No. 24-302

In the Supreme Court of the United States

MARCOS MENDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the warrantless border search of petitioner's electronic device was permissible under the border-search exception to the Fourth Amendment's warrant requirement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 103 F.4th 1303. The opinion and order of the district court (Pet. App. 18a-31a) is not published but is available at 2021 WL 3187718.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2024. The petition for a writ of certiorari was filed on September 9, 2024 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e). Judg-

ment 1. He was sentenced to 300 months of imprisonment, to be followed by ten years of supervised release. Judgment at 2-3. The court of appeals affirmed. Pet. App. 1a-14a.

1. On February 20, 2016, petitioner traveled from Ecuador to the United States, landing at O'Hare International Airport. Pet. App. 2a. Based on petitioner's arrest record and travel history, U.S. Customs and Border Protection (CBP) had issued a "lookout" for him. *Id.* at 3a. Petitioner had been arrested in 2010 for indecent solicitation of a child and child pornography, resulting in a 2011 conviction for child endangerment. *Ibid.* And petitioner had aroused CBP's suspicion upon his return from Mexico in 2014, when during an inspection, he claimed to have been kidnapped, robbed of his electronic devices, and told to leave the country. *Ibid.*

When he disembarked at O'Hare in 2016, petitioner was returning from a country that CBP identified as a potential child-trafficking source country, and his travel profile "fit the profile for child-pornography offenders: a single adult male traveling alone." Pet. App. 3a. Based on those facts and the lookout, a CBP investigating officer referred petitioner to a "secondary" inspection after he arrived. *Ibid.*

Within the first 30 minutes of the inspection, petitioner provided his personal cell phone and passcode. Pet. App. 3a. The CBP officer navigated to the phone's camera roll, where he found thousands of pornographic images, including images that appeared to be child pornography. *Ibid.* Using the phone's passcode, the officer also opened an application called "iSafe," which housed additional illicit images. *Ibid.*

The officer then moved petitioner to a more private location to conduct a "forensic" examination of the cell

phone. Pet. App. 3a; *id.* at 20a. CBP officers used data extraction technology to download a copy of the photos and videos stored on the device's camera roll. *Ibid.* This examination lasted roughly two hours and revealed more child pornography. *Id.* at 3a.[1]

CBP officers released petitioner after the inspection but retained his cell phone. Pet. App. 4a. Shortly after his release, petitioner remotely wiped the phone and traveled by car to Mexico. *Ibid.* An investigative team with Homeland Security Investigations extracted the metadata, including geolocation information, from the files that CBP had previously downloaded from petitioner's cell phone. *Ibid.* That data showed that several of the child-pornography images were taken near petitioner's residence in Illinois. *Ibid.*

2. A federal grand jury in the Northern District of Illinois returned an indictment charging petitioner with two counts of producing child pornography, in violation of 18 U.S.C. 2251(a); one count of transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1); and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. 4a. Petitioner was extradited to the United States. *Ibid.*

Petitioner moved to suppress the evidence found on his cell phone, arguing that the searches of his device violated the Fourth Amendment on the theory that they were unsupported by a warrant or reasonable suspicion. Pet. App. 18a-19a.

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[1] Petitioner had also traveled with a work cell phone and work iPad. Pet. App. 2a. Officers conducted a manual search of those devices, *id.* at 19a, but did not find anything of interest and returned them to petitioner, *id.* at 63a. Officers later obtained a search warrant for the devices. *Id.* at 20a. Petitioner does not challenge any search of his work devices. See Pet. 2-4.

The district court denied petitioner's motion after an evidentiary hearing. Pet. App. 18a-31a. The court observed that "no circuit court" has "required more than reasonable suspicion for a border search of cell phones or electronically-stored data." *Id.* at 24a (quoting *United States* v. *Wanjiku*, 919 F.3d 472, 485 (7th Cir. 2019)). And it found that here, CBP officers had reasonable suspicion of criminal activity when they encountered petitioner, justifying the initial search of his cell phone. *Id.* at 30a. The court also found that the discovery of child pornography during that initial search gave the government "at least reasonable suspicion" for its subsequent searches of the iSafe application, forensic download of the photos and videos, and extraction of metadata from those files. *Id.* at 27a n.7.

Petitioner subsequently pleaded guilty to one count of producing child pornography but reserved his right to appeal the district court's suppression ruling. Pet. App. 4a-5a. The government dismissed the remaining counts. *Id.* at 16a. The court sentenced petitioner to 300 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-14a.

