Nos. 20-1077, 20-1081

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GHASSAN ALASAAD; NADIA ALASAAD; SUHAIB ALLABABIDI; SIDD BIKKANNAVAR; JÉRÉMIE DUPIN; AARON GACH; ISMAIL ABDEL-RASOUL aka 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 FOR AMICI CURIAE FLOYD ABRAMS; JACK M. BALKIN; HANNAH BLOCH-WEBAH; KIEL BRENNAN-MARQUEZ; RYAN CALO; DANIELLE KEATS CITRON; JULIE E. COHEN; CATHERINE CRUMP; MARY ANNE FRANKS; WOODROW HARTZOG; HEIDI KITROSSER; GREGORY MAGARIAN; NEIL M. RICHARDS; SCOTT SKINNER-THOMPSON; DANIEL J. SOLOVE; AMIE STEPANOVICH; KATHERINE J. STRANDBURG; and ARI EZRA WALDMAN IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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INTEREST OF AMICI CURIAE[1]

Amici are among the nation's leading privacy law and First Amendment legal scholars. They include law school professors who have studied, taught, and written extensively about these deeply intertwined areas of law. They are professionally committed to the development, understanding, and application of First Amendment doctrine in the digital age, and to the protection of privacy vital to free thought and expression. A list of amici, with descriptions of their credentials, is included in the Addendum to this brief.

SUMMARY OF THE ARGUMENT

The electronic-device border searches challenged in this case impermissibly burden several core First Amendment freedoms. By failing to subject the Government's electronic-device-search policies (the "Policies") to any meaningful First Amendment analysis, the district court failed adequately to protect these

[1] Amici submit this brief on behalf of Plaintiffs-Appellees/Cross-Appellants ("Plaintiffs"). Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part; no party or counsel for a party contributed money intended to fund preparing or submitting this brief; and no person, other than amici or their counsel, contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

fundamental freedoms.[2] Under the required First Amendment scrutiny, the Policies are unconstitutional.

Electronic devices are profoundly different from a person's other effects, as the Supreme Court has recently recognized on multiple occasions. Because of their immense storage capacity and their overwhelming prevalence in today's society, electronic devices contain a wide array of information concerning their users: years' worth of communications, photos, and videos; comprehensive contact lists; internet browsing histories; and a range of software and programs reflecting personal interests, beliefs, and associations. As a result of this massive trove of stored personal information, searches of electronic devices offer an unparalleled look into the most intimate details of individuals' private lives. Such searches by the Government, therefore, impose a tremendous invasion of privacy.

The Supreme Court has been vigilant in recent years in protecting these privacy interests under the Fourth Amendment. But, searches of electronic devices also substantially burden several core First Amendment freedoms, including the freedom of speech, the freedom to receive information, the freedom of association, and the freedom of thought. These fundamental freedoms are not protected by the Fourth Amendment, and some courts' First Amendment jurisprudence has been

[2] The term "Government" refers collectively to the Defendants in this case, the Acting Secretary of the Department of Homeland Security, the Acting Commissioner of U.S. Customs and Border Protection, and the Acting Director of U.S. Immigration and Customs Enforcement.

badly outpaced by technological advances. Rote application of decades-old precedent to this transformed technological landscape is in error, as the Supreme Court has repeatedly made clear. Rather, the continued vitality of First Amendment freedoms requires an independent First Amendment analysis of any electronic-device-search policy.

The district court rightly rejected the Government's argument that the electronic-device searches at issue need not be based on any level of suspicion because they occur at the border, finding instead that such a search requires a reasonable suspicion that a device contains contraband. *See Alasaad v. Nielsen*, 419 F. Supp. 3d 142, 165-68 (D. Mass. 2019). This finding fails, however, to protect sufficiently the fundamental constitutional rights implicated by electronic-device searches. The indisputable fact that First Amendment freedoms may be abridged by an electronic-device search demands that the Government obtain a warrant, upon a showing of probable cause, before undertaking any such search.

