No. 22-1801

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

HAITAO XIANG,

Defendant–Appellant.

On Appeal from the United States District Court for the
Eastern District of Missouri
Case No. 4:19-cr-00980 (Hon. Henry E. Autrey)

BRIEF OF AMICI CURIAE THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF DEFENDANT–APPELLANT

[Case caption continued on next page]

Stephanie Krent
Scott Wilkens
Evan Welber Falcón
KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, N.Y. 10115
Telephone: (646) 745-8500

Bruce D. Brown* (Bar No. 1067194)
Katie Townsend
Gabriel Rottman
Grayson Clary
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

** Counsel of record for amici curiae*

CORPORATE DISCLOSURE STATEMENT AND CIRCUIT RULE 26.1A DISCLOSURE STATEMENT

The Knight First Amendment Institute at Columbia University has no parent corporations, and no publicly held corporation owns ten percent or more of its stock. The Knight Institute is a non-profit, non-partisan organization governed by a nine-member board of directors, five of whom are associated with Columbia University.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Knight First Amendment Institute at Columbia University ("Knight Institute") and the Reporters Committee for Freedom of the Press.

Amici file this brief in support of Appellant Haitao Xiang. Warrantless searches of electronic devices burden and chill First Amendment–protected activities, including newsgathering. As organizations that advocate for the First Amendment rights of the press and public, amici have a strong interest in ensuring that these searches honor constitutional limits.

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SOURCE OF AUTHORITY TO FILE

Counsel for all parties have consented to the filing of this amici brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici declare that:

1. No party's counsel authored the brief in whole or in part;
2. No party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. No person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Personal electronic devices have become extensions of the human mind. Cell phones and laptops store enormous volumes of individuals' expressive materials: their work product, private thoughts, personal and professional associations, and digital records of their whereabouts and communications. Warrantless searches of these devices at the border raise constitutional questions that analog-era precedents cannot answer. Because of the scale and sensitivity of the information stored on these devices, government searches of them pose a grave threat to the First Amendment freedoms of the press, speech, and association.

As part of the Justice Department's now-discontinued China Initiative, Appellant Haitao Xiang was stopped by CBP while traveling from Chicago to visit his family in China. *See* Appellant's Addendum at 25 ("A25"). CBP seized several electronic devices and sent them to the St. Louis division of the FBI. *Id.* The FBI then forensically imaged the devices, and—ten days after initially seizing the devices—the agency searched them for evidence of intellectual property theft. *Id.* at 27–28. Although the FBI ultimately obtained a warrant authorizing a search and seizure of the devices, it did not do so until seven days after the devices were searched and seventeen after they were seized. *Id.* at 28.

In a typical investigation, there would be no question that the warrantless search of Mr. Xiang's devices was unconstitutional and that the evidence obtained

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should be suppressed. But because CBP intercepted Mr. Xiang as he was leaving the country, the government argued—and the district court agreed—that the search fell within the "border search" exception to the warrant requirement. A12.

As amici discuss below, the questions before this Court have far-reaching implications for the newsgathering rights of journalists and the First Amendment rights of all travelers. Journalists are particularly vulnerable to the chilling effects of electronic device searches, both because confidential or vulnerable sources may refuse to speak with reporters for fear that anything they say may end up in the government's hands, and because such searches can be used to retaliate against or deter reporting critical of the government. Numerous complaints filed by travelers (obtained by amicus Knight Institute pursuant to a Freedom of Information Act request) demonstrate that the government often abuses its authority to conduct border searches in order to scrutinize sensitive expressive and associational content that travelers store on their devices. Forensic searches are the most invasive type of search, and burden expressive and associational rights most acutely.

The First Amendment implications of device searches should inform the Court's analysis in two ways. As an initial matter, the First Amendment applies independently to device searches at the border, and under traditional First Amendment analysis, warrantless searches of electronic devices are plainly unconstitutional. In addition, the serious First Amendment implications of device

searches should also affect the Court's consideration of the Fourth Amendment, because of the Supreme Court's admonition that the Fourth Amendment's warrant requirement must be applied with "scrupulous exactitude" when searches burden free expression. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). For both reasons, the Court should conclude that the search of Mr. Xiang's devices was unconstitutional, and that the district court erred by denying his motion to suppress on those grounds.