The court of appeals "join[ed its] sister circuits to hold that a border search of a cell phone or other electronic device requires neither a warrant nor probable cause." Pet. App. 12a. It observed that border searches "have long been exempted from warrant and probable cause requirements," *id.* at 6a, an exception that "has a history as old as the Fourth Amendment itself," *id.* at 2a (quoting *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977)). It explained that the government's authority "is rooted in 'the long-standing right of the sovereign to protect itself by stopping and examining persons and

property crossing into this country.'" *Id.* at 5a (quoting *Ramsey*, 431 U.S. at 616). And it recognized that such searches ordinarily "are reasonable simply by virtue of the fact that they occur at the border." *Id.* at 6a (quoting *United States* v. *Flores-Montano*, 541 U.S. 149, 152-153 (2004)).

The court of appeals rejected petitioner's argument that a different rule should apply to a search of cell phones or other electronic devices carried into the country. See Pet. App. 7a-12a. The court explained that "warrantless electronic device searches," no less than searches of other property, "are essential to the border search exception's purpose of ensuring that the executive branch can adequately protect the border." *Id.* at 9a-10a (quoting *Alasaad* v. *Mayorkas*, 988 F.3d 8, 17 (1st Cir.), cert. denied, 141 S. Ct. 2858 (2021)). The court recognized that "[t]he government's interest in detecting child pornography at the border is just as strong as its interest in intercepting firearms, narcotics, or any other prohibited item." *Id.* at 10a. And it emphasized that "[n]o circuit court * * * require[s] more than reasonable suspicion to support even the most intrusive electronics search at the border." *Id.* at 11a-12a (cataloging cases).

The court of appeals further "agree[d] with the consensus among circuits that brief, manual searches of a traveler's electronic device are 'routine' border searches" and therefore require "no individualized suspicion." Pet. App. 13a (cataloging cases). While the court acknowledged that cell phone searches can be "intrusive," it reasoned that any privacy concerns are "tempered by the fact that the searches are taking place at the border." *Ibid.* (internal quotation marks omitted). The court emphasized that "manual electronic searches at

the border are typically 'brief procedures'—here, around thirty minutes—practically limited in intrusiveness by the fact that the customs agent cannot download and peruse the phone's entire contents," but instead "must physically scroll through the device, making it less likely for an agent to tap into the revealing nooks and crannies of the phone's metadata, encrypted files, or deleted contents." *Ibid.* (bracket omitted).

The court of appeals declined to address "whether more intrusive, forensic electronic device searches [at the border] require individualized suspicion." Pet. App. 14a. The court explained that "this case does not require" addressing that issue because "even if the extensive forensic searches * * * required reasonable suspicion, customs agents had that and more once they found illicit images and videos of children on [petitioner's] phone during the routine search." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-31) that the search of his electronic device by CBP officers upon his arrival at a port of entry violated the Fourth Amendment. The court of appeals correctly upheld the border search in petitioner's case, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has recently and repeatedly denied review of petitions raising similar claims.[2] It should follow the same course here.

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[2] See, *e.g.*, *Castillo* v. *United States*, 144 S. Ct. 410 (2023) (No. 23-5840); *Skaggs* v. *United States*, 143 S. Ct. 604 (2023) (No. 22-6053); *Aigbekaen* v. *United States*, 141 S. Ct. 2871 (2021) (No. 20-8057); *Merchant* v. *Mayorkas*, 141 S. Ct. 2858 (2021) (No. 20-1505); *Aguilar* v. *United States*, 141 S. Ct. 1102 (2021) (No. 20-6265); *Williams* v. *United States*, 141 S. Ct. 235 (2020) (No. 19-1221); *Vergara* v. *United States*, 139 S. Ct. 70 (2018) (No. 17-8639).

1. The "'border search' exception" is a "longstanding, historically recognized exception to the Fourth Amendment's" warrant requirement. *United States* v. *Ramsey*, 431 U.S. 606, 621 (1977). That longstanding principle reflects that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *United States* v. *Flores-Montano*, 541 U.S. 149, 152 (2004). In addition, "the expectation of privacy [is] less at the border than in the interior." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 539 (1985). Consequently, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is * * * struck much more favorably to the Government at the border." *Id.* at 540.

"Time and again, [this Court] ha[s] stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.'" *Flores-Montano*, 541 U.S. at 152-153 (quoting *Ramsey*, 431 U.S. at 616). The Court has made clear that the doctrine applies at "functional equivalents" of the border, such as international airports. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973). And the Court has emphasized that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Montoya de Hernandez*, 473 U.S. at 538.

