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THE MODERN BORDER: THE GOVERNMENT CAN SEARCH . . . ANYTHING?

Abigail Nusbaum*

I. INTRODUCTION ............................................................................... 483
II. FOURTH AMENDMENT BACKGROUND ............................................ 485
III. SUPREME COURT JURISPRUDENCE ................................................. 487
   A. Scope of the Border Exception ................................................ 487
   B. Requisite Level of Suspicion .................................................... 491
IV. CURRENT STATE OF THE LAW ........................................................ 493
   A. Scope of the Border Exception ................................................ 494
      1. Searches for Digital Contraband ........................................ 494
      2. Searches for Evidence of Ongoing or Imminent Criminal Activity at the Border ........................................................ 496
      3. Searches for Evidence of Domestic Criminal Activity ...... 500
   B. Requisite Level of Suspicion .................................................... 501
      1. Forensic Cell Phone Searches Require Reasonable Suspicion............................................................................ 502
      2. Forensic Cell Phone Searches Require No Suspicion ...... 506
V. ANALYSIS ........................................................................................ 507
   A. The Border Scope is Limited to Searches for Evidence of Ongoing or Imminent Criminal Activity at the Border ............ 508
   B. Forensic Cell Phone Searches Require Reasonable Suspicion .................................................................................. 511
      1. Cell Phones Implicate Heightened Privacy Interests ......... 512
      2. Forensic Searches Are Highly Invasive ............................. 514
VI. CONCLUSION ................................................................................... 518

I. INTRODUCTION

The developing world is continually infused with advancements in modern technology, but with these benefits comes uncertainty in interpreting Fourth Amendment protections. Indeed, individuals are accustomed to themselves and their belongings undergoing x-ray scans or pat downs when

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traveling domestically or overseas. But what travelers are not accustomed to is border officials seizing and conducting forensic searches on their cell phones to uncover all that currently is and ever was stored on it—text messages, phone calls, photos, banking information, medical information, geo locations, past browsing history, details contained on apps, and deleted and encrypted files. It is unlikely that the Founders considered forensic searches of cell phones when they drafted the Bill of Rights. Consequently, a circuit split has emerged on the Fourth Amendment’s application to forensic electronic searches at the international border. The Supreme Court should hear and resolve the split and find that warrantless forensic cell phone searches require border officials to reasonably suspect the individual is engaging in ongoing or imminent criminal activity at the border. Doing so would properly account for competing interests—security of the international border and protection of individuals’ Fourth Amendment rights.

The Fourth Amendment prohibits the government from conducting unreasonable searches and seizures. Generally, for a search to be reasonable, officers must obtain a warrant based on probable cause. However, certain exceptions exist to this warrant requirement, one being at the international border, where the government needs no probable cause or suspicion for general searches. But a split in the circuits exists on how that standard applies to forensic searches of cell phones at the border. The split implicates two questions. First, what is the scope of the border exception to the warrant and probable cause requirement? Second, even when a search is within the border exception’s scope, is any level of suspicion required for forensic searches of cell phones at the border?

The Supreme Court has not addressed these two questions, but various lower courts have. Regarding the border exception’s scope, courts mainly consider whether the primary purpose of the forensic search is for one of the border exception’s underlying justifications. But some courts will also account for the duration and location of the search in considering whether it was a border search at all. The Ninth Circuit has adopted the narrowest approach, limiting forensic cell phone searches to searches for digital contraband on the phone itself. The Fourth and First Circuits take a broader scope, limiting forensic searches to searches for evidence of ongoing or imminent criminal activity at the border. A district court in the Second Circuit, however, interprets the border scope the broadest and allows forensic searches for the purpose of discovering prior domestic criminal activity. On the matter of reasonable suspicion, the Fourth and Ninth Circuits require reasonable suspicion for all forensic cell phone searches even when they are within the border exception. While the First Circuit has not made the same categorical determination for all forensic searches, it typically requires
reasonable suspicion in its holdings. The only circuit to definitively hold that no reasonable suspicion is required is the Eleventh.