But even requiring a warrant will not fully protect the First Amendment freedoms at stake. To protect those fundamental freedoms fully requires an independent First Amendment analysis of the agency procedures followed and standards applied in deciding to conduct an electronic-device search, as courts have held in analogous contexts. *See, e.g.*, *Tabbaa v. Chertoff*, 509 F.3d 89, 101-05 & n.4 (2d Cir. 2007). Viewed through the lens of the First Amendment, the

Policies at issue here are unconstitutional. They permit *any* electronic device to be subjected to an all-encompassing search. This approach is not narrowly tailored to advance directly the Government's interest in border security, and it burdens First Amendment freedoms substantially more than necessary. Accordingly, the judgment below should be vacated in part, and this Court should hold that the Policies violate the First Amendment.

ARGUMENT

I. Electronic-Device Searches at the Border Substantially Burden Fundamental First Amendment Freedoms.

Electronic devices are ubiquitous in today's world. *See Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018); *Riley v. California*, 573 U.S. 373, 385, 395 (2014). They are unique in their profound capacity for storage of "vast quantities of personal information," *Riley*, 573 U.S. at 386; *see also id.* at 393-97, and are easily kept on one's person or in the person's immediate vicinity throughout the day, *see id.* at 393-95; *see also Carpenter*, 138 S. Ct. at 2218 (recognizing that individuals "compulsively carry cell phones with them all the time"). Indeed, the Supreme Court has recognized that "[t]he sum of an individual's private life can be reconstructed" from the wealth of personal information found on modern electronic devices. *Riley*, 573 U.S. at 394. Put differently, modern electronic devices "hold for many Americans 'the privacies of life.'" *Id.* at 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Recognizing the privacy

interests implicated by devices that store such a trove of personal information, the Supreme Court has vigilantly upheld Fourth Amendment protections against government efforts to search such devices or engage in other forms of surveillance permitted by advancing technologies. *See, e.g.*, *id.* at 386 (holding that officers must generally secure a warrant before conducting a search of data stored on cell phones); *Carpenter*, 138 S. Ct. at 2217, 2221 (finding a legitimate expectation of privacy in the cell-site location information concerning one's cell phone and holding that officers must generally obtain a warrant before acquiring cell-site location information for a particular cell phone).

Wholly apart from the Fourth Amendment, however, an individual's privacy interests in information stored on an electronic device are protected by several First Amendment freedoms. For as long as the Supreme Court has recognized a constitutional right to privacy, it has also recognized that this privacy is foundational to First Amendment freedoms. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (noting "the vital relationship between freedom to associate and privacy in one's associations"); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (describing the penumbra of the First Amendment "where privacy is protected from governmental intrusion"); *Katz v. United States*, 389 U.S. 347, 350 & n.5 (1967) (citing the First Amendment as an example of a constitutional protection of "personal privacy from other forms of governmental

invasion"). The privacy invasions inherent in any electronic-device search substantially burden core First Amendment freedoms, including the freedom of speech, freedom of association, freedom to receive information, and freedom of thought.[3]

As an initial matter, electronic-device searches substantially burden an individual's freedom of speech. The First Amendment protection of speech includes the right to keep one's communications and writings private and one's identity anonymous. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *see also Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002); *Talley v. California*, 362 U.S. 60, 64 (1960). Yet, as the record in this case demonstrates, electronic-device searches allow border agents to read the thousands of private text messages, emails, and other correspondence typically stored on these devices. *See Alasaad*, 419 F. Supp. 3d at 151, 161. This type of intrusion necessarily deters individuals from communicating freely—it invades the privacy necessary for open communication. In this way, electronic-device searches directly impinge upon the freedom of speech.

[3] Searches of electronic devices at the border place particular burdens on journalists, who often store notes, story drafts, and contact information for confidential sources on their phones. For a more detailed discussion of how electronic-device searches burden freedom of the press specifically, amici refer the Court to the Brief of the Knight Institute and the Reporters Committee for Freedom of the Press as Amici Curiae.

Electronic-device searches also substantially burden the First Amendment "right to associate with others," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), and the corresponding right to "privacy in one's associations." *NAACP*, 357 U.S. at 462-63. Many individuals are less likely to associate freely when they think the government is monitoring the groups to which they belong. *Id.* The First Amendment thus restricts government-compelled disclosure of a group's members, *see id.*; *Bates v. Little Rock*, 361 U.S. 516, 523 (1960), as well as government efforts to coerce broad disclosures of individuals' personal associations, *see Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960).

