UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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GHASSAN ALASAAD, et al.,

Plaintiffs,

V.

ELAINE DUKE, et al.,

Defendants.

_____

Civil Action
No. 17-11730-DJC

April 23, 2018
2:56 p.m.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on April 23, 2018.)

THE CLERK: Court is in session. Please be seated.

Civil action 17-11730, Ghassan Alasaad, et al. v. Elaine Duke, et al.

Would counsel please state your name for the record.

MR. SCHWARTZ: Good morning, your Honor. Adam Schwartz from the Electronic Frontier Foundation for the plaintiffs.

MS. BHANDARI: Esha Bhandari from the ACLU for the plaintiffs. If the Court will grant permission, plaintiffs' counsel would like to split oral argument with Mr. Schwartz on standing, and I would argue the merits.

THE COURT: Thank you. Good afternoon to you both.

MR. SCHWARTZ: And, your Honor, I would just like to introduce the other counsel who are with us today. We have Aaron Mackey from the EFF; and also Hugh Handeyside, Nate Wessler, and Jessie Rossman from the ACLU; and we have two of our plaintiffs here today, Sidd Bikkannavar and Matt Wright.

THE COURT: Good afternoon.

MR. DREZNER: Good morning, your Honor. Michael

Drezner from the Department of Justice for defendants.

MS. BALAKRISHNA: Good afternoon, your Honor. AUSA Annapurna Balakrishna, local counsel.

THE COURT: Good afternoon.

Counsel, I know we're here on the defendants' motion to dismiss.

Counsel, I'm fine to have you split argument. I was thinking about 20 minutes either side. If you'd like to reserve some time for rebuttal, just let me know.

02:57 I will tell you that I have read the papers on both sides, as well as the policies, as well as the amicus briefs. So I understand the parties' positions, but I am more than happy to hear argument today.

Counsel.

MR. DREZNER: Thank you, your Honor. I'll reserve five minutes for rebuttal.

THE COURT: Sure.

MR. DREZNER: Thank you, your Honor. May it please the Court.

02:58 This case concerns the government's authority to conductor searches of electronic devices at the international border. Eleven plaintiffs have brought facial challenges to that authority here under three legal claims. As your Honor said, I think you're well aware of what they are, so I'll move right into standing and why your Honor need not even reach

those claims.

The first argument that they bring is they are going to go through a future search of their electronic devices at the border. But I think it's important to note that their burden here is a bit higher than it would otherwise be to show standing.

First, as the court noted in Clapper, the inquiry has to be especially rigorous where a court is asked to find unconstitutional the acts of another branch of government, and
02:58 that's certainly what they're asking for here.

Second, Lyons held that past injury in and of itself does not provide an entitlement to prospective injunctive relief, rather, plaintiffs have to show a sufficient likelihood of injury. And Clapper clarifies on this score that the injury has to be certainly impending and that allegations of possible future injury do not suffice. And plaintiffs --

THE COURT: But isn't there a showing here in that regard? My recollection -- I don't remember the exact number, but there are a number of the plaintiffs here that were
02:59 subjected to multiple searches. So what do you say to that argument?

MR. DREZNER: I think, your Honor, they would have to make some allegation in the complaint to say that they are somehow at a heightened risk of search in the future, and not just that, but that that risk indicates that that search is

certainly impending.

So, first, they haven't brought any allegation in the complaint, they don't say anything in the complaint about why they are more at risk in the future, they simply bring that up in one of their briefs. But even there, your Honor, they're simply speculating. They say, you know, whatever prompted these searches in the past may prompt a search in the future. So when plaintiffs have to speculate about the likelihood of their own injury, standing is clearly lacking.

03:00 So I think plaintiffs try and argue for this realistic risk standard quoting the Burner v. Delahanty case from the 1st Circuit, but to the extent that is less than the certainly impending requirement from the Supreme Court, that's simply incompatible. But looking to that case, the Court --

THE COURT: But isn't it imminent or a substantial risk that harm will occur?

MR. DREZNER: That's right, your Honor. In the Clapper decision there's a footnote saying, Well, in certain instances we found that a substantial risk could suffice where

03:00 plaintiffs took or incurred reasonable costs due to the substantial risk of a harm. And so I think the court was strongly implying at least that the substantial risk standard applies where plaintiffs may incur some cost due to the risk of a future injury.

Plaintiffs haven't alleged they have incurred any

costs here, and so I'm not sure that that standard applies. Even if it would, even if it could, we would argue they haven't met it either. That standard is certainly less than even an objectively reasonable likelihood of harm, which the Clapper court said was not consistent with their requirement that an injury be certainly impending. So plaintiffs have to show, I think, at bottom to this Court that if it were to reach the merits of this case, it would not be rendering an advisory opinion, but rather directly addressing a concrete injury that will occur in the future and not simply something that may occur in the future.