ARGUMENT

I. Government searches of electronic devices at the border burden First Amendment freedoms.

Policies promulgated by U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE") permit border agents to search travelers' electronic devices without a warrant, and often without any suspicion at all.[1] They also permit agents to conduct a "forensic examination"—a

[1] ICE, Directive No. 7-6.1, Border Searches of Electronic Devices (Aug. 18, 2009); CBP, Directive No. 3340-049, Border Search of Electronic Devices Containing Information (Aug. 20, 2009). At the time the search at issue in this case was conducted, CBP did not differentiate between basic and forensic searches. CBP released a revised directive in January 2018, which stated that forensic ("advanced") searches may only be conducted when "there is reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern, and with supervisory approval." CBP, Directive No. 3340-049A, Border Search of Electronic Devices § 5.1.4 (Jan. 4, 2018). ICE has adopted the reasonable suspicion standard for forensic searches. *See Alasaad v. Mayorkas*, 988 F.3d 8, 14 (1st Cir. 2021).

"powerful tool capable of unlocking password-protected files, restoring deleted material, and retrieving images viewed on web sites"—with mere reasonable suspicion. *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013).

These searches are commonplace for many travelers—in fiscal year 2021, for example, CBP conducted over 37,000 device searches. *See CBP Enforcement Statistics Fiscal Year 2022 – Border Searches of Electronic Devices*, U.S. Customs & Border Prot., https://perma.cc/6P47-XA4M (last modified July 18, 2022). And while it would be clear, even absent specific evidence, that these invasive, warrantless searches constrict the "breathing space" that First Amendment freedoms need "to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), the risks they pose also are well-documented through news reporting, transparency litigation, and journalists' and travelers' personal accounts.

A. Government searches of electronic devices at the border burden freedom of the press.

Electronic devices are critical tools for the modern-day press. For journalists on assignment, they serve as notebooks, typewriters, "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley v. California*, 573 U.S. 373, 393 (2014); *see also* Brooke Crothers, *How Many Devices Can a Smartphone, Tablet Replace?*, CNET (July 10, 2011, 3:59 PM), https://perma.cc/Z8KE-5Y8U; Michael J. de la Merced, *A World of Deal Making, Gleaned with an iPhone X*, N.Y. Times (Dec. 27, 2017),

https://perma.cc/5N4W-2LN8. "[I]t is neither realistic nor reasonable to expect the average [reporter] to leave [their] digital devices at home when traveling," *United States v. Kolsuz*, 890 F.3d 133, 145 (4th Cir. 2018) (citation and internal quotation marks omitted), and unfettered government access to them threatens a free press.

1. Electronic device searches chill reporter-source communications.

Experience teaches that government surveillance that is "too permeating" will predictably intrude on the newsgathering process—exposing stories pursued, newsgathering methods employed, and the identities of sources consulted. *United States v. Di Re*, 332 U.S. 581, 595 (1948). Device searches force reporters to disclose just such information to the government, deterring potential sources from speaking to the press and damming the free flow of information to the public.

As courts have recognized, "journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *see also* Lana Sweeten-Shults, *Anonymous Sources Vital to Journalism*, USA Today (Feb. 28, 2017, 6:29 AM), https://perma.cc/AV7V-Z4K8. Many sources are willing to speak to reporters only with that assurance of confidentiality because they reasonably fear retribution if their identities are revealed, including criminal prosecution, loss of employment, and even risk to their lives. *See Introduction to the Reporter's Privilege Compendium*, Reps. Comm. for Freedom of the Press,

https://perma.cc/LQ7X-AAJA (last updated Nov. 5, 2021). For just that reason, the Department of Justice recently sharply restricted its components' ability to seize journalists' data, recognizing that past policies "fail[ed] to properly weight the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government." Memorandum from the Att'y Gen. Regarding Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media (July 19, 2021), https://perma.cc/428V-FX24.[2]

But reporters who travel internationally cannot credibly offer sources confidentiality if the mere act of crossing the border exposes their electronic devices to search and the identities of their contacts to disclosure. *See, e.g.*, Alexandra Ellerbeck, *Security Risk for Sources as U.S. Border Agents Stop and Search Journalists*, Comm. to Protect Journalists (Dec. 9, 2016, 5:02 PM), https://perma.cc/VJ9L-HUG5. And when border agents can mine any journalist's work product at will, the press runs "the disadvantage of . . . appearing to be an investigative arm of the judicial system or a research tool of government" rather than an independent check on it, *United States v. LaRouche Campaign*, 841 F.2d

[2] In response to recent examples of ICE overreach, Congress directed the agency to adopt similar guidelines, though the protocols the agency issued are less protective. *See* Gabe Rottman, *ICE Enacts New Policy Protecting Media from Legal Demands*, Lawfare (June 29, 2022), https://perma.cc/3388-MYCS.