The Supreme Court should resolve this split by holding that warrantless forensic cell phone searches at the border are unconstitutional when the search’s primary purpose is not for evidence of ongoing or imminent criminal activity at the border. Doing so is consistent with the text, history, and purpose of the border authority. Next, even within the border exception’s scope, officials must have reasonable suspicion that ongoing or imminent criminal activity is taking place at the border to conduct a forensic cell phone search. These standards account for and balance all interests at stake. Border officials can effectively do their job, the integrity of the nation’s border is secured, and traveling individuals’ Fourth Amendment privacy rights are protected. Separation of powers and democratic principles are also adhered to and promoted.

II. FOURTH AMENDMENT BACKGROUND

The Fourth Amendment proscribes that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The amendment is a significant pillar to American society as it “was the founding generation’s response to . . . rummag[ing] through homes in an unrestrained search for evidence of criminal activity” during the colonial era. But interpretation of the seemingly straightforward amendment has evolved in application.

For some time, the standard requirement for all searches and seizures was a warrant based on probable cause, but certain exceptions to this standard rule now exist. In the criminal context, Terry stops allow government officials to conduct a narrow criminal search or seizure without a warrant for a very limited time if they have reasonable suspicion. If a Terry stop exceeds its narrow scope, however, it is subject to the normal Fourth Amendment analysis.

Another area of exceptions is in the non-criminal context where searches and seizures are limited to the primary purposes of the carved-out

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1 U.S. CONST. amend. IV.
3 JOSHUA DRESSLER ET AL., 1 UNDERSTANDING CRIMINAL PROCEEDURE: INVESTIGATION 121 (7th ed. 2017).
4 Id. at 263–64.
5 Id. at 264.
exceptions. Under these exceptions, no probable cause or even suspicion is required because the “exigencies of the situation” make the government’s interests in conducting the searches or seizures so compelling that the searches are objectively reasonable under the Fourth Amendment. Examples include administrative searches, inventory searches, highway sobriety checkpoints, and as this paper focuses on, border searches. Non-criminal exceptions, however, are limited by their scope, which is defined by the exceptions’ primary justifications. The primary purpose of a search must be the purpose of the exception, and if it is not, the search is beyond the scope of the exception. But even when a search’s primary purpose is within the scope of an exception, it still might exit the exception and be subject to a different analysis. The guide is “reasonableness,” as that is the “ultimate touchstone” of the Fourth Amendment. Such reasonableness is determined by weighing the intrusion into the individual’s Fourth Amendment interests against the intrusion’s promotion of governmental interests.

Under the border exception to the Fourth Amendment warrant requirement, border searches generally do not require any standard of suspicion due to the “longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.” The government’s power is at its “zenith at the international border,” and it has historically been so since the Nation’s inception. The First Congress granted the Executive branch the full power and authority to conduct routine searches and seizures at the border without a warrant or probable cause. Currently, 19 U.S.C. § 482 is the codified source of border search authority.

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6 Id. at 121.
8 See DRESSLER ET AL., supra note 3, at 292–317.
9 See Riley v. California, 573 U.S. 373, 388–89 (2014) (finding a search exceeded the search-incident-to-arrest exception because it was not for either of the exception’s purposes); Arizona v. Gant, 556 U.S. 332, 337–38, 339 (2009) (finding a warrantless search is not justified when the underlying justifications of the warrant exception do not exist); Florida v. Royer, 460 U.S. 491, 500 (1983) (finding warrantless searches “must be limited in scope to that which is justified by the particular purposes served by the exception”).
10 See Riley, 573 U.S. at 402; Gant, 556 U.S. at 339; Royer, 460 U.S. at 500.
11 Riley, 573 U.S. at 381 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).
14 Id. at 152.
15 See Ramsey, 431 U.S. at 616–17 (citing Act of July 31, 1789, ch. 5, 1 Stat. 29, § 24 (1789)).
16 Id.
17 19 U.S.C. § 482.
Since 1973, the Supreme Court has recognized the border exception to extend to functional border equivalents, which include international airports, international ports, and even international mail. The exception equally applies to exits along with entrances.