And so plaintiffs, I think, in the end resort to this probabilistic injury theory of harm. But, in fact, that theory has been very narrowly applied. Kerin v. Titeflex quoted the D.C. circuit to say were all heightened risks of injury enough to get into federal court, the entire requirement of Article III injury would be rendered moot. And it's for that reason that this theory has only come up in environmental and other health and safety sort of cases. And plaintiffs don't point to any similar cases on First or Fourth Amendment grounds applying this 1 in 10,000 chance as being sufficient to establish a concrete and particularized injury.

So with that said, I'll move on.

Plaintiffs' only other basis of injury is this idea of expungement, to get the government to destroy or return the

information they claim may have been retained, and I think there's a couple of points to note here.

First, even if plaintiffs have standing to seek expungement, that would only give them standing to seek expungement. They won't have standing to seek the other type of injunctions and declarations they're looking for here. But more importantly, your Honor, they don't have standing on this ground for two reasons: First, all plaintiffs, except one, have not even alleged any injury on this ground. They haven't stated that the government actually retained any of their information. So, indeed, all plaintiffs, I think it's 10 of the 11, have failed to establish an injury on this ground.

THE COURT: But where we're at the motion to dismiss stage and I have to take all of the allegations as true in the amended complaint, and I think I can take judicial notice, which I think most parties are comfortable with me doing of the various policies, isn't that the reasonable implication from the allegations about the length of time at which certain border agents had access and in some cases manually viewed the electronic devices in front of the plaintiffs? And my memory is, counsel, correct me if this is wrong, there's actually some language in the policies about agents documenting what they find. So isn't that the reasonable upshot of all of those things?

MR. DREZNER: I don't believe so, your Honor.

Respectfully, if plaintiffs wanted the Court to find those facts or draw those inferences, they could have stated as much in the complaint. They state very clearly where they think they have any basis for an allegation that some information was retained, and they do so with respect to plaintiff Matthew Wright. But every other plaintiff they simply don't allege that information was or even could have been retained. Some of these searches were short, 15 minutes, others were a bit longer. But plaintiffs don't say anything in the complaint as to which ones information have been retained in and why. So it's simply not proper for the Court to assume facts that plaintiffs haven't even alleged I would say.

THE COURT: But I guess, counsel, what I'm struggling with this argument is if the case -- is this an issue that I can decide at this juncture if I find that it's been plausibly alleged here or the reasonable inference can be drawn from the complaint?

MR. DREZNER: Your Honor, I think it's something you can decide. I think the Clapper court dealt with this. In a footnote it says, Well, gosh, why don't we have the government submit something to the Court in camera and basically explain whether or not they've intercepted plaintiff's communications and whether they have standing. And the Court said very plainly it is plaintiff's burden to establish standing by pointing to specific facts. It's not the government's burden

to disprove standing by revealing its surveillance priorities. And so I don't think discovery would allow plaintiffs to get any further. They have to stick with what they know and what they can allege in the complaint, and that's simply not sufficient enough to state an injury here. I think, further, all plaintiffs, including Matthew Wright, lack standing on this ground because they cannot show redressability. I don't think they dispute that in general it is not unlawful for the government to use information even when it's obtained
03:05 unlawfully in official proceedings like parole revocation proceedings or immigration proceedings. That's Hornbook law. And so while certainly the government would maintain that any information retained here was done so legally, even if they could show that all of their claims are meritorious, they simply could not receive the remedy of expungement because they haven't brought a claim to say that the retention of that information is itself unlawful. So there's simply no basis for this Court to find at this stage that it could likely grant the remedy of expungement that they now seek. So it's for that
03:06 reason they lack standing --

THE COURT: Both as to the Fourth Amendment allegations and the First Amendment allegations?

MR. DREZNER: That's correct, your Honor.

THE COURT: I suppose I might follow you as to the Fourth Amendment, but why would that be true as to the First?

MR. DREZNER: I'm sorry, your Honor, could you clarify?

THE COURT: Meaning, I understand your argument that you're saying essentially it wouldn't be illegal for them to retain unlawfully obtained information, is sort of the crux of your argument. Is that true as to both the Fourth Amendment and the First Amendment allegations?

MR. DREZNER: Your Honor, I think their claims are very precisely worded, and both the Fourth and the First Amendment claim say only that the search of the electronic device was itself unlawful. And so even if the Court were to agree with them that on that, that would not provide a basis to then expunge information that had been retained. I think plaintiffs would need to bring a further argument to argue legally that retention of this information is unlawful, as your Honor said, under the First Amendment. But they haven't brought any legal claim that the government can address, so we can't either discuss whether that's a valid claim or not because it hasn't been brought. So, yes, your Honor, I think it would apply equally in both contexts.