1176, 1182 (1st Cir. 1988) (internal quotation marks omitted), deterring future sources from stepping forward with sensitive information. Reporters repeatedly have described this dynamic in past controversies involving government investigations of the news media. *See, e.g.*, Jeff Zalesin, *AP Chief Points to Chilling Effect After Justice Investigation*, Reps. Comm. for Freedom of the Press (June 19, 2013), https://perma.cc/U7Z8-FPEK; *see also* Human Rights Watch, With Liberty to Monitor All: How Large-Scale US Surveillance Is Harming Journalism, Law, and American Democracy at 3–4 (2014), https://perma.cc/KUH6-4MVF. The warrantless search authority the United States defends here poses the same risk to the free flow of information to the public.

2. Reporters are particularly likely to be targeted for border searches.

The burden that warrantless device searches impose on newsgathering is only sharpened by the reality that journalists are at special risk of being singled out for such searches, sometimes in retaliation for critical reporting. Reporters often travel to report on stories of particular interest to the U.S. government, which naturally increases the likelihood that border agents will stop them and search their electronic devices. For instance, in 2016, agents at LAX airport asked to search two cell phones belonging to a *Wall Street Journal* reporter whose recent reporting had "deeply irked the US government," and whose previous reporting had sparked a congressional investigation into corruption in the military. Joseph Cox, *WSJ*

Reporter: Homeland Security Tried to Take My Phones at the Border, Motherboard (July 21, 2016, 12:06 PM), https://perma.cc/BMN9-96LW.

More recently, in early 2019, a flurry of news reports documented a clear pattern of harassment at the border of journalists covering migration issues, harassment that included device searches and detentions. *See Several Journalists Say US Border Agents Questioned Them About Migrant Coverage*, Comm. to Protect Journalists (Feb. 11, 2019, 11:40 AM), https://perma.cc/QYK3-BKSF; Ryan Devereaux, *Journalists, Lawyers, and Activists Working on the Border Face Coordinated Harassment from U.S. and Mexican Authorities*, The Intercept (Feb. 8, 2019, 11:42 AM), https://perma.cc/SR2Y-Y8KR. It was later learned that these screenings were the product of a secret database CBP maintained specifically to monitor and target reporters covering issues related to migrants crossing the U.S.-Mexico border. *See* Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC 7 (Jan. 10, 2020, 11:43 AM), https://perma.cc/6VPX-B67U. Screenshots of the database confirm that an "alert" was placed on these journalists' passports to flag them for secondary screening. And a federal court concluded, in a suit filed by five photojournalists whose names appear in the database, that the allegations stated a violation of the reporters' First Amendment rights. *Guan v. Mayorkas*, 530 F. Supp. 3d 237 (E.D.N.Y. 2021).

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Other recent examples of journalists subjected to invasive searches, including electronic device searches, illustrate how frequently journalists are targeted at the U.S. border:

- In October 2021, freelance journalist Sergio Olmos had his belongings searched in a secondary screening after declining to answer where he went to journalism school.[3]

- In April 2021, *The Intercept*'s Ryan Devereaux and photojournalist Ash Ponders were detained after returning to the United States from covering a protest in Mexico. Ponders was strip-searched, and border officials asked to see her footage; Devereaux was told "You are not a journalist" on sharing his affiliation with *The Intercept*.[4]

- In June 2019, CBP officers detained independent photographer Tim Stegmaier for over four hours, searching his computer, phone, and camera, which they then seized and retained for three months.[5]

- In May 2019, CBP officers detained *Rolling Stone* journalist Seth Harp in Austin, Texas for four hours, questioning him about his reporting and searching his electronic devices.[6]

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[3] *See Freelance Journalist Questioned About Journalism at Portland Airport*, U.S. Press Freedom Tracker (Oct. 18, 2021), https://perma.cc/V9K7-5GPU.

[4] *See Intercept Reporter Told "You Are Not a Journalist" When Stopped by Border Officials*, U.S. Press Freedom Tracker (Apr. 30, 2021), https://perma.cc/46N2-PV2H.

[5] *See Independent Photographer Stopped for Secondary Screening, Devices Seized*, U.S. Press Freedom Tracker (June 28, 2019), https://perma.cc/4XD7-Z6HC.