Just as under other exceptions to the normal warrant requirement, warrantless searches pursuant to the border exception must adhere to the purpose for the exception. The border exception is limited to two principal justifications. First, to identify lawful and unlawful entering travelers, and second, to verify that their belongings may also enter. But even when justified by one of these purposes, the exception is still not boundless. As the Supreme Court recognized, the border search exception that is “grounded in . . . who and what may enter the country” is “subject to substantive limitations imposed by the Constitution.”

III. SUPREME COURT JURISPRUDENCE

Despite having several opportunities to address the Fourth Amendment’s application to forensic cell phone searches at the border, the Supreme Court has consistently declined petitions for certiorari. It is therefore unclear as to what level of suspicion, if any, is required to conduct certain nonroutine searches at the border, or what the border exception’s scope is in the context of forensic searches. The Court has, however, addressed the scope of warrant exceptions generally and how their underlying justifications relate to searches, while leaving open the door to potentially require reasonable suspicion for certain highly intrusive searches.

A. Scope of the Border Exception

Three factors might affect whether a search falls within the scope of the border exception—the search’s primary purpose, location, and duration. The Court has established that the primary purpose of a warrantless search or seizure must be a purpose or justification for the warrant exception. If not, the search moves beyond the scope of the exception and is subject to the

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23 Id.
24 Ramsey, 431 U.S. at 620 (emphasis added).
normal Fourth Amendment analysis—a warrant based on probable cause. In City of Indianapolis v. Edmond, the Supreme Court held that a drug highway checkpoint, where motorists were stopped for no more than five minutes for narcotics-detection dogs to walk around the vehicle, violated the Fourth Amendment.26 Historically, brief, suspicionless seizures at highway checkpoints have been allowed when their primary purpose was “closely related to the problems of policing the border or the necessity of ensuring roadway safety.”27 But here, the drug checkpoint’s primary purpose was to “uncover evidence of ordinary criminal wrongdoing.”28

The city attempted to rectify its checkpoints by generalizing their primary purpose as well as the primary purpose of other checkpoints the Court previously deemed constitutionally valid; the Court rejected this attempt.29 Instead, the Court iterated that it had never upheld a checkpoint program where the primary purpose was to discover evidence of ordinary criminal wrongdoing.30 Despite drugs implicating strong safety concerns, checkpoints for that purpose were too general.31 Consequently, the checkpoints were beyond the scope of brief, suspicionless seizures at highway checkpoints, violating the Fourth Amendment.32

In a later case, Riley v. California, the Court displayed the same constraint on the warrant exception’s scope in two consolidated cases, but this time, the case involved searches of cell phones. In the first case, after arresting the defendant for domestic possession of concealed and loaded firearms, police officers manually searched the defendant’s cell phone without a warrant pursuant to the search-incident-to-arrest exception.33 The Court held the search was unconstitutional and intruded upon the defendant’s privacy rights.34 Although a warrant exception diminished the defendant’s privacy interests, it “does not mean that the Fourth Amendment falls out of the picture entirely.”35

A warrant exception is tied to its justifications, and thus, a search under a warrant exception must be as well.36 The purpose of the incident-to-arrest exception is to secure officers’ safety and to prevent the hiding or destruction

27 Id. at 41.
28 Id. at 42.
29 See id. at 41–42.
30 Id. at 41.
31 Id. at 42.
32 Id.
34 See id. at 401.
35 Id. at 392.
36 See id. at 386–87 (citing Arizona v. Gant, 556 U.S. 332, 343 (2009)).
Neither, however, justified the forensic search because the defendant was already arrested and secured.\footnote{Id. at 386–87.} Therefore, even under the incident to arrest warrant exception, the officers needed a warrant based on probable cause to conduct the manual search.\footnote{Id. at 386.} But in holding that the search-incident-to-arrest warrant exception did not apply to cell phones, the Supreme Court clarified that “other case-specific exceptions may still justify a warrantless search of a particular phone.”\footnote{Id. at 401.}