Electronic-device searches limit these associational freedoms because they reveal substantial information about one's associations to the Government. Electronic devices contain a vast array of associational information, including contact lists and communication records. *See Riley*, 573 U.S. at 393-94. These records can reveal "participation in email campaigns, or subscribing to an informational listserve, which could mark an individual as a 'member' of an association." Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741, 752 (2008). Electronic devices also store location data, which "provides an intimate window into a person's life, revealing not only [one's] particular

movements, but through them [one's] 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). The compelled disclosure of this trove of information to government agents that occurs with each electronic-device search profoundly threatens the freedom of association protected by the First Amendment.

Additionally, electronic-device searches substantially burden the freedom to receive information. The First Amendment undeniably protects a person's right "to receive information and ideas," and to do so while "free, except in very limited circumstances, from unwanted government intrusions into one's privacy," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). However, because individuals use their electronic devices to access a wide range of information sources,[4] device searches threaten their ability to do so privately. Given the quantity and detail of the information that devices contain, the fear of what agents may find influences the materials people view in the first place. Multiple studies confirm that people self-censor the information

[4] A 2015 Pew Research study documented the ways that Americans use their cell phones to access online information. In one year, 62% of those studied reported having used a phone to access information about health conditions, 43% for jobs, 40% for government services, and 30% for education. *U.S. Smartphone Use in 2015*, Pew Research Center 5 (Apr. 1, 2015), https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/. The same study found that 10% of Americans have broadband internet access ***only*** through their cell phone data plan. *Id.* at 3.

they seek when they fear they are being watched. *See, e.g.*, Jonathon W. Penney, *Chilling Effects*, 31 Berkeley Tech. J. 117, 130, 146 (2016) (finding "a large, sudden, and statistically significant drop" in views of terrorism-related Wikipedia articles following the Snowden disclosures of NSA surveillance, which revealed government "monitoring of phone records, e-mails, online chats, and browser histories," among other surveillance).[5]

This demonstrated tendency of government surveillance to lead to self-censorship not only burdens an individual's freedom to receive information, but it also foreshadows an even graver consequence: the inhibition of thought development. The harmful effects on thought development caused by government invasions of privacy by the government are well documented.[6] The "[i]ntellectual

[5] *See also* Alex Matthews & Catherine Tucker, The Impact of Online Surveillance on Behavior, *The Cambridge Handbook of Surveillance Law* 437, 445-51 (D. Gray & S. Henderson eds., 2017) (noting that surveillance led to a decrease in searches for health-related terms); Lee Rainey & Mary Madden, *Americans' Privacy Strategies Post-Snowden*, Pew Research Ctr. 4 (Mar. 16, 2015) (finding that 22% of American adults had changed their "use of various technological platforms 'a great deal' or 'somewhat' since the Snowden revelations"); The FDR Group, *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor*, PEN Am. Ctr. 6 (Nov. 12, 2013) (finding that, post-Snowden, "1 in 6 writers has avoided writing or speaking on a topic they thought would subject them to surveillance" and "[a]nother 1 in 6 has seriously considered doing so").

[6] *See, e.g.*, Neil M. Richards, *The Dangers of Surveillance*, 126 Harv. L. Rev. 1934, 1950 (2013) (arguing that intellectual privacy is required to guard against the "normalizing gaze of surveillance"); Margot Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance Beyond Chilling Speech*, 49 U. Rich. L. Rev. 465, 499, 500 (2015) (using social-

records—such as lists of Web sites visited, books owned, or terms entered into a search engine—" that are stored on electronic devices "are in a very real sense a partial transcript of the operation of a human mind." Neil M. Richards, *Intellectual Privacy*, 87 Texas L. Rev. 387, 436 (2008). Just as the First Amendment guards against invasions that chill the exercise of outward activities needed for a free society, it must also protect their antecedent—thoughts themselves—from government intrusion. Indeed, the Supreme Court has characterized freedom of thought as the very "beginning of freedom" as we know it. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) ("Freedom of thought . . . is the matrix, the indispensable condition, of nearly every other form of freedom."). Because electronic-device searches represent such an unparalleled invasion of personal privacy, they substantially burden the fundamental freedom of thought.