[6] Seth Harp, *I'm a Journalist But I Didn't Fully Realize the Terrible Power of U.S. Border Officials Until They Violated My Rights and Privacy*, The Intercept (June 22, 2019, 8:00 AM), https://perma.cc/6U24-2GQA; *Rolling Stone Journalist*

- In May 2017, U.S. border agents questioned a BBC journalist at Chicago O'Hare International Airport for two hours, searched his phone and computer, and read his Twitter feed.[7]

And stories have continued to emerge, for that matter, of broader misuse of CBP authorities to investigate members of the news media. Most recently, Yahoo News exposed "a sprawling leak investigation conducted by a secretive unit at CBP that regularly used the country's most sensitive databases to investigate the finances, travel and personal connections of journalists, congressional members and staff and other Americans not suspected of any crime." Jana Winter, *DHS to Provide Congress with Operation Whistle Pig Report Detailing Spying on Journalists, Lawmakers*, Yahoo News (Mar. 10, 2022), https://perma.cc/N57G-EMC7; *see also Reporters Committee for Freedom of the Press v. U.S. Customs and Border Protection*, Reps. Comm. for Freedom of the Press, https://perma.cc/T6N9-H9UF (last updated Oct. 25, 2021).

CBP and ICE device-search policies provide no substantive protections that would prevent similar abuses going forward. *See, e.g.*, CBP Directive No. 3340-049A § 5.2.2 (stating only that "work-related information carried by journalists[]

Stopped for Secondary Screening, Has Electronics Searched While Asked Invasive Questions About Reporting, U.S. Press Freedom Tracker (May 13, 2019), https://perma.cc/RV5B-SKES.

[7] *See BBC Journalist Questioned by US Border Agents, Devices Searched*, U.S. Press Freedom Tracker (May 18, 2017), https://perma.cc/CFK5-RH5E.

shall be handled in accordance with any applicable federal law and CBP policy"). But even if they did, "the Founders did not fight a revolution to gain the right to government agency protocols." *Riley*, 573 U.S. at 398. The warrantless search authority the district court endorsed poses an acute threat to the free press.

B. Government searches of electronic devices at the border burden travelers' freedoms of speech and association.

The chilling effect of device searches at the border extends beyond journalists' newsgathering rights. More broadly, these searches chill the First Amendment activities of ordinary travelers, further inhibiting public debate and the free flow of information. Through litigation under the Freedom of Information Act, *see Knight First Amendment Inst. at Columbia Univ. v. U.S. Dep't of Homeland Sec.*, No. l:17-cv-00548-TSC (D.D.C. 2017), amicus Knight Institute has obtained hundreds of complaints filed by individuals whose devices were searched at the border, as well as thousands of reports documenting device searches conducted by CBP and ICE. These records describe border agents' examinations of travelers' digitally recorded thoughts, communications, and photographs.

Some of these records also detail intrusions into travelers' political and religious associations. For example, in 2016, one traveler was detained by CBP officers in the Abu Dhabi airport for three days. At the beginning of the encounter, CBP officers confiscated the traveler's devices and demanded passwords to her

Facebook, Gmail, and WhatsApp accounts. Officers asked the traveler intrusive questions about her political beliefs, including "[w]hat [she] think[s] when Americans say that Muslims are terrorists." Her devices were only returned three days later, when she boarded a new flight to the United States.[8]

Another traveler was ordered to hand over his devices and provide officers with cell phone and computer passwords. When the traveler asked if the officers needed a warrant, one officer replied, "This is the border. We don't need anything." The officers then searched through the traveler's text messages, contacts, and photos, asking extensive questions about certain text messages. The officers also interrogated him about his political views, any political organizations he belonged to, and whether he hated America or was part of "Antifa."[9]

Many travelers reported being subjected to questions about their religious practices. One traveler noted that "after a lengthy interview, the officers interviewing me confessed that America needed more Muslim leaders and imams like myself. However, . . . they took my cellphone right after and downloaded all

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[8] CRCL Complaint Intake and Response (3/12/2018), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/44e9a5e460.

[9] CRCL Complaint Intake Form (5/27/2018), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/bafd769ac6.

my contacts and messages."[10] Another recalled that after officers confiscated her phone and demanded her password, they reviewed videos on her phone, checked her Facebook page, and interrogated her for forty-five minutes about the mosque she attended, whether she knew any victims of the Quebec mosque attack that had taken place the week before, and her opinion of President Trump's policies.[11]

Search reports completed by CBP and ICE officers show that they not only reviewed the contents of travelers' devices during border encounters, but also kept records of travelers' social media accounts. During one such search, CBP officers recorded a traveler's account handles on Instagram, Facebook, WhatsApp, Viber, Snapchat, YouTube, and Tango. The officers also made note of the traveler's answers to account security questions, his pin code, and the code to unlock his phone.[12] Other reports document the confiscation of travelers' email addresses.[13]

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[10] *Read Complaints About Warrantless Searches of Electronic Devices at the U.S. Border*, N.Y. Times (Dec. 22, 2017), https://nyti.ms/3B4lc10 (see page 24 of the embedded document entitled "KFAI FOIA TRIP Complaints Border Electronics Searches").