Besides the search’s primary purpose, its duration or location may also affect whether a search is within the border exception. The Court’s holdings in United States v. Ramsey and Almeida-Sanchez v. United States are informative starting points on how the location of a search can affect the scope of the border exception. In Ramsey, customs officials opened incoming international mail and discovered eleven heroin-filled envelopes.\footnote{United States v. Ramsey, 431 U.S. 606, 609 (1977).} The Court held the search was within the scope of the border exception.\footnote{Id. at 623.} Despite it not being at the physical border, there is “no reason to distinguish between letters mailed into the country and letters carried on the traveler’s person.”\footnote{Id. at 621.} The scope of the border exception doctrine does not suggest a distinction in “the mode of transportation across [the] borders.”\footnote{Id. at 621.}

Although the removed location of the centers that process international mail does not move a search beyond the border exception’s scope, there are constraints on the location of a border search. In Almeida-Sanchez, the Supreme Court held that Border Patrol’s warrantless search of the defendant’s car about twenty-five miles north of the Mexico-California border violated the defendant’s Fourth Amendment rights.\footnote{Almeida-Sanchez v. United States, 413 U.S. 266, 267–68 (1973).} Even if the search’s purpose was to prevent the entry of illegal aliens, which is a valid underlying justification of the border exception, the roving patrol being at least twenty miles north of the border did not constitute a functional border within the exception.\footnote{Id. at 273.} Rather, the officials needed a warrant based on probable cause to search or seize the contents of the car in the country’s interior.\footnote{Id. at 274–75.}
Regarding the duration of a border search, the Supreme Court has held that a sixteen-hour detention at the border was not unreasonable.\(^48\) Because of the context of the detention, however, the sixteen hours should not be applied as a general guideline, especially because the Court did not directly uphold the search under the border exception.\(^49\) In *United States v. Montoya de Hernandez*, a woman was suspected of trafficking drugs after a routine pat-down and questioning following her arrival at the Los Angeles International Airport from Colombia.\(^50\) Because she would not consent to an x-ray or a rectal exam, border officials gave her the option to return to Colombia, undergo an x-ray, or remain detained until she produced a monitored bowel movement.\(^51\) While attempting to put her on a returning flight, officials detained her in a room to monitor her bowel movements.\(^52\) Sixteen hours after her arrival, a court order authorized an involuntary x-ray and rectal examination which revealed eighty-eight balloons of cocaine.\(^53\) But the Court held the sixteen-hour detention prior to the warrant was not unreasonable under the Fourth Amendment. Although the detention time "undoubtedly exceeds any other detention [the Court] ha[s] approved under reasonable suspicion," the Court has also "consistently rejected hard-and-fast time limits."\(^54\) The necessary time associated with detecting and investigating alimentary canal drug smuggling made it so that the search at the border was not unreasonably long.\(^55\) The Court’s holding does not provide much guidance as to the duration of a search or seizure at the border before it is unreasonable because the situation was unique and the Court did not directly invoke the border warrant exception. But *Montoya de Hernandez* confirms that the analysis of a search’s duration is fact-intensive and context-specific.

A search might therefore exceed the scope of the border exception to the normal warrant requirement in three ways. First, its primary purpose may not be a justification for the border exception. Second, the location of the search might be too far removed to constitute a border search. Third, the duration might be so long that it exceeds the scope of a border search. Although the Supreme Court has not specified the time constraints, it has not foreclosed the potential for a search’s duration to have that effect.


\(^{49}\) See id. at 542–43.

\(^{50}\) Id. at 532, 534.

\(^{51}\) Id. at 534.

\(^{52}\) Id. at 535.

\(^{53}\) Id. at 535–36.

\(^{54}\) Id. at 543.