The Court has held, for example, that "the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassem-

ble, and reassemble a vehicle's fuel tank." *Flores-Montano*, 541 U.S. at 155. Likewise, customs officials may open and inspect envelopes sent by "international letter-class mail" without a warrant or probable cause. *Ramsey*, 431 U.S. at 607; see *id.* at 616-625.

2. Petitioner provides no sound reason why, notwithstanding the border-search doctrine, the searches of his cell phone required a warrant or probable cause. Petitioner contends that this Court in recent decisions has "upended" Fourth Amendment jurisprudence, to the effect that a warrant is generally required to search the contents of a person's cell phone, even at the border. Pet. 9-12 (citing *Riley* v. *California*, 573 U.S. 373 (2014), and *Carpenter* v. *United States*, 585 U.S. 296 (2018)) (citation omitted). But the decisions on which petitioner rely do not address, let alone undermine, the border-search doctrine at issue here.

a. *Riley* involved the search-incident-to-arrest doctrine, which allows an arresting officer, without a search warrant or additional justification, "to search the person arrested in order to remove any weapons" and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." 573 U.S. at 383 (quoting *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969)). Although the search-incident-to-arrest doctrine has existed in some form "for a century," debate has existed "for nearly as long" about "the extent to which officers may search property found on or near the arrestee" at the time of the arrest. *Id.* at 382.

The question presented in *Riley* was whether the search-incident-to-arrest doctrine encompassed a search of the data on a cell phone carried by an arrestee. 573

U.S. 378. The Court explained that "[a]bsent more precise guidance from the founding era," it "generally determine[s] whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 385 (citation omitted). The Court stated that this balancing of interests supports a "categorical" search-incident-to-arrest exception for searches of "physical objects" found on or near an arrestee's person. *Ibid.* But the Court determined that the justifications for the doctrine did not extend to a search of the digital data stored on an arrestee's phone. *Ibid.*

At the same time, *Riley* emphasized the narrow scope of its holding, noting that "other case-specific exceptions may still justify a warrantless search of a particular phone." 573 U.S. at 401-402. One established exception to the warrant requirement is the border-search doctrine. And unlike in *Riley*, "more precise guidance from the founding era" demonstrates the absence of a warrant requirement for border searches. *Id.* at 385. "The Congress which proposed the Bill of Rights, including the Fourth Amendment," also enacted the Nation's first customs statute, which recognized a "plenary customs power" to conduct warrantless searches at the border. *Ramsey*, 431 U.S. at 616. "The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is * * * manifest," because it demonstrates a Framing-era understanding that "border searches were not subject to the warrant provisions of the Fourth Amendment." *Id.* at 616-617.

This Court has thus recognized that the rule that "searches at our borders" do not require "probable cause" or "a warrant" has "a history as old as the Fourth Amendment itself." *Ramsey*, 431 U.S. at 619; see, *e.g.*, *Montoya de Hernandez*, 473 U.S. at 537 (tracing the rule's history to "the founding of our Republic"). Petitioner dismisses that history (Pet. 19-22), asserting that the border-search doctrine has traditionally distinguished between the "warrantless searches of ships"—which he acknowledges the Framers anticipated—and "searching a person's papers," *id.* at 20. This Court, however, rejected the same argument in *Ramsey*, where it applied the border-search doctrine to uphold searches of international mail without a warrant or probable cause. 431 U.S. at 608. The defendant in *Ramsey* argued that "whatever the rule may be with respect to travelers[and] their baggage," the Court should "not 'extend' the border-search exception" to include letters. *Id.* at 620 (citation omitted). But as this Court explained, "th[e] inclusion of letters within the border-search exception [did not] represent[] any 'extension' of that exception." *Ibid.* Rather, such searches fit firmly within the "historically recognized scope of the border-search doctrine." *Id.* at 621.

It is the entry of goods "into this country from without it"—not any balancing of interests—"that makes a resulting search 'reasonable.'" *Ramsey*, 431 U.S. at 620. Moreover, even were it necessary, any balancing of interests would not support the imposition of a warrant requirement in this very different context. The border-search doctrine rests on different justifications than the search-incident-to-arrest doctrine, and those justifications continue to apply with full force where, as here,

the object that a traveler seeks to bring across the Nation's international border is a cell phone.