[11] CRCL Complaint Closure (07/11/2017), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/Border-Search-FOIA-DHS-001-00513-00245-crcl-complaint-closure-07112017.

[12] CBP Electronic Media Report (7/26/2017), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/2bdbd307cb.

[13] CBP Electronic Media Report (9/03/2017), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/b955b770f4.

Some travelers, like Mr. Xiang, were also subjected to forensic searches of their devices, which are even more intrusive than basic searches. Forensic searches generally involve prolonged confiscation of an individual's devices so that the government can download the entirety of their contents for unlimited searching.[14] *See Cotterman*, 709 F.3d at 957, 966 (referring to such searches as equivalent to a "computer strip search"). Among other examples, one forensic search of a traveler's devices conducted by ICE yielded tens of thousands of chat messages, documents, photos, videos, and emails, which the government was then able to search at will.[15] Through warrantless forensic searches, border agents have downloaded travelers' geolocation data, giving the government "near perfect surveillance" into the "privacies of life."[16] *Carpenter v. United States*, 138 S. Ct. 2206, 2217–18 (2018) (citations omitted). Finally, border agents have also used

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[14] *See also, e.g.*, ICE Report of Investigation (Opened 1/12/2016, Approved 6/23/2016), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/m42vj4597j.

[15] ICE Report of Investigation (Opened 1/12/2016, Approved 6/6/2016), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/a6uozx9eks; ICE Report of Investigation (Opened 1/12/2016, Approved 6/23/2016), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/m42vj4597j.

[16] ICE Report of Investigation (Opened 4/13/2012, Approved 4/19/2012), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/9kq7ptugpu; ICE Report of Investigation (Opened 8/10/2012, Approved 10/22/2012), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/6twih6ui4t.

the threat of a forensic search to force travelers to unlock devices for a basic search.[17]

These searches inevitably burden speech and association. As in the context of government surveillance more generally, when individuals fear that their speech will be scrutinized, they will be less inclined to speak. *See, e.g.*, Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 Berkeley Tech. L. J. 117, 125 (2016) (finding a "statistically significant reduction" in Wikipedia traffic to privacy-sensitive articles after the Snowden disclosures in June 2013). When travelers know they could be subjected to warrantless searches touching on political, social, religious, or other expressive activity—activity that the First and Fourth Amendments were designed to protect from unreasonable government scrutiny—they are less likely to engage in that activity.

II. The district court erred in denying Mr. Xiang's motion to suppress because the government's warrantless search and seizure of his electronic devices was unconstitutional.

The district court denied Mr. Xiang's motion to suppress evidence obtained from the searches of his devices, concluding that the searches "fall within the border search exception to the warrant requirement." *See* A12. But in reaching that conclusion, the district court failed to appreciate the expressive and

[17] Letter from ACLU to DHS (5/4/2017), Knight First Amendment Inst. at Columbia Univ., https://knightcolumbia.org/documents/aj5jamik9x.

associational burdens imposed by searches of electronic devices. *See Carpenter*, 138 S. Ct. at 2219 (faulting the government for "fail[ing] to contend with the seismic shifts in digital technology"); *Riley*, 573 U.S. at 386 (explaining that "[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals" and therefore "bear[] little resemblance" to physical searches). These burdens make searches of electronic devices unlike the searches that historically fell within the so-called "border search" exception. *See id.*; *see also* A13 (equating border searches of electronic devices and those of travelers' physical property).

The differences between analog-era border searches and contemporary device searches have two major implications for the application of the border search exception to electronic devices. First, in light of travelers' and journalists' expressive and associational interests, these searches must comply with the First Amendment, which stands as an independent bulwark against the government's intrusion into individuals' electronic devices. Second, these serious First Amendment concerns also color the Fourth Amendment analysis conducted during a suppression hearing, because the Fourth Amendment's warrant requirement must be applied with "scrupulous exactitude" when searches burden First Amendment activity. *Zurcher*, 436 U.S. at 564 (quoting *Stanford*, 379 U.S. at 485). Through either lens, warrantless device searches at the border violate the Constitution.

