Nos. 20-1077, 20-1081

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GHASSAN ALASAAD; NADIA ALASAAD; SUHAIB ALLABABIDI; SIDD BIKKANNAVAR; JEREMIE DUPIN; AARON GACH; ISMAIL ABDEL-RASOUL, a/k/a Isma'il Kushkush; DIANE MAYE ZORRI; ZAINAB MERCHANT; MOHAMMED AKRAM SHIBLY; MATTHEW WRIGHT,

Plaintiffs-Appellees/Cross-Appellants,

v.

CHAD F. WOLF, Acting Secretary of the U.S. Department of Homeland Security, in his official capacity; MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; MATTHEW T. ALBENCE, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND PARTIAL AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

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, through our government, and with legal scholars to improve understanding of the Constitution and to 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 AND SUMMARY OF ARGUMENT

Law enforcement officers seized and examined the phones and laptops of the plaintiffs in this case as they reentered the United States after travelling abroad. Simply because these searches occurred at the border, the government maintains that it did not need a warrant, probable cause, or even reasonable suspicion 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

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

doctrine, rooted in the need "to prevent prohibited articles from entry," *id.* at 619, 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 inspect whatever documents, images, and recordings they please.

Significantly, however, there is no historical tradition of empowering border agents to examine the personal papers of international travelers without a warrant, much less 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 a power that the Fourth Amendment was meant to foreclose—the ability 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). This protection and the closely related ban on "general warrants" were 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.

One of the chief aims of the Fourth Amendment 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). Accordingly, the text of the Fourth Amendment specifically lists "papers" as protected from unreasonable search and seizure—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 given broad protection from search and seizure. The Supreme Court has repeatedly "held that documents enjoy[] special protection under the fourth amendment," and indeed, "more than a dozen decisions over the course of a century reiterated that an individual's private papers were absolutely exempt from seizure."

Schnapper, *supra*, at 869-70. While the Court has tempered this "nearly absolute" rule, it has preserved the underlying doctrine 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 search or gauge its 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.

Today, personal papers increasingly take the form of digital files. Based on technology "inconceivable just a few decades ago," electronic devices now hold "in digital form many sensitive records previously found in the home." *Riley v. California*, 573 U.S. 373, 385, 396-97 (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; personal photographs, videos, and voice recordings; and other materials that include "detailed information about all aspects of a person's life." *Id.* at 396. Consistent with the Fourth Amendment's special regard for private papers, routine border searches cannot be expanded to permit unfettered scrutiny into the contents of every international traveler's electronic devices.

Instead, "privacy-related concerns are weighty enough" to "require a warrant" for searches of electronic devices at the border, "notwithstanding the diminished expectations of privacy" there. *Id.* at 392 (quotation marks omitted). At a minimum, these searches require reasonable suspicion that a device contains digital contraband, as the district court held. That requirement is not an attempt to revive the discredited "mere evidence" rule, as the government claims. Gov't Br. 42. Rather, it ensures that the border search doctrine remains tethered to its historical purpose: "excluding illegal articles from the country." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971).

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 Struggle that Produced the Fourth Amendment.

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*, 573 U.S. at 403. Its terms were meant to embody the principles established in a series of well-known judicial decisions that involved

"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). Those cases addressed "two distinct issues: first, the validity of general warrants, and second, the absolute immunity of certain property from search or seizure." Schnapper, *supra*, at 876. Both decisions helped establish the privileged status of private papers under the law.

John Wilkes was a member of Parliament and publisher of a newspaper that often criticized 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 verdict in Wilkes's favor, 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*, the warrant at issue "named Entick as the suspect whose possessions were to be seized." Schnapper, *supra*, at 881. But 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).