I think even if this Court were to reach the merits, the complaint should be dismissed nonetheless. Your Honor properly recognized in the House decision that the border is a unique context under the Fourth Amendment, and so I'll turn to that claim first.

I think Flores-Montano, Montoya de Hernandez, and a host of other cases have emphasized that the government's interest in preventing unwanted persons and effects is at its zenith at the international border, and it's for that reason that the court held in Ramsey there has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. Put another way, there's never been a warrant requirement at the border, and that's exactly what plaintiffs are arguing for here.

03:08

I think it's also for this reason in light of all of this case law that the vast majority of searches at the border do not require any individualized suspicion, that's in light both of the government's compelling interests and the traveler's diminished interest in privacy at the border.

As your Honor recognized in House, it's only the most intrusive searches that impinge on travelers' dignity that require even reasonable suspicion, and those are strip-searches and body cavity searches under the Braks holding. Indeed, a border search that is less intrusive than those requires no reasonable suspicion at all, that's pursuant to Braks.

03:09

And so it's in light of all these standards, your Honor, that numerous courts have considered this precise question, and all have uniformly held that probable cause and a warrant is not required to do a search of electronic devices at

the border. This dates as far back as the Hampe case in 2007 in the District of Maine, and I think we cite maybe 20-plus cases all to this effect in our brief. Plaintiffs simply doesn't distinguish this.

I would highlight --

THE COURT: I guess, counsel, and I'm still -- I understand all of the cases you cited, but I believe some of them predate the Supreme Court's decision in Riley.

What do you say -- I know you take the position that Riley doesn't support on its face or by extension the plaintiffs' position, but what do you say in light of Riley? There seem to be -- I mean, it's -- obviously it's not dealing with the border, but it's certainly dealing with another exception to the warrant requirement where Chief Justice Roberts seem to be pointing out the ways in which the digital devices in our lives are very different in terms of the balance between governmental interests and privacy. So what do you say in light of Riley?

MR. DREZNER: I think there's a couple of things.

First, the 1st Circuit's decision in Molina-Gomez in 2015 postdates Riley. That case primarily dealt with the physical disassembly and search of a laptop, but it's important to note that that border search also involved the officers turning on the laptop, seeing there was no data on it, looking at the traveler's cell phones, seeing suspicious text messages,

and those factors, along with others, prompted further searches. That was of no moment to the 1st Circuit. So I think even after Riley the 1st Circuit either held or very strongly implied that these types of electronic searches don't require even reasonable suspicion, let alone probable cause and a warrant.

To answer your Honor's question more directly, I think, as you noted, Riley only applies to the search incident to arrest exception. So several courts have held that it simply does not narrow the limits of the border search doctrine. That's precisely what Lopez in the Southern District of California held. Saboonchi, Kolsuz, and others all said that while this is an interesting and novel argument, there has never been a court that has found that more than reasonable suspicion is required for a border search of any extent. And so you simply couldn't extend Riley to this type of search at the border.

And I think, further, if we were to look at what Riley did, it devaluated the justifications for the search incident to arrest exception, the destruction of evidence, and officer safety and found they simply didn't translate where an electronic device was at issue.

By contrast, the purposes underlying the border search doctrine are far broader: preventing the entry of contraband and safeguarding national security. And as the Feiten court

held in the Eastern District of Michigan, applying the border search doctrine in this context is utterly consistent with its historical moorings. So I think your Honor's decision --

THE COURT: But even where it goes to the vast array of personal information that would be in someone's electronic device where none of the policies -- I think only the more recent 18 policy applies reasonable suspicion to the advance search. So why -- so I guess that's what I'm asking you, is how do the rationales for the border exception, how are they effectuated by a standardless search of electronic devices at the border of U.S. citizens?

MR. DREZNER: I think it makes just as much sense, your Honor, to search a suitcase as it does a cell phone at the border because both can be used to transport contraband across the border.

THE COURT: Contraband like what?

MR. DREZNER: Child pornography has often been found in electronic devises.

THE COURT: Is that common post the digital age in terms of child pornography?

MR. DREZNER: Your Honor, I can't speak to how common it is, but I think if we look to the host of cases that we've cited in our brief, the vast majority arise in the context of a defendant having something discovered on their electronic device, sometimes --

THE COURT: I think that's true, but how many of those folks are being stopped at the border?