A. Warrantless searches of electronic devices at the border violate the First Amendment.

1. Searches of electronic devices at the border trigger First Amendment scrutiny.

The First Amendment stands as an independent source of protection, separate and apart from the Fourth Amendment, against the search and seizure of travelers' and journalists' devices at the border. *See Alasaad*, 988 F.3d at 22 ("The First Amendment provides protections—independent of the Fourth Amendment—against the compelled disclosure of expressive information."); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[T]he *First* Amendment operates independently of the Fourth and provides different protections.").

The distinction between First and Fourth Amendment protections has been clear since the Supreme Court first articulated the "border search" exception to the Fourth Amendment's warrant requirement in *United States v. Ramsey*, 431 U.S. 606 (1977). *Ramsey* involved a search of incoming international mail suspected to contain heroin. *Id*. at 609–10. After holding the search permissible under the Fourth Amendment, the Court separately considered the possibility that the border search policy would chill free speech; it concluded that any such chill would be "minimal," given that the statute at issue prohibited the opening of envelopes absent reasonable suspicion and that the "[a]pplicable postal regulations flatly prohibit, under all circumstances, the reading of correspondence absent a search warrant." *Id.* at 623–24 (citation omitted). In other words, the Court made clear

that the inspection of expressive content at the border raises independent First Amendment concerns.

In *New York v. P.J. Video, Inc*., 475 U.S. 868 (1986), the Court again highlighted independent First Amendment protections in the context of searches and seizures of expressive material. There, the Court explained that it had "long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures." *Id.* at 873. The Court made clear that the First Amendment has in numerous circumstances played an important role in protecting expressive material against seizures that might otherwise have been permissible under the Fourth Amendment, including where Fourth Amendment "exception[s]" like exigent circumstances would ordinarily allow law enforcement to seize material without a warrant. *Id.* at 873, 875 n.6 (discussing *Roaden v. Kentucky*, 413 U.S. 496 (1973)).[18]

More recent cases, too, highlight the Court's special concern for searches—especially warrantless ones—that burden expressive activities. Ordinarily, for

[18] Some courts have interpreted *P.J. Video* as suggesting that the First Amendment provides no independent protection against the search and seizure of expressive material because the case held that the First Amendment did not require a "higher" standard of probable cause for the seizure of allegedly obscene material. *See, e.g.*, *United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005). But those courts were incorrect to mistake the Supreme Court's narrow holding about the probable cause standard for a broad decision limiting the First Amendment's applicability to searches of expressive material.

instance, the Court has held that an individual has a lesser expectation of privacy in information voluntarily provided to third parties. *See Smith v. Maryland*, 442 U.S. 735, 743–44 (1979). But in *Carpenter*, the Court rejected the extension of the third-party doctrine to cell-site records because of "the seismic shifts in digital technology" that made possible "the exhaustive chronicle of location information casually collected by wireless carriers today," which could "provide[] an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217, 2219 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

Similarly, in *Riley*, the Court held that the well-established "search incident to arrest" exception to the warrant requirement did not extend to searches of cell phones, explaining that the "quantitative and . . . qualitative" differences between electronic devices and other objects that might hold expressive content necessitate rethinking the application of analog-era constitutional doctrines in new technological circumstances. 573 U.S. at 393. As the Court explained, cell phones can carry "every piece of mail [owners] have received for the past several months, every picture they have taken, [and] every book or article they have read," as well as "picture messages, text messages, internet browsing history, a calendar, a thousand-entry phone book, and so on." *Id.* at 393–94. And searches could reveal

"private interests or concerns," such as "where a person has been" and "records of . . . transactions," in addition to the owner's communication history with every person she knows stretching back to the device's purchase. *See id*. at 395–96.[19]

Riley's teaching that courts must consider the scale and sensitivity of the information stored on electronic devices—as well as their importance as a means of communication, association, and newsgathering—is particularly instructive here because the "search incident to lawful arrest" exception and the "border search" exception are "similar" exceptions to the warrant requirement, *Ramsey*, 431 U.S. at 621. Courts must therefore take into account the unique ability of electronic devices to store and transmit vast quantities of protected expressive and journalistic material by applying the First Amendment's requirements to device searches at the border.

2. Warrantless device searches do not survive any form of heightened scrutiny.

Applying the First Amendment's independent guarantees in light of these cases, it is clear that warrantless searches of electronic devices, like the ones at issue in this case, demand close scrutiny. Part I, *supra*, demonstrates the First

[19] These cases make clear that the Court's concern with searches that implicate expressive or associational rights is not limited to "the special threat posed by prior restraints to First Amendment guarantees," *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1240 (8th Cir. 1990), and requires careful scrutiny when searches of electronic devices are conducted.