Siding with Entick, the court held that this power to search and seize "all the party's papers" was unknown to English common law. *Id.* at 1064. As the court explained:

> 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 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." Dripps, *supra*, at 61. The most widely circulated pamphlet argued both that general warrants were illegal and that "a Particular, or any Warrant, for seizing the papers, is likewise, as the law now stands, good in no case whatever." Father of Candor, *A Letter Concerning Libels, Warrants and the Seizure of Papers* 77 (5th ed. 1765). Such warrants, it was said, would subject all "correspondencies, friendships, papers and studies" to "the will and pleasure" of the authorities. *Id.* at 59. The debate subsided only after the House of Commons issued resolutions 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 developments were widely covered by newspapers in the colonies, where Americans were aggrieved by the general warrants known as writs of

assistance, and the colonial reaction "was intense, prolonged, and overwhelmingly sympathetic." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 538 (2009). Entick's case was "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 search and seizure 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. Among the legal manuals published in the Founding era, "[n]one suggest[ed] common law authority to issue warrants for papers," and some expressly prohibited them. *Id.* at 76; *see, e.g.*, William Waller Hening, *The New Virginia Justice* 404 (1795) (citing *Entick*'s holding "[t]hat a warrant to seize and carry away papers in the case of a seditious libel was illegal and void," and discussing "the doctrine of general warrants" separately).

Indeed, only one known attempt was made to authorize the search and seizure of papers during this period—a Pennsylvania bill that failed after it was attacked in

the press as "contrary to common law." Dripps, *supra*, at 78; *see* Zuinglius, *For the Pennsylvania Gazette*, Pa. Gazette, Dec. 20, 1780 ("[T]he possession of private papers, as of our secret thoughts, is a natural right which we do not give up when we enter into society . . . . What punishment can be more dreadful to one of a delicate and sensible mind, than to have his papers laid open to those who may come with a warrant to inspect them. . . . [N]or is it only the individual who is subjected to this evil but all others who have ever corresponded with him. Letters of business, letters of friendship, notes, memorandums, containing the most delicate particulars, are all laid open to view."). Reflecting these sentiments, the constitutions of four states expressly protected security in one's "papers." Mass. Const. art. XIV (1780); N.H. Const. art. XIX (1784); Pa. Const. art. IX, § 8 (1790); Vt. Const. ch. I, art. XI (1777).

When the Constitutional Convention later sent its proposal for a new federal charter to the states for ratification, many feared that this powerful national 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 key holdout states Virginia, New York, and North Carolina all specifically included the security of "papers" among the protections sought. *See 18th Century Documents: 1700–1799*, Yale Law School

Lillian Goldman Law Library, https://avalon.law.yale.edu/subject_menus/18th.asp (last visited Aug. 6, 2020) (providing access to the state ratification messages).

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 . . . 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 decisions, but state decisions reveal the continued acceptance of *Entick*, *see Grumon v. Raymond*, 1 Conn. 40, 45 (Conn. 1814), and its protection for personal papers, *see Commonwealth v. Dana*, 43 Mass. 329, 334 (Mass. 1841) ("the right to search for and seize private papers is unknown to the common law").

Significantly, early Congresses never authorized the search or seizure of private papers—at the border or anywhere else. An early statute permitted customs officers "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 without a warrant. Act of July 31, 1789, § 24, 1 Stat. 29, 43. The

enactment of this statute by the same Congress that proposed the Fourth Amendment is the primary evidence of a traditional border exception to the warrant requirement. *See Ramsey*, 431 U.S. at 616. But critically, this statute did not permit the seizure of any papers—only "goods, wares or merchandise," a formulation repeated sixty-three times. And the 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. *See* Act of July 4, 1789, § 1, 1 Stat. 24; *cf. id.* at 26 ("all *blank* books" (emphasis added)). A later revision to the statute permitted officers to inspect ships' manifests, but no other records or papers. *See* Act of Aug. 4, 1790, § 31, 1 Stat. 145, 164.

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.

That omission reflects the value attached to the privacy of papers. "When Congress passed its first comprehensive postal statute in 1792," for instance, "the confidentiality of the contents of sealed correspondence was . . . written into law." Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 Stan. L. Rev. 553, 566 (2007) (citing Act of Feb. 20, 1792, § 16, 1 Stat. 232, 236). Even the notorious Sedition Act did not authorize the

seizure of papers, *see* Act of July 14, 1798, ch. 73, 1 Stat. 596, and the history of its enforcement shows "no evidence of search warrants to search for and seize personal papers," Dripps, *supra*, at 82. By the mid-nineteenth century, federal law prohibited circulating certain materials through the mails, but the Attorney General concluded that a federal agent's power to examine such materials did not extend to "letters, the contents of which he has no ordinary and public means to know . . . and which he has no business to inquire into." *Yazoo City Post Office Case*, 8 U.S. Op. Att'y Gen. 489, 495 (1857). The Supreme Court, in its first significant comment on the Fourth Amendment, confirmed that "the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, . . . closed against inspection, wherever they may be." *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