MR. DREZNER: I think all the cases we cite in our briefs concern border searches, and they're making the argument that plaintiffs make now, which is, you needed a warrant; and the court says, no, that the border search doctrine applies equally to electronic devices. Some have said at most reasonable suspicion is required for certain types of searches, but none have held that probable cause and a warrant is
03:14 required. So the Court isn't writing on a blank slate here. This question has been asked and answered consistently in the same way.

I think plaintiffs similarly fail --

THE COURT: Counsel, I'm aware of the time, so I'll give you another minute. I recognize that I've been asking you a lot of questions, so I'll give you a minute or two, counsel.

MR. DREZNER: Thank you, your Honor. I'll just finish quickly.

Under the First Amendment, your Honor, plaintiffs
03:14 similarly fail to state a claim. They cannot show that there should be additional requirements under the Fourth Amendment for items that may be protected by the First Amendment. Ickes and Arnold and Seljan held very clearly that that would have staggering consequences for the government's authority at the border, I think as your Honor probably recognized in House.

In addition, plaintiffs cannot state a claim with regard to this idea that whenever a device is detained past the time the traveler leaves the border, all of a sudden you have a probably cause requirement. Even if there could be any limits on the authority of the government to detain a device to effectuate a search at the border, Montoya de Hernandez says the courts are asked to use their common sense and experience and there are no hard-and-fast time limits. But plaintiffs would obviate that precedent and impose this arbitrary bright-line requirement, and there's simply no support for that.

03:15

So for those reasons, your Honor, we ask that the complaint be dismissed. Thank you.

THE COURT: Thank you.

Counsel.

MR. SCHWARTZ: May it please the Court. I will be speaking for 10 minutes about injunctive standing at which point my co-counsel, Ms. Bhandari, will cut me off.

THE COURT: Okay.

03:15

MR. SCHWARTZ: So there are several reasons why the plaintiffs have injunctive standing. I'd like to make a few quick points.

Number one, there are a host of law enforcement cases which the defendants address neither in their brief nor at this oral argument which hold that standing to seek an injunction

against law enforcement officials rests on the combination of a policy or practice plus the plaintiffs' exposure to it. So if there is a policy of traffic stops or sidewalk stops, it is those policies themselves plus the exposure of the plaintiffs because they walk on that sidewalk or they drive on that highway that grants them standing. There is not an analysis of the statistical likelihood that a given traveler will be stopped.

Number two, an additional parallel doctrine to give injunctive standing to challenge the future injury is the probabilistic cases. They have odds of injury caused by something that the defendant has done which are similar to the alleged odds from the defendants in this case of 1 in 10,000, cases giving standing where there's a 1 in 10,000 chance of injury, even a 1 in 200,000 chance of injury. Contrary to what the defendant has said, these cases transcend the environment law context. They appear in voting rights cases, in airport traffic cases, in cases about identity theft after data breaches.

Number three, the plaintiffs have among them four individuals who have suffered injury on multiple occasions. As this Court noted earlier today, this is a strong factor weighing in favor of the existence of injury. As the Supreme Court in O'Shea said, while past injury does not prove future injury, it is relevant to future injury. And if one looks at

the experiences, for example, of Mr. Shibly, the plaintiff, or of Mr. Dupin, one of the plaintiffs, they crossed a border and their devices were searched and a day or two later they crossed the border and their device was searched again. What this shows is that when border agents look at their computers and see that a previous border agent took an action against this traveler, that puts them at an enhanced risk of future injury. This isn't just common sense, this is the holding of the Western District of New York in the Tabbaa case. So these past injuries are critical.

03:18

Number four, in addition to all of this, this standing to seek an injunction based on future injury, we have the independent standing to seek expungement of the records the government has retained about the plaintiffs from their devices. This is an ongoing injury that derives from the constitutional violations of searching the devices in the first place. There are three Circuit Court opinions that we cite in our briefs. From the D.C. Circuit, Hedgepeth, written by then Judge Roberts, now, of course, Chief Justice Roberts; Paton from the 3rd Circuit; Tabbaa from the 2nd Circuit, all agreeing that if the allegation is that some law enforcement officials have unlawfully seized information, that there is continuing injury in the retention of that information, whether it's an FBI file, a police report, or, in the case of Tabbaa, a border stop --

03:18

THE COURT: And what do you say to your brother's argument in terms of the allegations made in the amended complaint that don't clearly allege as to I think it's everyone except perhaps Mr. Wright about the retention of information?