Amendment interests at stake when the government conducts even basic device searches at the border. The type of forensic search conducted in this case is far more intrusive, allowing law enforcement to sift through an exact replica of the contents of the seized device, potentially revealing private readings, anonymous writings, or, in the case of journalists, confidential sources and newsgathering efforts. Because these kinds of "[g]overnment information gathering can threaten the ability to express oneself, communicate with others, explore new ideas, and join political groups," Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. Rev. 112, 121 (2007), these searches require careful review. Under any level of First Amendment scrutiny, warrantless searches of electronic devices at the border violate the First Amendment.

The Supreme Court has long applied some form of heightened scrutiny to the forced disclosure of personal beliefs and private associations. In general, "[w]hen a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6–7 (1971). And in *Americans for Prosperity Foundation v. Bonta*, the Court held that compelled disclosure of association must be subjected to exacting scrutiny, "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." 141 S. Ct. 2373, 2383 (2021) (quoting *NAACP v.*

Alabama ex rel. Patterson, 357 U.S. 449, 460–61 (1958)). As the Court explained, "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id.* at 2382 (quoting *NAACP*, 357 U.S. at 462).

Anonymous writings, too, enjoy strong First Amendment protection. The Supreme Court has held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Because "identification of the author against her will" can "reveal[] unmistakably the content of her thoughts on a controversial issue," forced identification of a speaker can be "particularly intrusive." *Id.* at 355. Therefore, "exacting scrutiny" applies to burdens on the right to anonymity. *Id.* at 347 (citation omitted) (forced identification of pamphleteer unconstitutional).

The First Amendment concerns with unmasking anonymous speakers are especially acute when those speakers are reporters' confidential sources, because their exposure threatens the ability of reporters to gather and report the news. *See Zerilli*, 656 F.2d at 710–11 ("Compelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems," and "the press' function as a vital source of information is weakened whenever the ability of

journalists to gather news is impaired."). As noted above, reporters returning from global assignments often carry with them information from confidential sources.

Regardless of whether the applicable level of scrutiny is the "closest" or most "exacting," warrantless searches of electronic devices fail. Even under intermediate scrutiny, the government must show that its searches are "narrowly tailored to serve a significant governmental interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and that they "leave open ample alternative channels of communication," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *cf. Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 546 (1963) (requiring legislature to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest" in justifying demand for organization's membership list). It cannot do so here.

First, warrantless searches of electronic devices at the border fail to satisfy the "narrow tailoring" requirement. In *Riley*, the Court rejected the government's contention that searches of cell phones incident to arrest were constitutional if officers had a reasonable suspicion that they would uncover "information relevant to the crime, the arrestee's identity, or officer safety." 573 U.S. at 399. The Court explained that the reasonable suspicion standard was not enough because such searches "would sweep in a great deal of information, and officers would not

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always be able to discern in advance what information would be found where." *Id.* Here, too, even if officers searched devices only when they had a reasonable suspicion that the devices contained contraband, the searches "would sweep in a great deal of information," much of it expressive in nature. *Id*.

While the First Circuit rejected a facial challenge to the government's electronic device search policies in *Alasaad v. Mayorkas*, its analysis was flawed. There, the court held that the government's policies had "a plainly legitimate sweep" and "serve[d] the government's paramount interests in protecting the border." *Alasaad*, 988 F.3d at 22. But it failed to reckon with the massive amount of expressive information swept up in electronic device searches, and it failed to ask whether the searches could be narrowed or constrained while still serving the government's interests. As *Riley* made clear, courts *must* consider the consequences of electronic device searches on free expression, especially when obtaining a warrant is an available alternative. 573 U.S. at 401–03. And there is no question that obtaining a warrant is an available and more narrowly tailored option, especially with respect to forensic searches like those at issue in this case. *See United States v. Cano*, 934 F.3d 1002, 1020 (9th Cir. 2019) ("[I]n most cases the time required to obtain a warrant would seem trivial compared to the hours, days, and weeks needed to complete a forensic electronic search.").

In addition, the harm from the government's policies extends far beyond those travelers whose devices have been searched. The knowledge that the content of their devices *may* be searched without a warrant has a chilling effect on the expressive activities of *all* travelers, who may refrain from using their devices for expressive and associational purposes for fear that their communications will be exposed. This chilling effect is exacerbated by the nearly unfettered authority that CBP's and ICE's policies give border agents to decide whose devices to search and for what reason. *Cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (referring to the "time-tested knowledge that in the area of free expression . . . placing unbridled discretion in the hands of a government official or agency . . . may result in censorship"). Warrantless electronic device searches thus threaten to chill the speech of every traveler and journalist.