Not until the funding of the Civil War effort was imperiled by a widespread evasion of duties did Congress enact "[t]he first federal statute authorizing warrants to seize papers." Dripps, *supra*, at 85; *see* Act of Mar. 3, 1863, ch. 76, 12 Stat. 737. And that measure did not last. As modified, the law authorized courts to order the production of "any business book, invoice, or paper" that might "tend to prove any allegation made by the United States" in forfeiture proceedings. *Boyd*, 116 U.S. at 619-20 (quoting statute). But the Supreme Court struck this measure down, holding 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 the holding of that decision as "settled" and as "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 "liable to duties" or "unlawful" to possess, 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.

For decades, *Boyd* remained "[t]he leading case" on the Fourth Amendment, *Carroll v. United States*, 267 U.S. 132, 147 (1925), making private papers largely free from search and seizure. Bradley, *supra*, at 461.[2] Indeed, *Boyd*'s holding was later broadened to shield *all* private property sought by the government for its evidentiary value alone. *See Gouled v. United States*, 255 U.S. 298 (1921). Under this new rule, private papers became simply an "example" of the kinds of property that could not be seized "merely for use as evidence." *Abel v. United States*, 362 U.S. 217, 234 (1960).

When the Court eventually jettisoned this "mere evidence" rule, it reconfirmed the distinction between private papers and other objects of search,

[2] During this period the Court approved the use of subpoenas for "corporate records," *Wheeler v. United States*, 226 U.S. 478, 490 (1913), but distinguished such requests from "compulsory production of [one's] private books and papers," which were "[u]ndoubtedly" protected, *Wilson v. United States*, 221 U.S. 361, 377 (1911); *see Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946).

loosening the Fourth Amendment's standards only for the latter. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court approved a blood-alcohol search carried out for evidence of intoxication, but it reached that result only by distinguishing cases that shielded "private papers." *Id.* at 768; *see id.* at 775 (Black, J., dissenting) ("It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime . . . but proscribes compelled production of his lifeless papers.").

In *Warden v. Hayden*, 387 U.S. 294 (1967), which definitively rejected the mere evidence rule, the Court again "was careful . . . to confine its holding to non-testimonial items." Steven H. Shiffrin, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 Loy. L.A. L. Rev. 274, 289 (1973). Emphasizing that the articles of clothing at issue were not "communicative" in nature, the Court in *Hayden* left open whether there are items "whose very nature precludes them from being the object of a reasonable search and seizure." 387 U.S. at 302-03; *see* Shiffrin, *supra*, at 287 ("The actual holding of *Warden* was that a man's non-documentary effects could be seized during a lawful search to be used as evidence."). 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)).

Whether or not private papers are entirely immune from search and seizure under the Fourth Amendment, they clearly require heightened protection whenever courts are called upon to evaluate the reasonableness of a search or assess its intrusiveness—that is, in cases like this one. From the nineteenth century to the modern era (further discussed below), the Supreme Court has highlighted the special place of private papers under the Fourth Amendment and has acknowledged the unique harms that occur when their contents are exposed to the government.

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

Although "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border," and "[r]outine searches of the persons and effects of entrants" are exempt from the warrant requirement, 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)); *see Braks*, 842 F.2d at 512 ("reasonable expectations of privacy" must 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). A rule becomes 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." *Id.* at 344-45; *see Riley*, 573 U.S. at 386 (rejecting extension of rule governing "physical objects" to "digital content" due to heightened "privacy interests" in the latter).

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 it suggested that only searches affecting a person's body can severely intrude upon "dignity and privacy." *Flores-Montano*, 541 U.S. at 152. That notion is belied by the history of the Fourth Amendment, which involved objections to seizures of papers and other objects from the home. *See supra* Part I. Thus, in upholding a suspicionless border search of a fuel tank, the Court did not explain that all property searches at the border are reasonable, but rather that there is no "privacy interest in [a] fuel tank," which "should be solely a repository for fuel." *Flores-Montano*, 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).