\(^{55}\) Id. at 543–44.
B. Requisite Level of Suspicion

Even within the border exception’s scope, a search might still require some level of suspicion to be reasonable under the Fourth Amendment. Although the Court does not directly address whether reasonable suspicion is required for forensic searches at the border, it has addressed cell phone searches in the context of another warrant exception. Currently, Supreme Court case law reflects two circumstances where reasonable suspicion might be required at the border: (1) where a search is highly intrusive to constitute a nonroutine search, and (2) where a search results in damage to the property.

The Court’s first indication that the intrusiveness of a border search could require reasonable suspicion was in *Montoya de Hernandez*. Its holding for the search that revealed eighty-eight cocaine balloons, however, was vague and limited. The Court did not require the border officials to have probable cause, and it also did not state that the officials needed reasonable suspicion. Instead, it held that detention at the border “beyond the scope of a routine customs search and inspection” was justified if officials had reasonable suspicion, and the officials here did.56 The Court explained it had previously held in the domestic context that “[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion [beyond the body’s surface] on the mere chance that desired evidence might be obtained.”57 In *Montoya de Hernandez*, the Court clarified that this prior holding displayed “the necessity for particularized suspicion that the evidence sought might be found within the body of the individual.”58 The rectal examination of Montoya de Hernandez was highly intrusive to require that same suspicion.59

Although this decision determined a potential ceiling of required suspicion, it did not establish a floor because the Court made clear it was not holding what level of suspicion was required for nonroutine border searches, as that specific question was not before it.60 Despite this reservation, *Montoya de Hernandez* provides a starting point on two issues. First, a distinction exists between routine and nonroutine searches, which may very well reflect when a certain level of suspicion is required. Second, the Court provided initial guidance as to what types of searches might be nonroutine including strip, body cavity, and involuntary x-ray searches.61 Notably, *Montoya de Hernandez* resembled a *Terry* stop due to the Court’s application of its

56 Id. at 541–42.
57 Id. at 540 n.3 (quoting Schmerber v. California, 384 U.S. 757, 769–70 (1966)).
58 Id. at 540.
59 See id.
60 Id. at 541 n.4.
61 See id.
principles, but the Court did not label it as such. Instead, it incorporated principles of analysis under the border exception.

Nearly twenty years later, the Court again faced the same question but in a slightly different context. In United States v. Flores-Montano, border officials searched the defendant’s gas tank at a secondary inspection station upon his crossing the border from Mexico to southern California. After removing and disassembling the defendant’s gas tank, the officials discovered and seized thirty-seven kilograms of marijuana. The Court rejected the defendant’s contention that the search constituted a significant deprivation of his property interest under the Fourth Amendment because the search did not result in any property damage and the government’s interest in protecting the border is paramount.

Instead, it found that “the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles.” In its use of permissive language (“might”), the Court continued to leave open the question of whether reasonable suspicion is required for certain border searches. But Flores-Montano was helpful in that it affirmed the Court did not foreclose reasonable suspicion from being required for highly intrusive searches. It also introduced another scenario that might require such suspicion: searches resulting in damage to property.

A third and notable case that assists lower courts in their analysis of forensic searches at the border is Riley v. California. Indeed, Riley was instructive on the constraints of a warrant exceptions’ scope, but it is also helpful in determining whether reasonable suspicion is required for forensic cell phone searches within that scope. Both Montoya de Hernandez and Flores-Montano indicate that highly intrusive searches might require reasonable suspicion, while Riley similarly analyzes how the nature of cell phones implicates a search’s invasiveness.