MR. SCHWARTZ: Yes. The complaint squarely alleges as to all plaintiffs that they all are suffering the retention of information, and that pleading is based in additional allegations, number one, that each of the plaintiffs has been subjected to a border device search; and number two, that each 03:19 of them is subject to the government's own policies, which include I think as -- which include a provision that says if information that the agents find in a traveler's device is relevant to customs, immigration and other enforcement, then the government can retain that information even in the absence of probable cause. And so the combination of their searches of their devices plus a policy authorizing the retention of information from those devices for purposes of Iqbal, Twombly are specific and plausible bases to support our ultimate allegation which is that information has been retained.

03:20 And in addition to all of this as to all of the plaintiffs, we have for Mr. Wright, as you noted, the additional allegation that we have documentation of what happened with his device, which includes --

THE COURT: That's a response to the FOIA request.

MR. SCHWARTZ: Correct.

THE COURT: Okay.

And what do you say to your brother's argument, I think he was making a distinction in your allegations between an argument that the search itself violated the Fourth Amendment and the First Amendment versus the retention being a violation of law? Do you agree with that distinction and does it make any difference in the plaintiffs' view as to standing for expungement?

MR. SCHWARTZ: It does not make a legal difference. What the defendants do not do in their brief or at this argument is address Hedgepeth or Paton or Tabbaa, all of which explain that it is the continuing injury from the original violation which gives the standing for expungement. We don't also need to show that the retention is itself a separate and independent constitutional violation.

So in Paton, you know, the court explains, for example, with an FBI record, that the retention of this information puts at risk the defendant seeking future employment or education. In the Hedgepeth case, which involved an adolescent who was arrested in a train station, the expungement of the arrest report obviously would protect them from future harm to their lifetime opportunities. In Tabbaa, the retention of the information about agents -- about travelers by border agents, as we've explained, puts travelers at risk of future searches and seizures by those border agents.

And there's nothing about the Herring and the Pennsylvania Parole Board cases that the government cites that are to the contrary. Those are suppression cases. Of course there is a suppression rule that ordinarily applies that says generally the government cannot use the illegally collected information in a criminal prosecution. But what's controlling here is not those criminal cases on suppression, but Hedgepeth, Tabbaa, and Paton.

Your Honor, there is one additional issue I want to make sure I touch on, which is this 1 in 10,000 figure. I want to be clear, this is not the plaintiffs' alleged number, this is what the defendant has put forward. We have only put forward 30,000 searches last year and 18,000 searches a few years before by way of showing the widespread nature of this practice, which is relevant to injunctive standing under the law enforcement cases.

We believe this 1 in 10,000 figure as a matter of law is no barrier to our standing and that as a matter of fact it's misleading. As a matter of law under the law enforcement cases, they simply don't look at these numbers. So, for example, in Ortega, the District of Arizona says what matters is the exposure, quote-unquote, of the plaintiff even though as to any particular driver the chances of being stopped again are, quote, not high.

In the probabilistic cases, under NRDC, 1 in 200,000

risk, under Sierra Club, 1 in 10,000. Our 1 in 10,000 is not a barrier to standing.

Finally, I just want to emphasize this figure as a factual matter is misleading for three reasons.

Number one, the rate of boarder device searches is going up every single year. Five years ago it was 5,000; this past year it was 30,000, sixfold increase.

Number two, as I've said, the risk to the plaintiffs is higher than the risk to other travelers because when agents look at their names, they're going to see the past searches which makes them more likely to be searched again. Again, that's Tabbaa and common sense and the experiences of Mr. Dupin and Mr. Shibly.

Number three, this 1 in 10,000 figure is the risk for each crossing of the border, but we need to be aggregating risk over a lifetime, which is exactly what the D.C. Circuit said in the NRDC case.

So for all of these reasons, the 1 in 10,000 figure is very misleading and the actual risk being faced by the plaintiffs is much higher. But, again, as a matter of law, under the probabilistic cases, that risk is adequate, and under the law enforcement standing cases it just doesn't matter at all.

Unless this Court has more questions on standing, my half of the argument has passed, and I'd like to pass the baton

to Ms. -- to Esha.

THE COURT: Thank you, counsel.

Counsel.

MS. BHANDARI: May it please the Court, Esha Bhandari for plaintiffs.

Riley did two critical things that bear on this case. In Riley, the Supreme Court made clear that any warrant exception under the Constitution doesn't automatically apply to digital data, that, in fact, a warrant exception has to be considered in light of the category effects. And then secondly, Riley went on to do that balancing in the context of digital data where it weighed the privacy harms against the government's interest and found that a warrant is required.

Taking the guidance from Riley, it is clear that the Constitution requires a warrant for searches of digital devices at the border. The privacy interests are identical to those that were at stake in Riley.

