24-1680

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

SEQUAN JACKSON, AKA SEALED DEFENDANT 2, ANTHONY MCGEE, AKA SEALED DEFENDANT 3, KAHEEN SMALL, AKA SEALED DEFENDANT 4, DAMON DORE, AKA SEALED DEFENDANT 5, HASIM SMITH, AKA SEALED DEFENDANT 6, RAHMIEK LACEWELL, AKA SEALED DEFENDANT 7, MANUEL PEREIRA, AKA SEALED DEFENDANT 8, OCTAVIO PERALTA, AKA SEALED DEFENDANT 9, CARL WALSH,

Defendants,

JATIEK SMITH, AKA SEALED DEFENDANT 1,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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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 is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the 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, detained, and copied the contents of Jatiek Smith's cellphone as he reentered the United States—not because customs agents suspected that the phone contained digital contraband, but rather because FBI and Homeland Security agents who were investigating Smith for a domestic crime wanted information to advance their investigation. According to the government, law enforcement officers do not need a warrant or probable cause that a device contains unlawful material to scrutinize the entire library of files that travelers carry on their electronic devices. So long as a seizure occurs at the border, in the

[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.

government's view, officers may search and seize the devices of whomever they wish while looking for evidence of past or future offenses. Because the government's position is at odds with precedent and the Fourth Amendment's original meaning, this Court should reject it.

The government rests its sweeping 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 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 agents to inspect whatever documents, images, and recordings they please.

Crucially, however, there is no Supreme Court precedent or historical tradition allowing 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 attempting to secure a power the Fourth Amendment

was meant to foreclose—the power to indiscriminately search and seize the "papers" of the people.

"Protection 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), and the Founders' commitment to that principle helped motivate the Fourth Amendment's adoption. Together with a rejection of "general warrants," safeguarding private papers was one of the twin pillars of the search and seizure doctrine that emerged in eighteenth-century English common law—a development celebrated by 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 the Constitution 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" covered separately by the text. 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 "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 eventually tempered that absolute rule, it preserved the underlying 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 search or gauge its intrusion on "dignity and privacy interests," *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), the Fourth Amendment demands greater protection for personal papers than for other objects.

Today, personal papers increasingly take the form of digital files. 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 should require reason to believe that a device contains digital contraband. Only that approach ensures that the border search exception 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, and both established the privileged status of private papers under the common law: "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.

In 1763, an issue of John Wilkes's radical newspaper *The North Briton* 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 . . . 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 the American 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) (discussing the rule of *Entick* separately from "the doctrine of general warrants").

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 ("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. . . . 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," including "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 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 (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 singling out of "papers" in the Fourth Amendment's text was no accident: safeguarding personal papers was an essential part of the common law protections that the Founders aimed to preserve.

B. Personal Papers Have Historically Received Heightened Fourth Amendment Protection.

The Supreme Court rendered few Fourth Amendment decisions in the antebellum period, but state decisions reveal the continued acceptance of *Entick*, *see Grumon v. Raymond*, 1 Conn. 40, 45 (1814), and its protection for personal papers, *see Commonwealth v. Dana*, 43 Mass. 329, 334 (1841) ("the right to search for and seize private papers is unknown to the common law"). Significantly, too, early Congresses never authorized the search or seizure of private papers—at the border or anywhere else.

The historical foundation for the border search doctrine is an early statute that 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 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 listed. *See* Act of July 4, 1789, § 1, 1 Stat. 24; *cf. id.* at 26 ("all *blank* books" (emphasis added)). A later 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. And agents could employ that power only when they had "reason to suspect" that prohibited items were concealed onboard a ship. Act of July 31, 1789, § 24, 1 Stat. at 43.

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 mail, but a federal agent's power to enforce this law by examining mail did not extend to "letters, the contents of which he has no ordinary and public means to know." *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 funding for the Civil War 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 it did not last. As modified, that 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 the 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 "settled" holding of that decision as "on[e] 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), and private papers continued to be largely free from search and seizure. *See* Bradley, *supra*, at 461.[2]

Boyd's holding was later broadened beyond personal papers and transformed—shielding all private property sought by the government for its

[2] During that 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 Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946) ("corporate or other business records").