Although not essential to the holding that the search exceeded the scope of the warrant exception and was subject to the normal Fourth Amendment analysis, the Court spent considerable time explaining the nature of cell phones and privacy. Because electronics differ from other items both qualitatively and quantitatively, the search-incident-to-arrest exception does

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62 See id. at 543.
63 See id. at 537–38, 544.
65 Id. at 150–51.
66 Id. at 154–55.
67 Id. at 152.
not apply to cell phones at all. Quantitatively, electronics store far more than individuals can “lug around.” The large capacity consists of an expansive variety of private information. Exposing cell phones to the warrant exception as if they were any other item has significant privacy consequences, allowing officials to reconstruct an individual’s life history in-depth. Electronics’ capacities also interplay with their unique qualitative abilities. Considering the distinct differences of electronics, the Court found that a cell phone contains even more information and sensitive records than would be found in a home, “unless the phone is [there].” Although not dispositive on the matter, Riley is indicative that cell phone searches might be highly intrusive and is heavily relied on by almost all lower courts when analyzing whether a forensic cell phone search requires reasonable suspicion.

Montoya de Hernandez, Flores-Montano, and Riley utilize principles relevant to forensic cell phone searches at the international border—nonroutine or intrusive searches, the border exception, and cell phones. Despite the ambiguity that remains on the issue, it is clear the Fourth Amendment still limits border searches. And although the Court has not stated destruction of property and highly intrusive border searches violate the Fourth Amendment without reasonable suspicion, lower courts have interpreted the Court to have suggested reasonable suspicion is the standard. But the contours of these limits are unclear, especially after Riley, which clarifies that the unique quantitative and qualitative nature of electronics, and specifically cell phones, implicate major privacy issues. Because the Court has consistently declined to hear a case on the issue, there is ambiguity on the constitutionality of warrantless forensic cell phone searches at the border. Consequently, a circuit split has emerged.

IV. CURRENT STATE OF THE LAW

Due to their differing interpretations of the border exception’s purpose, circuit courts vary in their restrictions on forensic cell phone searches at the
border. The circuit split exists on two distinct aspects: (1) what the purpose of the border exception is as it relates to forensic searches, and (2) even within the purpose of the border exception, whether any level of suspicion is required for forensic cell phone searches at the border. Whereas manual searches merely involve an official physically scrolling by screen through a cell phone’s contents, forensic searches are fundamentally different. A forensic search involves the use of specialized software to comprehensively create a copy and analyze all data on the device, often even deleted files. Currently, several standards circulate in the lower courts on both the border exception’s scope and requisite level of suspicion. Some courts, however, have punted on the issues, resolving the cases without answering either question.

A. Scope of the Border Exception

The scope of the border exception to the normal warrant requirement applies to all border searches—including both manual and forensic cell phone searches. The lower courts employ three different scopes, allowing cell phone searches for the purpose of discovering: (1) digital contraband itself; (2) evidence of ongoing or imminent criminal activity at the border; and (3) evidence of prior and domestic criminal activity. Although their interpretations diverge, the courts converge that, aside from the good faith exception’s applicability, a search beyond the exception’s interpreted scope is subject to the normal Fourth Amendment analysis.

1. Searches for Digital Contraband

The narrowest standard as it applies to forensic searches limits the border exception’s scope to searches for digital contraband on the electronics

76 United States v. Kolsuz, 890 F.3d 133, 139 (4th Cir. 2018).
78 Oftentimes, they do so on grounds of the good faith exception, which courts have interpreted to allow them to deny the defendant relief even when border officials have conducted an unreasonable search or seizure violating the Fourth Amendment. See, e.g., United States v. Molina-Isidoro, 884 F.3d 287, 293 (5th Cir. 2018) (resolving the case on good faith exception grounds); Malik v. U.S. Dep’t of Homeland Sec., 619 F. Supp. 3d 652, 662–63 (N.D. Tex. 2022) (same); United States v. Skaggs, 25 F.4th 494, 500 (7th Cir. 2022) (same); United States v. Wanjiku, 919 F.3d 472, 479 (7th Cir. 2019) (same); United States v. Kamaldoss, No. 19-CR-543, 2022 U.S. Dist. LEXIS 7857, at *29 (E.D.N.Y. Apr. 22, 2022) (same); United States v. Hassanshahi, 75 F. Supp. 3d 101, 126 (D.D.C. 2014) (declining to determine what level of suspicion is required). Under the good faith exception to the exclusionary rule, courts look at whether officials acted in objective good faith that they had the authority to lawfully execute the search at that time, even when they did not. But when the deterrence of an officer’s gross negligence or reckless disregard for Fourth Amendment rights outweighs the cost of suppressing the evidence, the good faith exception does not apply. See Davis v. United States, 564 U.S. 229, 237–38 (2011).
themselves. The Ninth Circuit is the only circuit to adopt it and did so in its landmark case, *United States v. Cano* (hereinafter the ‘Cano standard’).\(^{79}\) In *Cano*, the forensic search was a result of a secondary inspection by random computer referral when the defendant crossed the border from Mexico to California.\(^{80}\) Officials discovered thirty pounds of cocaine in the spare tire of the defendant’s trunk, leading to two manual cell phone searches and a third search using external software to download the phone’s data—potentially a forensic search.\(^{81}\) The first manual search was only for the purpose of determining whether there were text messages containing child pornography, while the second was to copy several phone numbers and text messages.\(^{82}\)

Although the first manual search was within the border exception’s scope, the Ninth Circuit held the second manual search exceeded it.\(^{83}\) It iterated the two purposes of the border exception—to verify who and what may lawfully enter the country.\(^{84}\) The court interpreted these justifications to support searches for contraband itself but not for evidence of contraband or border-related crimes.\(^{85}\) It found that border officials’ authority under 19 U.S.C. § 482(a) allowed them to search and seize merchandise but did not provide them “general authority to search for crime,” even if crime may occur at the border.\(^{86}\) It further relied on Supreme Court precedent distinguishing between seizing goods at the border because they were illegally imported and prohibiting the seizure of goods at the border “because they may be useful in prosecuting crimes.”\(^{87}\) Therefore, cell phone searches at the border, “whether manual or forensic, must be limited in scope to a search for digital contraband.”\(^{88}\)

The first manual search was within the scope of the border exception because it was directed to discover contraband because child pornography, which is digital contraband in the phone’s data, could have been in the perused text messages.\(^{89}\) In contrast, the officials conducted the second manual search and the forensic search based on the suspicion that the defendant’s cell phone contained evidence of additional drugs, but they did

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\(^{79}\) *United States v. Cano*, 934 F.3d 1002, 1011 (9th Cir. 2019).

\(^{80}\) *Id.* at 1008.

\(^{81}\) *Id.*

\(^{82}\) *Id.* at 1019.

\(^{83}\) *Id.*

\(^{84}\) *Id.* at 1013 (citing *Carroll v. United States*, 267 U.S. 132, 154 (1925)).

\(^{85}\) *Id.* at 1018.

\(^{86}\) *Id.* at 1017.

\(^{87}\) *Id.* at 1018 (citing *Boyd v. United States*, 116 U.S. 616, 622–23 (1886), *overruled in part on other grounds by Warden v. Hayden*, 387 U.S. 294 (1967)).

\(^{88}\) *Id.* at 1007.

\(^{89}\) *Id.* at 1019.
not suspect he was transporting contraband in the phone itself.\textsuperscript{90} Although the download of the cell phone’s data—potentially constituting a forensic search—was within the scope, it was also unconstitutional under the Fourth Amendment because the officials did not have reasonable suspicion.\textsuperscript{91}

2. Searches for Evidence of Ongoing or Imminent Criminal Activity at the Border

The second approach lower courts take is broader than the Ninth Circuit’s \textit{Cano} standard. Under it, searches pursuant to the border exception are limited to evidence of ongoing or imminent criminal activity at the border. The First and Fourth Circuits have employed this standard, along with district courts in both the D.C. and Seventh Circuits. The Fourth Circuit and the district court in the Seventh Circuit’s analyses center around the Supreme Court’s primary purpose analysis in \textit{Edmond} and \textit{Riley}—whether the primary purpose of the search was within the exception’s justifications.\textsuperscript{92} While the First Circuit and a district court in the D.C. Circuit too consider the search’s primary purpose, they also consider the \textit{conduct} of officials in the forensic search to determine whether it was a border search at all to apply the warrant exception. These factors might include the search’s nature, duration, and location.