Critically, the Supreme Court has never held that the border search exception permits government officers to examine the contents of personal papers. On the

contrary, when the Court sanctioned the warrantless opening of internationally mailed envelopes, it repeatedly stressed that its holding would *not* allow officials to read the contents of letters, but only to search for drugs or other contraband hidden inside the envelopes. As the Court noted, the statute authorizing these 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 decisive.[3] The Court reserved judgment on whether the "full panoply of Fourth Amendment requirements" would be needed "in the absence of the regulatory restrictions." *Id.* at 624 n.18.

Even if the border search doctrine permitted government officers to read the limited number of physical papers carried 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."

[3] *See Ramsey*, 431 U.S. at 624 ("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.* at 612 n.8 (denying 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"); *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").

Riley, 573 U.S. at 392-93. The intrusion on privacy and dignity would be cabined by the "physical realities" limiting the range of paper documents that travelers carry. *Id.* at 393. 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 386. 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 400.

Simply put, unfettered power to browse through a person's entire library of digital papers—not to mention seize that library indefinitely and subject it to advanced computer analysis—cannot be crammed within the traditional border search exception. Nor can it be reconciled with the Fourth Amendment's special regard for personal papers, which have two key attributes that heighten the intrusion on privacy and dignity when they are searched.

First, the "protection of an individual's private papers goes to the very core of the fourth amendment," given the inherently "personal, private nature of such papers." McKenna, *supra*, at 68. An individual's "right of personal security," the Supreme Court has stressed, demands "exemption of his private affairs, books, and papers from the inspection and scrutiny of others." *Sinclair v. United States*, 279

U.S. 263, 292-93 (1929); *see Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (upholding a person's "right to be free from state inquiry into the contents of his library").

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), whether their form is physical or digital, *see 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 "purely private materials, such as diaries, recordings of family conversations, [and] private correspondence," which represent far more than mere "property." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 484 (1977) (White, J., concurring). When private papers are involved, "the searcher is invading not only the subject's house but his or her thoughts." Bradley, *supra*, at 483.

Second, because papers must be examined to be identified, the authority to hunt for a particular record in a given location necessarily includes a license to review *all* the records 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 . . . a search and

seizure of a person's papers that are not necessarily present in [a] 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). Such dangers are present whenever government officers comb through papers in a suitcase or bag, but they are magnified incalculably when those officers 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. An unbounded authority to search electronic devices at the border cannot be justified, therefore, on the basis that the contents of those devices may include digital contraband or shed light on "border-related crimes." Gov't Br. 10. 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?" Father of Candor, *A Postscript to the Letter on Libels, Warrants, &c.* 18 (2d ed. London 1765).

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. 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*, 573 U.S. at 396 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926)). 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." *Kirschenblatt*, 16 F.2d at 203.

A tipping point is crossed, therefore, when the traditional power to inspect a limited number of items at the border—a power that, again, the Supreme Court has never extended to the contents of private papers—is broadened to sweep in all of the sensitive files stored on modern electronic devices. The government's contrary argument ignores the very "seismic shifts in digital technology," *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018), that its own policies are seeking to exploit. The imperatives underlying the border search doctrine, significant as they are, cannot justify granting government agents unfettered license to rummage at will through the digital library of every person who crosses the border.

III. Requiring Suspicion of Contraband to Search Electronic Devices Keeps the Border Search Doctrine Tethered to Its Historical Justifications.

Consistent with the principles discussed above, the district court held that officers conducting border searches of electronic devices must have reason to

believe that those devices contain contraband. Addendum 47-48. Because the border search exception rests on "the government's interest in stopping contraband at the border," the court recognized, the exception does not justify searches aimed more broadly at uncovering "evidence of past or future crimes." *Id.* at 36. That, however, is precisely what the government wants—unrestricted power to search travelers' digital libraries for "evidence of border-related offenses." Gov't Br. 43. Among the "wide range" of laws that the government wants this rule to cover are measures addressing "intellectual property," "food and drug safety," "agriculture," "vehicle emissions standards," and "art and antiquity theft." *Id.* at 3, 44.

The government portrays the distinction drawn by the district court as a revival of the discredited "mere evidence" rule. Gov't Br. 42. But that is wrong. The difference between the authority to intercept contraband and the authority to investigate "border-related" crimes is rooted in the historical rationale for the border search exception itself, along with the need to ensure that the exception remains tethered to that rationale. *See Riley*, 573 U.S. at 386.