Second, these searches fail to "leave open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45. In the modern world, there is no realistic alternative to the communication channels that the internet and electronic devices provide, whether a potential alternative is evaluated in terms of speed, scope, breadth of audience, or ability to communicate with otherwise remote persons. *Cf. Riley*, 573 U.S. at 393 (describing "qualitative" and "quantitative" differences in the storage, communicative capacity, and pervasiveness of cell phones compared to pre-digital objects); Part I.A, *supra*

(describing journalists' dependence on electronic devices to gather and disseminate news). The government's claim that it may seize and forensically image the contents of literally every device crossing the border without ever once obtaining a warrant leaves no realistic alternative for travelers. These searches are therefore entirely inconsistent with the requirements of the First Amendment.

B. The First Amendment implications of electronic device searches at the border require scrupulous adherence to the Fourth Amendment warrant requirement.

Regardless of whether this Court independently evaluates the search at issue under the First Amendment, the Fourth Amendment requires "scrupulous" adherence to the warrant requirement where expressive values are also at risk. *Zurcher*, 436 U.S. at 564 (quoting *Stanford*, 379 U.S. at 485); *see also United States v. Kelly*, 529 F.2d 1365, 1372 (8th Cir. 1976) ("[I]n the absence of exigent circumstances in which police must act immediately to preserve evidence of the crime, we deem the warrantless seizure of materials protected by the First Amendment to be unreasonable."). So too here, where permitting border agents to intrude on First Amendment interests without judicial oversight would have grave consequences for freedom of the press, free speech, and free association.

From the outset, the Fourth Amendment's protections have been understood as safeguards for free expression and the free press in particular. Just as "Founding-era Americans understood the freedom of the press to include the right

of printers and publishers not to be compelled to disclose the authors of anonymous works," *Ams. for Prosperity Found.*, 141 S. Ct. at 2390 (Thomas, J., concurring) (citation and internal quotation marks omitted), the prohibition on unreasonable searches was widely understood as a response to abusive English practices targeting dissident publishers, *see Stanford*, 379 U.S. at 482. As the Supreme Court has observed, two of the landmark cases that informed the Fourth Amendment's adoption—*Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), and *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763)—were press cases. And whether a particular case involves the institutional press or not, the insight that a "discretionary power given to messengers to search wherever their suspicions may chance to fall" is "totally subversive of the liberty of the subject" continues to inform the best reading of the Fourth Amendment today. *Marcus v. Search Warrants*, 367 U.S. 717, 728–29 (1961) (quoting *Wilkes*, 19 How. St. Tr. at 1167).

Recognizing that connection, the Supreme Court has required adherence to the warrant and probable cause protections of the Fourth Amendment with "scrupulous exactitude" when confronted with searches and seizures of materials that "may be protected by the First Amendment." *Zurcher*, 436 U.S. at 564 (quoting *Stanford*, 379 U.S. at 485). And for just that reason, "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Id.* (quoting *Roaden*,

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413 U.S. at 501). The same is true: Whatever the merits of the border search exception in its traditional sweep, *see United States v. Aigbekaen*, 943 F.3d 713, 727 (4th Cir. 2019) (Richardson, J., concurring in the judgement) (noting that "more recent historical work" has cast doubt on its pedigree), it cannot reasonably be extended to the digital equivalent of traveler's "papers," U.S. Const. amend. IV.

The rule governing searches of these kinds must be framed with the care the Supreme Court has required where the government's discretion could, if left unregulated, be abused to tread on First Amendment interests. A warrant, and nothing short of it, is necessary to safeguard the newsgathering activities of journalists and the speech and associational rights of travelers. "No less a standard could be faithful to First Amendment freedoms." *Stanford*, 379 U.S. at 485.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's denial of Mr. Xiang's suppression motion.

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Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown* (Bar No. 1067194)
Katie Townsend
Gabriel Rottman
Grayson Clary
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005

Stephanie Krent
Scott Wilkens
Evan Welber Falcón
KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, N.Y. 10115
Telephone: (646) 745-8500

Telephone: (202) 795-9300
Facsimile: (202) 795-9310

* *Counsel of record for amici curiae*

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Dated: July 20, 2022

/s/ Bruce D. Brown
Bruce D. Brown
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of Amici Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system on July 20, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: July 20, 2022

/s/ Bruce D. Brown
Bruce D. Brown
REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS