No. 20-1505

IN THE

Supreme Court of the United States

ZAINAB MERCHANT, ET AL.,

Petitioners,

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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

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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 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 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

Whenever an American takes an international trip, federal agents have free rein to pore through the photographs, videos, emails, text messages, notes, and other private contents of his or her electronic devices. Border agents do not need a warrant, probable cause, or even reasonable suspicion that a device contains unlawful material. Instead, agents may search and seize the devices of whomever they wish while looking for evidence of past or future violations of the laws their agencies enforce.

That is the holding of the decision below. And because this state of affairs is intolerable under the Fourth Amendment, this Court should correct it.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to its filing. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The court below rested its sweeping holding 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 has always been tied to its historical rationale, the need "to prevent prohibited articles from entry," *id.* at 619, and has always been further constrained by the physical realities that limit the items carried by travelers. The decision below expands 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.

Crucially, 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 federal government is attempting to secure a power the Fourth Amendment was designed 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 the security of personal papers 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 the American colonists who were 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 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).

This Court too has long recognized that personal papers enjoy special protection under the Fourth Amendment. 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. Although this 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, 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), fidelity to 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, 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, the authority to conduct routine border searches cannot justify 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 must require reasonable suspicion that a device contains digital contraband. Such a requirement is not a revival of the discredited "mere evidence" rule, as the court below concluded. 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).

This Court's intervention is needed to clarify that invading someone's digital library for the information it contains is fundamentally unlike combing through a suitcase for contraband. Petitioners' case, which does not arise from a suppression motion in a criminal

prosecution, offers a rare opportunity to address that vital issue in a context resembling the majority of the tens of thousands of warrantless electronic device searches that the government performs each year. This Court should take that opportunity and grant the petition for a writ of certiorari.

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 common law.

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 (last visited May 27, 2021) (providing access to the state ratification messages).

Ultimately, as this Court has explained, 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 what the Founders sought to achieve.

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

In the antebellum period, this Court rendered few Fourth Amendment decisions, 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.

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 this 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*, this 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 so private papers continued to be largely free from search and seizure. *See* Bradley, *supra*, at 461.[2]

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 this 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 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. And in *Warden v. Hayden*, 387 U.S. 294 (1967), which definitively rejected the mere evidence rule, this 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.

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[2] During that period, this 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").

274, 289 (1973). Emphasizing that the articles of clothing at issue in *Hayden* were not "communicative" in nature, this 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; *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."); *see also, 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)).

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. This 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. Suspicionless Border Searches of Personal Papers Stored on Electronic Devices Are Constitutionally Unreasonable.

A. Reviewing the Contents of Digital Files Is Unlike Combing Through a Traveler's Luggage.

Although "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border," this Court has allowed suspicionless 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 this 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 this Court said that searches can unreasonably intrude on "dignity and privacy," *Flores-Montano*, 541 U.S. at 152, only when they involve "an intrusive search of a *person*," Pet. App. 18a, as the court below suggested.

Most critically, this Court has never held that the border search exception permits government officers to examine the contents of personal papers. On the contrary, when this 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 this 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,[3]

[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

was key: This 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 border agents were allowed to read the limited number of physical papers carried by an international traveler—a question this Court has not answered—that would merely resemble 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 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, this 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 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.

& 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").

As explained above, *see supra* Part I, this 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 "border-related crimes." Pet. App. 19a. 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)).

A tipping point is crossed, therefore, when the traditional power to inspect a limited number of physical items at the border—a power that, again, this 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. Permitting that expansion requires ignoring the very "seismic shifts in digital technology," *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (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.

B. To Keep the Border Search Doctrine Tethered to Its Historical Rationale, Searches of Electronic Devices Must Require Suspicion of Contraband.

For all the reasons discussed above, the court below erred in stretching the border search doctrine to encompass the review of personal papers stored on electronic devices. The court compounded its error by expanding the purposes for which agents may conduct these warrantless searches. Instead of limiting border searches to their traditional function of discovering prohibited items, the court permitted border officials to access travelers' digital libraries to search more generally for "evidence of activity in violation of the laws enforced or administered" by their agencies. Pet. App. 22a. And as the government admits, the "wide range of federal laws" these agencies enforce includes measures concerning "financial and trade-related" offenses, "intellectual-property rights," "food and drug safety," "agriculture," and "vehicle-emissions standards," among other "various areas." BIO 2. In other words, the decision below allows government agents to search travelers' digital papers—without a warrant or reasonable suspicion—for evidence of any offense that relates in some conceivable way to the border.

Under the Fourth Amendment, however, these searches must, at a minimum, be based on a

reasonable belief that a particular device contains digital contraband. The court below thought that limiting the border search doctrine in this way would revive the discredited "mere evidence" rule. *See* Pet. App. 22a n.13. But that is wrong: the contours and underpinnings of these two rules are entirely different.

As recounted above, in the twentieth century this Court transformed the *Boyd* decision—which had emphasized the unique status of private papers—into a broader rule that focused more exclusively 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, this Court rejected "[t]he premise that property interests control the right of the Government to search and seize." *Id.* at 304.

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 "evidence of . . . border-related crime." Pet. App. 21a. 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. For instance, the mere evidence rule prohibited seizing certain types 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 contraband. 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.

Apart from misconstruing this point, the court below also asserted that any intrusion on privacy and security stemming from its ruling would be mitigated by resource constraints that "limit[] in practice" how much time border agents can spend manually examining the contents of an electronic device. Pet. App. 18a & n.10. To be sure, "practical limits" prevent border agents from exhaustively reviewing every device that crosses the border, *id.*, but similar practical limits also prevent local police officers from exhaustively reviewing every device carried by every arrestee—and that did not give this Court pause in *Riley*.

In any event, such assurances miss the point. The Fourth Amendment protects "[t]he right of the people to be secure" in their papers against unreasonable searches. U.S. Const. amend. IV. No one can be "secure" in their digital papers if law enforcement officers may peruse 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). This Court should not allow the decision below to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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