In sum, electronic-device searches directly invade our many freedoms protected by the First Amendment. Thus, as set forth below, the First Amendment

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science research to demonstrate that surveillance "is damaging to the development of diverse viewpoints"); Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First?*, 127 Yale L.J. F. 444, 449 (2017), http://www.yalelawjournal.org/forum/why-rely-on-the-fourth-amendment-to-do-the-work-of-the-first (comparing surveillance to the "observer effect" in physics: "Unobserved, a citizen's thoughts—like particles—follow their own path. But the more closely watched they become, the more their possible paths are determined by the very act of observation.").

must be central to any constitutional analysis of a government policy authorizing searches of electronic devices.

II. The District Court Erred in its Treatment of the First Amendment Freedoms Burdened by Electronic-Device Searches at the Border.

The district court failed to give full consideration to the First Amendment freedoms burdened by searches of electronic devices at the border. The court expressly declined to undertake a First Amendment inquiry independent of its Fourth Amendment analysis, instead concluding that its adoption of the reasonable suspicion standard would be sufficient to protect the many First Amendment freedoms at stake. *See Alasaad*, 419 F. Supp. 3d at 169-70. This conclusion was incorrect.

As an initial matter, and at an absolute minimum, the impact on First Amendment freedoms requires issuance of a warrant before the search of an electronic device can occur. But this heightened Fourth Amendment protection does not alone sufficiently safeguard the vital First Amendment freedoms at stake. *See infra* Part II.B. Thus, an independent First Amendment analysis is required: the Government must demonstrate that its actions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information.

A. Because Electronic-Device Searches Burden First Amendment Freedoms, a Warrant is Required Before the Search Can Occur.

Because determining what is reasonable under the Fourth Amendment depends on particular facts and circumstances, *see Roaden v. Kentucky*, 413 U.S. 496, 501 (1973), the Supreme Court has consistently "recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979). Under the principle of "scrupulous exactitude," a warrant is required for searches of materials protected by the First Amendment. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)); *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 873-74 (1986); *Roaden*, 413 U.S. at 504; *Heller v. New York*, 413 U.S. 483, 491-92 (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205, 210-11 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 731-33 (1961). Indeed, the Court has explained that "no less a standard could be faithful to First Amendment freedoms." *Stanford*, 379 U.S. at 484.

It is undisputed that the electronic devices at issue here contain materials and information protected by the First Amendment. *See Alasaad*, 419 F. Supp. 3d at 168. Under the case law cited above, these First Amendment materials could not be searched without a warrant. The district court erred in concluding, to the contrary, that the mere presence of reasonable suspicion can justify a search of an electronic device in the absence of a warrant. The warrant requirement is the

absolute minimum protection required. Even that level of Fourth Amendment protection, however, is insufficient in itself to protect the First Amendment freedoms eroded by electronic-device searches at the border.

B. Electronic-Device Searches Require Independent First Amendment Analysis.

Relying solely on a Fourth Amendment analysis to protect First Amendment freedoms critically overlooks the important differences between the distinct protections of those amendments and the manner in which those protections are enforced. Only an independent First Amendment analysis can properly protect the First Amendment freedoms at stake.

By failing to apply independent First Amendment scrutiny, the district court incorrectly assumed that the Fourth Amendment procedures fully protect First Amendment rights. But "the *First* Amendment operates independently of the Fourth and provides different protections." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorsuch, J., concurring in part and dissenting in part). In particular, there are at least three crucial differences in the way that the First and Fourth Amendments protect against unlawful government intrusions.

First, the two amendments protect different interests and do so with different scopes. The First Amendment protects a range of interests, including those enumerated in Part I, and First Amendment jurisprudence protects these interests both at the individual and societal level. The Supreme Court has repeatedly

stressed that the First Amendment interests of those not before the Court can be vindicated in actions brought by others. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (holding that plaintiffs were "permitted to challenge a statute not because their own rights of free expression are violated," but because a statute's "existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (explaining that "the people as a whole retain their interest in free speech" under the First Amendment); *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (stating that, under the First Amendment, both the "interest of the community and that of the individual in freedom of discussion" must be considered).