On the government-interest side, *Riley* emphasized that the interests served by a search incident to arrest —preventing "harm to officers and destruction of evidence"—do not apply "when the search is of digital data." 573 U.S. at 386; see *id.* at 386-392. The border-search exception, in contrast, reflects "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country," *Ramsey*, 431 U.S. at 616, in order to, among other things, "prevent the introduction of contraband," *Montoya de Hernandez*, 473 U.S. at 537. That vital interest "is at its zenith at the international border," *Flores-Montano*, 541 U.S. at 152, and it is directly implicated regardless of whether the traveler carries a "cell phone" or a "traditional piece of luggage," Pet. 11. As this case illustrates, cell phones can be used to physically transport child pornography or other contraband, including pirated intellectual property or "highly classified technical information." *United States* v. *Kolsuz*, 890 F.3d 133, 152 (4th Cir. 2018) (Wilkinson, J., concurring in the judgment). And, as the court of appeals observed, "[t]he government's interest in detecting child pornography at the border is just as strong as its interest in intercepting firearms, narcotics, or any other prohibited item." Pet. App. at 10a.[3]

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[3] Petitioner expresses concern that the government "continued forensically searching" his phone "even though it had more than enough time and resources to request a warrant." Pet. 30-31. But it is irrelevant whether the government would have "difficulty * * * obtaining a warrant" to search items seized at the border. *Ramsey*, 431 U.S. at 621 (citation omitted). The border-search doctrine "is

The privacy side of the balance also differs significantly at the border. Unlike the search-incident-to-arrest doctrine, the border-search doctrine does not rest on the premise that a border search "works no substantial additional intrusion on privacy" beyond some separately authorized intrusion like an arrest, and it therefore does not depend on the quality or quantity of the information at issue, or whether it might be "crammed into [a suspect's] pockets." *Riley*, 573 U.S. at 393, 400. Instead, the border-search doctrine reflects a categorical judgment that "the expectation of privacy is less at the border than it is in the interior." *Flores-Montano*, 541 U.S. at 154. The doctrine therefore extends to *all* property transported across the border, including "luggage," *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion); "vehicles," *Flores-Montano*, 541 U.S. at 152; sealed envelopes, *Ramsey*, 431 U.S. at 616-617, and even "private living quarters aboard [a] ship," *United States* v. *Alfonso*, 759 F.2d 728, 738 (9th Cir. 1985); see, *e.g.*, *United States* v. *Whitted*, 541 F.3d 480, 486 (3d Cir. 2008) (applying the doctrine to "a passenger's cruise ship cabin").

The privacy implications of border searches also differ from those at issue in *Riley* for an additional reason. "*Riley* involved the warrantless search of a cell phone following an ordinary roadside arrest after a traffic violation." *Kolsuz*, 890 F.3d at 152 (Wilkinson, J., concurring in the judgment). In that case, as in most searches incident to arrest, the arrestee's encounter with law enforcement was involuntary and unanticipated. Border searches, in contrast, occur only during predictable and

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not based on the doctrine of 'exigent circumstances' at all," but rather on the government's sovereign interest in protecting its border. *Ibid.*

voluntary border crossings. "Travelers 'crossing a border * * * are on notice that a search may be made,' and they are free to leave any property they do not want searched"—including digital data—"at home." *United States* v. *Touset*, 890 F.3d 1227, 1235 (11th Cir. 2018) (brackets and citation omitted). That further limitation on the privacy interest underscores why, even were such a reassessment necessary, the privacy interest could not overcome the centuries-old governmental sovereignty interests that animate the border-search doctrine.

b. Petitioner's reliance (Pet. 9-12) on this Court's decision in *Carpenter* is similarly misplaced. The Court held in *Carpenter* that the government's acquisition of seven days or more of historical cell-site location records created and maintained by a cell-service provider is a Fourth Amendment search generally subject to the warrant requirement. 585 U.S. at 310 & n.3. *Carpenter* did not involve a border search, and the Court did not mention, let alone question, its longstanding border-search precedents. Nothing in *Carpenter*—a "narrow" decision concerning the application of the reasonable-expectation-of-privacy test for a search and the third-party records doctrine to the specific type of data at issue in that case—bears on the application of the border-search doctrine to a cell phone that a traveler is attempting to bring into the United States. *Id.* at 316.

c. The court of appeals' rejection of a warrant or probable cause requirement here accords with the decisions of every other court of appeals to address the issue. "[N]o court has ever required a warrant for any border search or seizure." *United States* v. *Wanjiku*, 919 F.3d 472, 481 (7th Cir. 2019); accord, *e.g.*, *United States* v. *Xiang*, 67 F.4th 895, 899-900 (8th Cir. 2023);