Riley involved a manual search of a cell phone, and the Supreme Court very clearly lays out both the quantitative and qualitative privacy risks. But I do want to note a few critical things. One, the Riley court made clear that searches of digital devices can provide information that would be more extensive than that would even be found in a house unless the device were found in the house. You know, the type of information that is available, including metadata, is of a

nature that might provide access to someone's perfect memory. So for this reason, this weighed heavily in the court's consideration.

But the really critical step that the Riley court took which did not -- was not clear at the time that Ickes and Arnold and House were decided, is that you look at the category of effects as a whole, you look at the privacy harms from digital searches as a whole. Even if that might lead to the types of anomalies that the court in Ickes identified, such as 03:26 an individual carrying papers on them which could be subject to a search, where the same content if it were on a digital device could not be searched. The Riley court was comfortable with that distinction in part because it said there is a physical limitation on how much information people could simply be carrying on them, which didn't exist with digital data.

So it rejected this concern with what the Ickes court called an exception for expressive materials, and it looked at the privacy harms from digital searches as a whole and it took a categorical approach.

03:27 So that is a really critical distinction from the earlier cases that the government cites. And, most notably, the 1st Circuit made that distinction and decided in Wurie, which was later upheld in Riley, that for that reason searches incident to arrest of cell phones required a warrant.

And the second point from Riley, which is about the

government's interests having to be tethered to the justification for the exception, is relevant here as well. The border search exception dates back -- you know, it's discussed in Boyd in the 1880s, the Supreme Court case, it dates back from 1789. It has always been strictly limited. It's about the power of the sovereign to keep out people and goods, and it's always been about searches of tangible goods. Boyd in the 1880s made clear that there is a difference between searches of goods and searches of information that might be used against an individual. And that distinction has carried over, that concern has carried over. So the Supreme Court has never suggested that reasonable suspicion is the highest level of suspicion available at the border. In Ramsey, in Flores-Montano the Supreme Court reiterated that some searches may be per se unreasonable at the border. So certainly reasonable suspicion has never been a ceiling, it is, in fact, a floor for certain category of searches.

THE COURT: So I guess, just to go back to Riley for a moment and then move forward to this argument about the scope of the governmental interests at the border, what is it about the Supreme Court's reasoning in Riley which is squarely in the law enforcement category, is it clear from the precedent about the border that the Supreme Court would view the security of the border squarely in the law enforcement context? Meaning, the law enforcement context is different in the sense of being

clearly individualized. Is there any suggestion that the Supreme Court used the border in the same way? Particularly, particularly where you're encountering at the border both citizens and non-citizens, meaning, both people who are entering and returning.

MS. BHANDARI: I think that the Supreme Court has made it clear that it would view both warrant exceptions the same, meaning that the balancing has to be done. So in Ramsey, the Supreme Court equated the border search exception to the
03:29 warrant requirement to the search incident to arrest exception. It put it in the same category of considerations. And then in Riley, the Supreme Court showed when you have a warrant exception and you're considering whether that applies to digital data, here's how you do that. So even though the justifications underlying the exceptions might be different, the Supreme Court showed that you have to look at the tethering.

Now, in Riley, the concerns that were animating the government there were officer safety and destruction of
03:30 evidence. And the Supreme Court very carefully looked at whether both of those justifications would be effectuated sufficiently by warrantless device searches, and it decided that even though there might be certain circumstances in which there might be evidence that could be acquired from warrantless searches, that interest was not serious enough or widespread

enough to justify dispensing with a warrant requirement as a categorical matter.

Now, when we're talking about the border search exception, as I mentioned, the justification of keeping out physical goods has run through all of the Supreme Court's decisions. And despite the defendants' arguments that digital contraband is the justification for these searches, one, there's no -- there is no reason to believe that the government's interests can't be effectuated by a warrant requirement, in the first instance, that the problem contraband is so great that it would overwhelm the very significant and acute privacy interests that are on the other side. Because, again, the government asserts the power to search all travelers, innocent travelers, without suspicion. So there's a massive and acute privacy concern on the other side.

But even with respect to digital contraband, digital contraband does not need to be carried across the border. When it comes to physical goods, the sovereign has to inspect them at the border. But with digital contraband, it can be sent over the internet. And furthermore, even if it is found or searched at the border, that doesn't prevent it from entering the country. So the government's interests aren't even effectuated. I think even with the CBP and ICE policies which explicitly allow for copying and retaining the information and sending the devices back, that demonstrates that, in fact,

there's no interest in those instances of keeping digital contraband out. It's simply a dragnet search. It allows the government to copy and retain the contents of devices, keep that information, send that device with its information back.