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 that "mere evidence" rule, it reconfirmed the distinction between private papers and other objects of search—loosening the Fourth Amendment's standards only for other objects, not for papers. 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. And 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 in *Hayden* were not "communicative" in nature, the Court 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. Thus, "[t]he actual holding of *Warden* was that a man's non-documentary effects could be seized during a lawful search to be used as evidence." Shiffrin, *supra*, at 287; *see also 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)).

In short, constitutional text, history, and precedent all demand heightened protection for personal papers whenever courts are called upon to assess the reasonableness or intrusiveness of a search. The Supreme Court has repeatedly highlighted the special protection that private papers enjoy under the Fourth Amendment and has acknowledged the unique harms that occur when their contents are exposed to the government. Those principles hold true whether papers take the form of physical documents or digital files.

II. Warrantless Searches of Digital Papers Stored on Electronic Devices Cannot Be Equated with Examining a Traveler's Luggage.

Although "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border," the Supreme Court has allowed warrantless examinations of persons and property at the border only within the scope of "routine" border searches. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985). Whatever else a "routine" border search may cover, it cannot include inspecting a person's entire library of digital papers. That broad power would "untether" the border search doctrine "from the justifications underlying" it and create "a serious and recurring threat to the privacy of countless individuals." *Arizona v. Gant*, 556 U.S. 332, 344-45, 343 (2009).

While the Supreme Court has identified some types of "nonroutine" border searches, *see, e.g.*, *Montoya de Hernandez*, 473 U.S. at 541 & n.4, it has never implied that there are no others. Nor has the Court said that only searches involving a person's body can unreasonably intrude on "dignity and privacy," *Flores-Montano*, 541 U.S. at 152, as the government has elsewhere argued.

Most 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 it 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

[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").

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.

To be sure, this Court has allowed border agents to examine and copy a person's spiral-bound notebook based on reasonable suspicion of criminal conduct. *See United States v. Levy*, 803 F.3d 120, 122-24 (2d Cir. 2015). But even if border agents are allowed to peruse the limited number of physical papers carried by an international traveler, that merely resembles police officers' ability to examine an arrestee's "billfold and address book," "wallet," or "purse." *Riley*, 573 U.S. at 392-93. The intrusion on privacy is categorically different than the intrusion at issue here because it is cabined by the "physical realities" limiting the range of paper documents that travelers carry. *Id.* at 393. The Supreme Court has repudiated "mechanical application" of such traditional exemptions from the warrant requirement to the digital world, recognizing the "vast quantities of personal information" stored on electronic devices. *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 and perform sophisticated computer searches of its contents—cannot be crammed within the traditional border search exception. Nor can it be reconciled with the Fourth Amendment's special regard for personal papers.

As explained above, the Supreme Court has recognized that an individual's "right of personal security" 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); *cf. 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"). After all, "[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 in physical or digital form, *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 . . . ."). That is certainly true 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).

Moreover, "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." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Because papers must be examined to be identified, the authority to hunt for a particular type of record entails a license to review *all* the records stored in the same place, making it "certain" that "innocuous documents will be examined . . . in order to determine whether they are, in fact, among those papers authorized to be seized." *Id.* Inevitably, therefore, a search of papers "partakes of the same generality characteristic of the sweeping exploratory searches at which the fourth amendment was directed." McKenna, *supra*, at 83. Such dangers are present whenever government officers may 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 date back to the Fourth Amendment's origins. In the Wilkes controversy, critics "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 unlimited power to search digital papers at the border, therefore, cannot be sanctioned simply because some papers may shed light

on criminal investigations. As one opponent 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. 1765).

The "unbridled discretion to rummage at will" through a person's digital library thus "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 physical items at the border is broadened to sweep in all of the sensitive files stored on modern electronic devices. Permitting that expansion ignores the very "seismic shifts in digital technology," *Carpenter v. United States*, 585 U.S. 296, 313 (2018), that the government is exploiting through its searches of these devices. The imperatives underlying the border search doctrine, significant

as they are, cannot justify giving federal agents license to rummage at will through the digital library of every person who crosses the border.