Alasaad v. *Mayorkas*, 988 F.3d 8, 16-18 (1st Cir.), cert. denied, 141 S. Ct. 2858 (2021); *Kolsuz*, 890 F.3d at 147; *United States* v. *Vergara*, 884 F.3d 1309, 1312-1313 (11th Cir.), cert. denied, 139 S. Ct. 70 (2018); *United States* v. *Molina-Isidoro*, 884 F.3d 287, 292 (5th Cir. 2018). This Court's review is therefore unwarranted.

3. There is likewise no disagreement in the circuits on the subsidiary recognition that no individualized suspicion is required for "brief, manual" inspections of cell phones at a port of entry, like the one at issue here. Pet. App. 13a; see *Alasaad*, 988 F.3d at 13 (1st Cir.); see also *United States* v. *Castillo*, 70 F.4th 894, 898 (5th Cir.), cert. denied, 144 S. Ct. 410 (2023); *United States* v. *Cano*, 934 F.3d 1002, 1016 (9th Cir. 2019), cert. denied, 141 S. Ct. 2877 (2021); *United States* v. *Linarez-Delgado*, 259 Fed. Appx. 506, 508 (3d Cir. 2007); *Kolsuz*, 890 F.3d 133, 146 n.5 (4th Cir.) (citing *United States* v. *Ickes*, 393 F.3d 501, 505-07 (4th Cir. 2005)). And this Court has required a degree of individualized suspicion for a border search or seizure only once, in a different context.

In *Montoya de Hernandez*, customs officers who reasonably suspected that a traveler was smuggling drugs in her alimentary canal detained her for 16 hours to monitor her bowel movements. 473 U.S. at 534-536. The Court upheld the seizure, explaining that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents * * * reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Id.* at 541. But the Court expressed "no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4. And the manual search of petitioner's cell phone in this case

bears no resemblance to the nonroutine inspection in *Montoya de Hernandez*; cf. *Flores-Montano*, 541 U.S. at 152 (holding that lower court erred in extending *Montoya de Hernandez* to the factually dissimilar context of vehicle searches and observing that "[c]omplex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles").

Within the first 30 minutes of the inspection, petitioner provided his cell phone and passcode to the CBP officer, who manually unlocked it, navigated to the camera roll, and observed images displaying child pornography. Pet. App. 3a. This type of search is "practically limited in intrusiveness" because "the customs agent cannot download and peruse the phone's entire contents" at his leisure; the agent instead "must physically scroll through the device." *Id.* at 13a.

To the extent that petitioner briefly asserts (Pet. 31) that at least "reasonable suspicion should be required for an initial search" like the one performed on his cell phone, his case would be an unsuitable vehicle for considering that issue, see Pet. i, because the district court found that CBP officers did indeed have reasonable suspicion to perform that search. They knew petitioner had been flagged for a "lookout" with respect to child pornography and that the lookout was based on (*inter alia*) his arrest history involving child pornography and indecent solicitation of a child in 2010; his 2011 conviction for endangering the life or health of a child; and his suspicious encounter with CBP in 2014. Pet. App. 28a-29a. They also knew that petitioner had arrived in the United States from a country understood to be a potential source of child trafficking, and was traveling in a

manner that fit the profile of a child-pornography offender. *Id.* at 3a; 29a. In addition, petitioner was condescending and evasive during an initial exchange with the CBP officer, as if he were attempting to deflect attention from the inspection. *Id.* at 29a.

Although the court of appeals did not rest its decision on that finding (or the good-faith exception to the exclusionary rule), see Pet. App. 8a, it would remain an obstacle to the exclusionary-rule remedy that petitioner ultimately seeks. Accordingly, even if the reasonable-suspicion issue otherwise merited further review, it would not be outcome-determinative here. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

4. Finally, this case does not implicate any disagreement on the question whether particularized suspicion is needed for an advanced or forensic search of an electronic device at the border. While the court of appeals perceived "divergence among the circuits" on that issue, it made clear that it "need not resolve this issue today because this case does not require it." Pet. App. 14a. The court observed that "even if" extensive forensic searches require reasonable suspicion, the agents here "had that and more" once they found illicit images and videos on petitioner's phone during the routine search, *ibid.*, and petitioner has not challenged that factbound holding in this Court, see Pet. i.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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