The Fourth Amendment, by contrast, protects an individual's privacy interests only from unreasonable searches and seizures. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2213-14. Because Fourth Amendment rights are individual rights only, they "may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). The Fourth Amendment thus does not recognize the cumulative effect an invasive government search program has on society. *See, e.g.*, *In re* Application of the FBI for an Order Requiring the Production of Tangible Things from [redacted], BR 13-109, at 9 (FISA Ct. Aug. 29, 2013) ("[W]here one individual does not have a Fourth Amendment interest, grouping together a large number of

similarly-situated individuals cannot result in a Fourth Amendment interest springing into existence ex nihilo.").

Simply put, the Fourth Amendment does not perform the work and provide the protection of the First Amendment. Knowing that government agents can review the text messages, emails, and contacts of any person returning from international travel chills expression and association at a societal level and impacts a far broader swath of interests than an individual's right to be free from unreasonable searches. The district court ignored this societal impact and the several additional interests at stake when it relied on a Fourth Amendment analysis alone.

Second, courts review government officials' actions with different levels of scrutiny when evaluating claims under each amendment. When reviewing First Amendment claims, courts will not defer to government officials' decisions because those individuals are neither trained nor authorized to assess First Amendment violations. Indeed, "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992). The Court has accordingly repeatedly struck down statutes that give officials broad leeway to police or discriminate against speech. *See Smith v. Goguen*, 415 U.S. 566, 578 (1974); *see also City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750, 772 (1988). By contrast,

under Fourth Amendment jurisprudence, courts often defer to law enforcement when evaluating the relationship between search tactics and the circumstances that initially justified the search. *See, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (deferring to border officers' reasonable suspicion that the individual they searched "was smuggling narcotics in her alimentary canal" because "trained" officers, unlike federal judges, "had encountered many alimentary canal smugglers.").

Third, the First Amendment offers stronger protection than the Fourth in its demand for narrow tailoring. As applicable here, the First Amendment demands that government actions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. *Cutting v. City of Portland*, 802 F.3d 79, 84 (1st Cir. 2015). Again, and by contrast, the touchstone of the Fourth Amendment is reasonableness. *See Riley*, 573 U.S. at 381. So long as a search clears this reasonableness threshold, the Fourth Amendment imposes no further restrictions on government action, irrespective of whether there are alternative, less-intrusive means. *See Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

Because of each of the differences between the two amendments, the district court's sole focus on the Fourth Amendment failed to evaluate adequately Plaintiffs' First Amendment claims. The district court erred in concluding that a

separate First Amendment analysis was unnecessary.[7] An independent First Amendment analysis is the ***only*** way to protect the First Amendment interests at stake.

C. The Border-Search Exception to the Fourth Amendment's Warrant Requirement Cannot Justify a Failure to Conduct an Independent First Amendment Analysis of Electronic-Device Searches.

The Government suggested below that the border-search doctrine permits warrantless (and, indeed, suspicionless) searches of electronic devices at the border, notwithstanding any First Amendment freedoms that would be burdened by those searches. *See* Gov't's Mem. in Support of Mot. to Dismiss 21-23 (ECF No. 15). This suggestion—essentially that the First Amendment does not apply at the border—must be rejected for at least two reasons. First, it fails to recognize that the border-search doctrine is an exception to the warrant requirement of the *Fourth* Amendment and was never intended to eradicate freedoms secured by other

[7] Neither case cited by the district court, *see Alasaad*, 419 F. Supp. 3d at 170, supports this conclusion. The Court's decision in *P.J. Video* held simply that "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." 475 U.S. at 875. That decision does not stand for the proposition that a government policy is immune from independent First Amendment scrutiny when, as here, it is challenged in a case seeking injunctive and declaratory relief and outside the context of a criminal prosecution. Similarly, the other case cited by the district court, *United States v. Brunette*, 256 F.3d 14, 16-17 (1st Cir. 2001), involved a straightforward application of *P.J. Video*'s holding in the context of a criminal defendant's challenge to the sufficiency of a search-warrant application.

amendments, such as the First Amendment freedoms at issue in this case. Second, the Supreme Court's emphatic recognition that electronic devices are both quantitatively and qualitatively different from a person's other effects, *see Riley*, 573 U.S. at 393, demonstrates that it is error to apply mechanically decades-old precedent to electronic devices. Instead, as several cases have recognized, the First Amendment freedoms that undeniably exist at the border require application of independent First Amendment scrutiny.