And I also want to note --

THE COURT: But I guess -- and not to go back to what's troubling me, but, counsel, what about the distinction between the scenario with law enforcement, where you have sort of these different levels of inquiry, right, so if you need to 03:32 stop someone, it's reasonable suspicion; if you're going to arrest someone, it's probable cause; if you're going to search with the exceptions carved out, you otherwise need to get a warrant. But at the border, aren't the levels different? Meaning, there's no particular standard, right, that applies, at least from a constitutional standpoint, for taking someone into secondary inspection. So why -- I guess back to my question about why do we think that the Supreme Court -- you want me to extrapolate from Riley, right, to say that if the Supreme Court were to get this case, they would extend Riley. 03:33 Why -- have you said all that you can say in regards to why we think the Supreme Court would move in this direction?

MS. BHANDARI: Well, I think that a warrant for certain searches at the border is not unprecedented. So, in fact, while searches of goods have been done without any suspicion, certainly courts have required reasonable suspicion

for certain other intrusive physical bodily searches. So there is, in fact -- there are gradations under existing law.

But in Ramsey, the Supreme Court contemplated a potential First Amendment harm if border agents were able to read incoming international mail. And it was concerned that that would pose a problem under the First Amendment, and it explicitly noted if there were not a regulation flatly prohibiting customs agents from reading incoming international mail, that a warrant requirement could perhaps address that First Amendment harm.

03:34

Similarly, the government cites 19 USC 1583, which is a statute governing searches of outgoing international mail. And that statute, in fact, requires a warrant before the contents of mail can be read. It sets out that if there is -- if there are packages above a certain weight, they can be searched, presumably, again, because there's the possibility of physical goods being in them, but that agents cannot read those without a warrant.

In Montoya de Hernandez I think it's important to note that while the Supreme Court said that a 16-hour detention upon reasonable suspicion was permissible, in that case border agents had actually gotten a court order before the physical elementary canal search.

03:35

Similarly in United States v. Arnold, the older 9th Circuit case, border agents had gotten a warrant before

conducting a forensic examination of the device, the laptop at issue.

So a warrant requirement is not unheard of at the border; it imposes no practical impediments. And the Supreme Court has made clear it's not a sort of one size fits all to the reasonableness of searches at the border.

And certainly I think Ramsey's concerns about the power to read mail, to read all incoming international mail, are applicable here.

03:36 And if there are no further questions on the Fourth Amendment point, I would like to just mention the point about confiscation.

In United States v. Place, it was clear that you have to look at the -- both the reasonableness of a confiscation and its scope and duration.

Here we have two plaintiffs, the Alasaads, whose unlocked devices were kept for 15 days. Mr. Allababidi's unlocked device was kept for two months and his locked device for 10 months. And Mr. Wright's locked device was kept for 56

03:36 days. And these confiscations were unreasonable under the Fourth Amendment.

And lastly on the First Amendment point, I think Ramsey shows that the First Amendment has to be considered as an independent constitutional protection.

Ickes had no occasion to consider the subsequent 2009

ICE and CBP policies which explicitly allow for suspicionless searches of electronic devices. That is the regime that now travelers operate under in which any innocent traveler crossing the border can be searched without suspicion whatsoever and the entire contents of their devices can be copied and retained.

The First Amendment cases that we cite in our brief make clear that government demands for expressive information of the type contained on electronic devices always has to be subject to a heightened level of scrutiny. And at various
03:37 times courts have imposed a requirement of a compelling interest and narrow tailoring. And certainly a policy and practice of suspicionless searches of electronic device does not meet that standard.

We think the warrant requirement is the proper solution here, because a warrant based on probable cause can, in some instances, address acute First Amendment harms. The court in Zurcher stated as much; and the court in Ramsey nodded toward that solution if, in fact, incoming international mail was being read.

03:38 So in light of the First Amendment interest at stake, a warrant based on probable cause is the only remedy to address the harms that plaintiffs and millions of travelers are suffering, otherwise, the risks of self-censorship are too high and impede on everyone's First Amendment rights.

THE COURT: Thank you.

MS. BHANDARI: Thank you.

THE COURT: Counsel, I think you had retained some time.

MR. DREZNER: Thank you, your Honor. Just a few points.

First, plaintiffs are advancing this theory that all they need to show to establish injury is the existence of a government policy and their exposure to that policy. That's simply not the law. I think the Frank case from the 1st
03:38 Circuit in 1992 said it's not pertinent whether there's some official policy at issue, the question is whether plaintiffs themselves will be injured by application of that policy.

And indeed, they say, Well, this 1 in 10,000 figure is the government's statistic, so I think what they're saying is we don't know what the chances are of a future search, we're not going to put them before the Court and the Court should simply speculate that some injury might happen in the future, and therefore, we have standing. Again, there's no basis for that certification. Again, they say that simply because people
03:39 were searched in the past there may be a basis that they can be searched in the future. Again, your Honor, even an objectively reasonable likelihood of a search doesn't pass muster under the Clapper test.

