory searches at which the fourth amendment was directed." McKenna, *supra*, at 83. As the Supreme Court has warned, "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined . . . in order to determine whether they are, in fact, among those papers authorized to be seized." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *see Zurcher*, 436 U.S. at 573 n.7 (Stewart, J., dissenting) ("to find a particular document . . . the police will have to search every place where it might be . . . and to examine each document they find to see if it is the correct one"). Such dangers are present whenever government agents comb through papers in a suitcase or bag, but they are magnified incalculably when agents gain access to a person's entire digital library.

These concerns stretch back to the roots of the Fourth Amendment. In the Wilkes affair, "[c]ritics focused on the large volume of unrelated papers government officials read in their search for documents pertaining to *North Briton No. 45*." Schnapper, *supra*, at 917. Opposition to seizing papers was propelled by "the belief that any search of papers, even for a specific criminal item, was a general search." Dripps, *supra*, at 104. It does not suffice, therefore, to note that papers stored on modern electronic devices can include contraband material. *See* Mot. to Dismiss Mem. at 20. As a critic of the Wilkes searches put it: "'Every private paper, according to this doctrine, might be scrutinized by the examiner; for, without doing so, how could he determine whether something could not be proved from thence?'" Schnapper, *supra*, at 907 (quoting pamphlet).

Thus, the "unbridled discretion to rummage at will" through a person's digital library

"implicates the central concern underlying the Fourth Amendment." *Gant*, 556 U.S. at 345. As Learned Hand once explained, "it is 'a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.'" *Riley*, 134 S. Ct. at 2490-91 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926)). Judge Hand recognized that "a paper may be itself the very thing" sought, but countered that "if all records of the offender's doings . . . are to be included, there would seem to be no escape from allowing a search at large through all his papers." *Kirschenblatt*, 16 F.2d at 204. And "to rummage at will among his papers in search of whatever will convict him" is "indistinguishable from what might be done under a general warrant." *Id*. at 203. While "a criminal document can be found in a pool of innocent documents, at some point the exposure of innocent information becomes a greater evil than the loss of evidence." Dripps, *supra*, at 108. That tipping point is crossed when the power to inspect a limited number of physical items at the border is broadened to give access to the immense range of digital papers stored on electronic devices.[4]

In sum, whether they exist in physical form or as digital files, "private papers are deserving of the fullest possible fourth amendment protection." McKenna, *supra*, at 69. The imperatives underlying the border search doctrine, significant as they are, cannot justify granting government agents unfettered license to rummage at will through the entire digital library of every person who crosses the border. The clear text and history of the Fourth Amendment demand otherwise.

[4] Moreover, by examining the papers stored on electronic devices for the *information* they contain, government agents are using border searches for more than identifying contraband and people who should be denied entry. *See, e.g.*, U.S. Customs and Border Prot., CBP Dir. No. 3340-049A, *Border Search of Electronic Devices* 1 (Jan. 4, 2018) (searches of electronic devices are used to "reveal information about financial and commercial crimes," including "copyright" and "trademark" violations). That practice untethers the border search exception from its justification, which is the need to control "who and what may enter the country," *Ramsey*, 431 U.S. at 620, and turns border searches of digital papers into a general law enforcement tool.

## CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss should be denied.

Respectfully submitted,

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