The border-search doctrine operates as an exception to the *Fourth* Amendment's warrant requirement; under that doctrine, "routine" border searches are reasonable for Fourth Amendment purposes even in the absence of a warrant, probable cause, or reasonable suspicion. *See United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004); *United States v. Ramsey*, 431 U.S. 606, 617-19 (1977). The Supreme Court has never suggested that citizens lose First Amendment rights, or any rights secured by amendments other than the Fourth Amendment, during border searches. The district court was therefore correct in recognizing that the mere fact that a "search and seizure occurred at the border does not strip [a citizen] of his First Amendment rights." *Alasaad*, 419 F. Supp. 3d at 169 (quoting *House v. Napolitano*, No. 11–10852–DJC, 2012 WL 1038816, at *13 (D. Mass. Mar. 28, 2012)).

Moreover, the Supreme Court has recently recognized on two separate occasions that searches of electronic devices are profoundly different than searches of an individual's other objects. *See Riley*, 573 U.S. at 386, 393; *Carpenter*, 138 S. Ct. at 2217. As a result of these differences, the Court has rejected mechanical extension of Fourth Amendment doctrine to searches of electronic devices and information derived therefrom. *See Riley*, 573 U.S. at 386 (rejecting a "mechanical application" of prior precedent and holding that searches of cell phones could not be justified under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement); *see also Carpenter*, 138 S. Ct. at 2217, 2219 (declining to "mechanically apply[ ]" the Fourth Amendment's third-party doctrine to the "novel circumstances" presented by "the unique nature of cell phone location records" because "[t]here is a world of difference between the limited types of personal information addressed in [the relevant third-party-doctrine precedent] and the exhaustive chronicle of location information casually collected by wireless carriers today."). The staggering technological capabilities presented by electronic devices, when coupled with their immense storage capacity, led the Court to recognize the need for careful analysis instead of mere extension of existing precedent that may appear, at first blush, to be analogous. *See Riley*, 573 U.S. at 385-86, 393; *see also Carpenter*, 138 S. Ct. at 2216-17, 2219.

This analysis applies with full force to electronic-device searches at the border. The out-of-circuit cases relied upon by the Government below—*United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005), and *United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008)—engaged in just the sort of rote application of decades-old precedent that the Supreme Court has made clear fails to recognize the critical differences between searches of electronic devices and searches of other objects. Those opinions, therefore, are doctrinally unsound today.[8] This Court should not follow the flawed reasoning of *Ickes* and *Arnold*.[9]

[8] *Ickes* and *Arnold* also both erroneously suggest that applying the First Amendment to border searches would somehow create a "First Amendment exception" to the border-search doctrine. *See Ickes*, 393 F.3d at 506; *Arnold*, 533 F.3d at 1010. That suggestion fails to appreciate that the border-search doctrine is a creature of the *Fourth* Amendment and in no way eradicates the freedoms of the First Amendment, as explained above.

[9] For similar reasons, the Court's decision in *Ramsey* does not preclude an independent First Amendment analysis of the Policies. *Ramsey*'s treatment of First Amendment interests was expressly linked to the then-prevailing system of border searches. *See id.* at 623 ("[T]he *existing system* of border searches has not been shown to invade protected First Amendment rights . . . ." (emphasis added)). The *Ramsey* Court obviously had no occasion in 1977 to address the profound First Amendment implications of a border search of an electronic device, which effectively allows users to "lug around every piece of mail they have received for the past several months, every picture they have taken, [and] every book and article they have read," among other information. *Riley*, 573 U.S. at 393-94. Moreover, given the statutory and regulatory restrictions that applied to the conduct at issue in *Ramsey*, the Court explicitly declined "to decide whether, in the absence of the regulatory restrictions, speech would be 'chilled,' or, if it were, whether the appropriate response would be to apply the full panoply of Fourth Amendment requirements." *Ramsey*, 431 U.S. at 624 n.18; *see also id.* at 624.