The contours and underpinnings of the mere evidence rule were completely different. As recounted above, in the early twentieth century the Supreme Court transformed the landmark *Boyd* decision—which had emphasized the unique status of private papers—into a broader rule that was based entirely on ownership concepts. *See* Shiffrin, *supra*, at 278 ("the emphasis shifted in *Gouled v. United States*").

"Whereas *Boyd* would absolutely prohibit the seizure of *private papers*, . . . *Gouled* refused to place papers in a special category, holding rather that seizure of any of an individual's property *merely for evidentiary purposes* was constitutionally prohibited." *Id.* at 278-79. This new rule, and its "requirement of a governmental property interest in the item to be seized," *id.* at 286, proved incompatible with routine law enforcement and generated specious distinctions between "items of evidential value only" and "the instrumentalities and means by which a crime is committed," *Hayden*, 387 U.S. at 300, 296. In finally repudiating this rule, the Court rejected "[t]he premise that property interests control the right of the Government to search and seize." *Id.* at 304.

The district court's order plainly has nothing to do with the mere evidence rule. First, the order draws a different line between permissible and impermissible searches than the mere evidence rule did. For instance, the mere evidence rule permitted the government to search for anything in which it ostensibly held an ownership interest, not just contraband, including "the fruits of crime such as stolen property" and "instrumentalities and means by which a crime is committed." *Hayden*, 387 U.S. at 296; *see Marron v. United States*, 275 U.S. 192 (1927). Those concepts play no role in the district court's order, however, because they are not relevant to the border search exception.

Second, the mere evidence rule prohibited seizing certain items under *any*

circumstances. *See Gouled*, 255 U.S. at 309. But the district court's order simply requires the government to follow the normal Fourth Amendment process, *i.e.*, to "get a warrant," *Riley*, 573 U.S. at 403, before conducting searches for reasons other than detecting contraband.

Third, the district court's rule arises directly from the historical justifications for the border search exception: the need "to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537. After all, the 1789 customs statute on which that exception rests did not permit searches of ships for "evidence of border-related offenses." Gov't Br. 43. Rather, it permitted officers to search only those ships "in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed." Act of July 31, 1789, § 24, 1 Stat. 29, 43. Congress imposed the same restriction when it authorized customs inspections at land borders. *See* Act of Feb. 4, 1815, ch. 31, § 2, 3 Stat. 195, 195 (permitting an officer to search persons and vehicles "on which he shall suspect there are any goods, wares, or merchandise, which are subject to duty, or which shall have been introduced into the United States in any manner contrary to law"). By echoing that rule, the district court was faithful to the traditional border search doctrine.

The government, on the other hand, wants to convert that traditional doctrine into something else entirely: a loophole allowing it to employ warrantless border

searches to investigate any offense that relates in some conceivable way to the border. Downplaying the privacy implications of its position, the government offers assurances that "comprehensive data collection" from every traveler "would place impossible demands on the agencies' resources." Gov't Br. 32. But such "practical considerations" also deter local police departments from scrutinizing "all accessible data" on every arrestee's cell phone, *id.*, and that did not give the Supreme Court pause in *Riley*.

The government's assurances miss the point. The Fourth Amendment protects the "right of the people to be secure" in their papers and effects from unreasonable intrusions. U.S. Const. amend. IV. Regardless of how likely it is that any specific individual will be among the tens of thousands whose devices are searched annually at the border, no one can be "secure" in their digital files if law enforcement officers may peruse those files at will whenever one takes an international trip. Because "no [person] whatsoever is privileged from this search," *Entick*, 19 How. St. Tr. at 1065, this is "a power that places the liberty of every man in the hands of every petty officer," James Otis, *Against Writs of Assistance* (1761).

CONCLUSION

For the foregoing reasons, border searches of electronic devices require a warrant and probable cause or, at a minimum, reasonable suspicion that a device contains digital contraband.

Respectfully submitted,

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Dated: August 7, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Dated: August 7, 2020

/s/ Dayna J. Zolle
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: August 7, 2020

/s/ Dayna J. Zolle
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