On the issue of expungement of information, I think plaintiff spent some time arguing that this could be an injury

but they don't say whether it is a legal violation and under what theory it would be a legal violation for the government to remain information. Certainly if they had brought that claim, we might have argued against it. We could have should shown this Court why the government can retain this information and why it should not grant the remedy of expungement. But, again, they never brought that claim, so the issue of expungement isn't properly before this Court.

I think quickly on the merits, they point to Ramsey a lot and say that, you know, it's sort of nodded or winked in a certain direction. I think what Ramsey said and held is most clearly appropriate, and that is that a warrant is not required at the border. They said we reaffirm that principle today. In addition, in Ramsey they said this doesn't impose a chill on First Amendment rights because there was no allegation of a chill there. And similarly, when defendants said to plaintiffs, Look, there have not been sufficient allegations of a First Amendment chill, they essentially conceded that point and said, We're not claiming injury based on a chill. So just as in Ramsey, there's been no showing that defendants' policies somehow impact First Amendment rights.

And I think plaintiffs pointed to a statute that says in certain instances a warrant may be required, and certainly statutes can impose tighter requirements on searches and seizures than the Constitution necessitates. And plaintiffs

are free to petition Congress if they want to have such a statute passed in this case. But the constitutional answer is clear. It's been asked and answered in Braks, in Molina-Gomez, and by this Court this 2012.

I think your Honor got it right. The question is what would the Supreme Court do? And I think it would not uphold a system where you need only reasonable suspicion to search a traveler's elementary canal but a warrant to search their laptop. Plaintiffs haven't argued anything that could resolve 03:41 that incoherence, I think as a result, the complaint should be dismissed.

Thank you, your Honor.

THE COURT: Thank you, counsel.

Just give me a moment, counsel.

(Pause.)

THE COURT: But, counsel, do you think that last point is correct in light of Riley where the Supreme Court is addressing the instance where someone is already under arrest? Meaning, there's already been an articulation of probable cause 03:42 and the court is saying even in that scenario you need a separate showing of probable cause as to the device?

MR. DREZNER: Your Honor, are you asking --

THE COURT: Yes, and I guess what I'm saying is, hypothetically, why do you think the Supreme Court would take a different position as to a U.S. citizen returning to the United

States for which there is no suspicion articulated at all? And is the answer, in the defendants' view, it's the border, the border is different in the way the plaintiffs say digital is different? What's the answer to that from the defendants' point of view?

MR. DREZNER: You summarized it pretty well. I think you got to the question correctly when you asked plaintiffs is this just about law enforcement, and I don't think necessarily that's the case. The justifications underlying the search incident to arrest exception were much narrower than those underlying the border search exception which are generally the integrity of the nation and safeguarding the border, preventing the entry of terrorists and contraband, terrorist communications. There's a whole host of reasons undergirding the border search exception. So to question, well, would the court hold the same, I think the answer is clearly no. Both as your Honor said, because the court -- because the border is different, but also because the regime that has been created at the border has explicitly said that the highest level of suspicion is indeed reasonable suspicion that's required to conduct any search. Indeed, I didn't hear from plaintiffs a single case where a warrant is required at the border for any type of search, even a body cavity search. That's the 1st Circuit's decision. So, again, I seriously doubt the court would create this incongruity were they to hear this case.

THE COURT: Thank you.

Counsel, I appreciate the arguments today on either side and the briefing on either side. You certainly have given me a lot to think about, which I will and I'll go back to your papers with your arguments today in mind and take the matter under advisement.

There is one thing that I made a note to note at the beginning of this hearing and then neglected to. I just wanted to state this for the record.

03:44 In reviewing one of the amicus briefs, I noticed that Jonathan Albano was one of the attorneys on the amicus briefs. I just want to note for the record what seems now like a lifetime ago I worked with Mr. Albano at the firm that no longer exists, Bingham -- what was at one time Bingham Dana. I don't have an ongoing relationship with Mr. Albano, but I wanted to note, as I have in other cases, that prior affiliation.

I don't think there's any basis for me to recuse myself in this matter, but I certainly wanted to let counsel on

03:45 both sides know this. If counsel on either side thinks I should re-examine this issue, I'd give you two weeks from today to file something to that effect. Okay.

But, otherwise, I'm going to keep the matter under advisement.

Thank you.

THE CLERK: All rise.

(Court adjourned at 3:45 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Debra M. Joyce
Debra M. Joyce, RMR, CRR, FCRR
Official Court Reporter

May 21, 2018
Date