Instead, an independent First Amendment analysis is necessary to ensure that the profound privacy interests and First Amendment freedoms implicated by electronic-device searches are respected. In *Tabbaa*, a case involving both First and Fourth Amendment claims arising from a border search, the Second Circuit recognized that an independent First Amendment analysis was required. The court explained that determining whether an individual's rights were burdened "under the First Amendment ***requires a different analysis, applying different legal standards***, than distinguishing what is and is not routine in the Fourth Amendment border context." *Id.* at 102 n.4 (emphasis added). For that reason, even after it rejected the plaintiffs' Fourth Amendment claims by invocation of the border-search doctrine, *see id.* at 98-101, the court nonetheless proceeded to conduct an independent First Amendment analysis of the plaintiffs' First Amendment claims. It required the CBP to demonstrate both that the special operation served a compelling government interest and that it could not have achieved that interest through means significantly less restrictive of the plaintiffs' First Amendment right to association, *see id.* at 101-05. Other cases have similarly conducted an independent First Amendment analysis of burdens on First Amendment freedoms that occur at the border. *See, e.g.*, *Cherri v. Mueller*, 951 F. Supp. 2d 918, 933 (E.D. Mich. 2013); *Heidy v. U.S. Customs Serv.*, 681 F. Supp. 1445, 1450 (C.D. Cal. 1988).

In sum, irrespective of the fact that these searches occur at the border, an independent First Amendment analysis is required because of the profound privacy interests explicitly recognized by the Supreme Court with respect to electronic-device searches.[10]

III. The Policies Fail Independent First Amendment Scrutiny.

As demonstrated above, *see supra* Part II.B, independent First Amendment scrutiny is necessary to protect the First Amendment freedoms that are substantially burdened by electronic-device searches.

The Policies, even with the additional requirement imposed by the district court, cannot survive any level of heightened First Amendment scrutiny, whether strict or even intermediate scrutiny.[11] Under intermediate scrutiny, the

[10] With respect to other amendments, courts have recognized that conduct that withstands scrutiny under one amendment's jurisprudence might nonetheless violate another amendment. For example, there can be a violation of the Fifth or Fourteenth Amendment's Equal Protection Clause in the case of an arrest based on discriminatory grounds, even where the Fourth Amendment is satisfied because the objective facts demonstrated probable cause for the arrest. *See Nieves*, 139 S. Ct. at 1731 (Gorsuch, J., concurring in part and dissenting in part) ("Everyone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause."); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Holland v. City of Portland*, 102 F.3d 6, 11 (1st Cir. 1996).

[11] Plaintiffs argued and amici agree that the Policies should be subjected to strict scrutiny. Electronic devices contain troves of highly sensitive information concerning Plaintiffs' expressive activities and personal, confidential, and anonymous communications and associations. Forced disclosure of such core First Amendment activity must survive strict scrutiny. *See, e.g.*, *NAACP*, 357 U.S. at 460-62 (compelled disclosure of associations requires strict scrutiny); *Gibson v.*

Government must show that the Policies are "narrowly tailored to serve a significant governmental interest, and [leave] open ample alternative channels for communication of the information." *Cutting*, 802 F.3d at 84 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).[12] The Policies are not narrowly tailored, under any and all articulations of this requirement, and thus are unconstitutional under the First Amendment.

The Government undeniably has an interest in protecting its borders, but the mere presence of a significant governmental interest does not end the First Amendment inquiry. Rather, the government action under review must be narrowly tailored to serve that interest. First Amendment narrow tailoring constrains government action in two often-overlapping ways. First, there must be a close fit between the governmental interest and the means selected to achieve that interest. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (explaining that the First Amendment's narrow tailoring requirement "demand[s] a close fit between

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Fla. Legis. Investigation Comm., 372 U.S. 539, 544-46 (1963) (government demands for information revealing expressive activities requires strict scrutiny); *In re Grand Jury*, 706 F. Supp. 2d 11, 17-18 (D.D.C. 2009) (compelled disclosure of records of customer purchases of expressive materials requires strict scrutiny). Here, however, where the Policies fail even intermediate scrutiny for the reasons discussed below, this Court need not reach the question of whether the Policies must be subjected to strict scrutiny.