III. To Keep the Border Search Doctrine Tethered to Its Historical Rationale, Searches of Electronic Devices Must Be Limited to Looking for Digital Contraband.

For the reasons discussed above, history and precedent do not support expanding the border search doctrine to allow warrantless review of digital papers stored on electronic devices. But at the very least, border searches must be aimed at discovering prohibited items—the historic function that has justified dispensing with the warrant requirement. The Fourth Amendment thus requires, at a minimum, reason to believe that a particular electronic device contains digital contraband.

Contrary to what the government has elsewhere argued, and what some courts have suggested, *e.g.*, *Alasaad v. Mayorkas*, 988 F.3d 8, 20 (1st Cir. 2021), limiting electronic-device border searches to the interception of digital contraband does not revive the discredited "mere evidence" rule. This limitation instead derives from the historical rationale for the border search exception itself, and it ensures that the exception remains tethered to that rationale.

The contours and underpinnings of the mere evidence rule were completely different. As recounted above, in the twentieth century the Supreme Court transformed the *Boyd* decision—which had emphasized the unique status of private

papers—into a different and broader rule that centered on ownership concepts. "Whereas *Boyd* would absolutely prohibit the seizure of *private papers*," the "emphasis shifted" in *Gouled v. United States*, which "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." Shiffrin, *supra*, at 278-79 (citing *Gouled*, 255 U.S. 298 (1921)).

Ultimately, however, this "requirement of a governmental property interest in the item to be seized," *id.* at 286, proved unworkable 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 repudiating that rule, the Supreme Court rejected "[t]he premise that property interests control the right of the Government to search and seize." *Id.* at 304. But in doing so, the Court reasserted the distinction between private papers and other objects of search. *See supra* at 14-16.

Restricting warrantless border searches to their traditional function of discovering prohibited items has nothing to do with the mere evidence rule. Instead, this important limit arises from the rationale for the border search doctrine itself—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. This

limit ensures that the doctrine remains tethered to its justifying rationale. *See Riley*, 573 U.S. at 386.

After all, the 1789 customs statute on which the border search doctrine rests did not permit officers to search ships for general investigative or law enforcement purposes—the power the government claims here. Rather, it allowed 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. at 43. Congress imposed the same restriction when it authorized warrantless 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"). Enforcing these traditional limits on the discretionary search power of border agents is simply being faithful to the border search doctrine itself.

Moreover, because the mere evidence rule was rooted in different concepts, its scope was entirely different from a proper limit on border searches. For instance, the mere evidence rule prohibited seizing certain kinds of items under *any* circumstances. *See Gouled*, 255 U.S. at 309. But enforcing the traditional limits of the border search doctrine simply requires officials 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 prohibited items.

Likewise, 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" 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 have no relevance to the constitutional limits on border searches, further illustrating the lack of any relationship between those limits and the mere evidence rule.

At bottom, it is the government, not those advocating for limits on border searches, that is pushing for a radical change in Fourth Amendment doctrine. The government wants to convert the traditional border search doctrine into something else entirely: a loophole allowing it to employ warrantless searches to investigate any potential offense whenever a person of interest takes an international trip. To be sure, practical limits may currently prevent border agents from exploiting this power to its full potential. But similar practical limits also prevent local police officers from exhaustively reviewing every device carried by every arrestee—and that did not give the Supreme Court pause before recognizing in *Riley* that the Fourth Amendment restricts such searches.

That is because such assurances miss the point. The Fourth Amendment protects "[t]he right of the people to be secure" in their papers against unreasonable searches and seizures. U.S. Const. amend. IV. No one can be "secure" in their digital papers if law enforcement officers may peruse and copy them 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, reason to believe that a device contains digital contraband.

Respectfully submitted,

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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 6,097 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: November 27, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2024, 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: November 27, 2024

/s/ Brianne J. Gorod
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