[12] Because the Policies restrict substantially more speech than is necessary, and because there were less restrictive means of serving the Government's significant interest in protecting the border, this Court need not address the Policies' separate fatal failure to leave open ample alternative channels for communication.

ends and means"); *Cutting*, 802 F.3d at 86 (explaining that "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency"). Second, the First Amendment bars the government from burdening "substantially more speech than is necessary" to further the asserted government interest. *McGuire v. Reilly*, 260 F.3d 36, 48 (1st Cir. 2001); *see also Cutting*, 802 F.3d at 90 (invalidating a city ordinance banning pedestrians from roadway medians because it was "so sweeping that it does ban substantially more speech than necessary to serve the City's interest"). The Policies clearly fail the narrow-tailoring requirement in both respects.

The Policies do not directly advance the Government's interest in border security *and* they burden substantially more speech than necessary. The Policies do nothing to restrict searches to the Government's purpose in preventing border-related crimes and are thus grossly overinclusive. Indeed, provided that officers have "reasonable suspicion," the Policies allow border agents to go through *every* item stored on a traveler's device. As demonstrated in the undisputed factual record, border officers routinely take advantage of these Policies to do just that. *Alasaad*, 419 F. Supp. 3d at 149-50. Therefore, under the current version of the Policies, substantially more speech is burdened than is necessary to achieve the governmental interest at stake. This First Amendment harm is not limited to the individuals who are actually searched. Regardless of whether an individual is

subjected to a search, the search regime erected by the Policies—whereby electronic devices can be subjected to an invasive, all-encompassing search on the basis of nothing more than a single border agent's on-the-spot belief that reasonable suspicion is present—threatens to chill the speech of every international traveler.

Moreover, the district court did not and indeed could not support its suggestion that there are no less restrictive means that can be utilized here. *See Alasaad*, 419 F. Supp. 3d at 169. There are in fact multiple ways that the Government could restrict device searches to target contraband narrowly. As an initial matter, the minimal requirement that the Government obtain a warrant before conducting an electronic-device search would be more tailored and burden less speech than the Policies in their current form. Additionally, law enforcement, internet service providers (ISP), and websites all routinely use automated tools developed specifically to detect child pornography and copyrighted material. *See, e.g.*, *United States v. Keith*, 980 F. Supp. 2d 33, 36-37 (D. Mass. 2013) (explaining how an ISP uses "hash value[s]" to identify and report child pornography); Dennis Martin, *Demystifying Hash Searches*, 70 Stan. L. Rev. 691, 699 (2018) (explaining how law enforcement can use a "hash search" to "quickly exclude files guaranteed not to contain evidence"). The Government could use similar tools to locate digital contraband while minimizing officers' exposure to emails, text messages, contact

lists, and other expressive materials. Agencies could also require that device searches be conducted only by specialists trained to identify digital contraband. *See* Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 Yale L.J. F. 961, 998 (2019). The Government's failure "to address the problem with less intrusive tools readily available to it," *Cutting*, 802 F.3d at 92, provides further support that the Policies are not sufficiently tailored.

The Policies are not tailored to achieve the Government's interest in preventing border crimes and burden substantially more speech than necessary. For these reasons, they are clearly not narrowly tailored. They are, therefore, unconstitutional under the First Amendment. By failing to conduct this First Amendment analysis and denying Plaintiffs any relief on First Amendment grounds, the district court erred.

CONCLUSION

For all these reasons, the judgment below should be vacated in part, and this Court should hold that the Policies violate the First Amendment.[13]

Respectfully submitted,

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[13] This brief was prepared with substantial assistance from Jackson Busch, James Fitch, and Lorand Laskai, students in the Media Freedom & Information Access Clinic at Yale Law School. It does not represent the institutional interests of Yale Law School or Yale University, if any.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,250 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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