The Fourth Circuit was the first to outline a border exception scope limited to ongoing and imminent criminal activity and has done so twice,\textsuperscript{93} most recently in \textit{United States v. Aigbekaen}. There, the defendant’s cell phone, computer, and iPod were forensically searched at John F. Kennedy International Airport when he re-entered the country.\textsuperscript{94} Although the search revealed conversations seeming to relate to sex trafficking, officials conducted it based on suspicion from a pre-existing sex-trafficking investigation into the defendant prior to his initial exit of the country.\textsuperscript{95} Before the forensic search, domestic law enforcement had specific information identifying the defendant as a domestic sex-trafficker, including his phone number, surveillance footage, and linking details from prostitution ads.\textsuperscript{96}

\textsuperscript{90} Id. at 1021.
\textsuperscript{91} Id.; \textit{see also infra} Section IV(B)(i).
\textsuperscript{92} City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000); Riley v. California, 573 U.S. 373, 386–87 (citing Arizona v. Gant, 556 U.S. 332, 343 (2009)).
\textsuperscript{93} See \textit{United States v. Kolsuz}, 890 F.3d 133, 144 (4th Cir. 2018); \textit{United States v. Aigbekaen}, 943 F.3d 713, 721 (4th Cir. 2019).
\textsuperscript{94} \textit{Aigbekaen}, 943 F.3d at 717–18.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
The court held the warrantless forensic search to discover evidence of that domestic crime was not within the scope of the border exception. Its starting point was recognizing that the border exception “is not boundless.” Next, it relied on Supreme Court precedent in *Riley v. California* and *Arizona v. Gant* requiring a warrantless search exception to be constrained by its purpose. The border exception’s purpose is to “protect[] national security, collect[] duties, block[] the entry of unwanted persons, or disrupt[] efforts to export or import contraband.” Beyond these justifications, a warrant based on probable cause or a different exception must support the government’s search.

Although there was as much as probable cause that the defendant “previously committed grave domestic crimes,” prior domestic crimes are not within the government’s interests and purposes justifying the border exception. If it were, the government would “invoke[] the border exception on behalf of its generalized interest in law enforcement and combatting crime.” In effect, the government could then conduct a forensic search for suspected offenses that “have little or nothing to do with the border.”

The Fourth Circuit’s ruling in *Aigbekaen* affirmed its ruling in *United States v. Kolsuz* just a year prior. In *Kolsuz*, Customs and Border Patrol (CBP) officers forensically searched the defendant’s cell phone at the Washington Dulles International Airport after a routine luggage search revealed firearm parts when he attempted to board a flight to Turkey. Like in *Aigbekaen*, the Fourth Circuit relied on the Supreme Court’s decisions in both *Riley* and *Arizona*, constraining a warrant exception’s scope to its justifications. That scope is limited to the “prevention and disruption of ongoing efforts to export contraband illegally.” The defendant’s forensic search was within the scope because its purpose was to disrupt firearms smuggling across the border, which is a transnational offense.

More recently, the First Circuit joined the Fourth Circuit in employing this scope. In *United States v. Qin*, the defendant’s electronics were...
forensically searched when he re-entered the country from his trip to China. The defendant’s business dealings and suspected him of export violations at the border. Various agencies had already been investigating the defendant’s company’s connections to ongoing export violations, which was reflected by border officials’ relevant keyword searches. The search was therefore within the scope of the exception when looking at its primary purpose.

The defendant also contended that the duration of the search—sixty days of holding his devices—moved it beyond the warrant exception. Although the court left open the possibility that the duration could affect whether a search is within the scope, it rejected that being the case here because a duration analysis is fact dependent. Because of the large amount of data on the electronic devices, language barriers in the information, and encrypted files, the duration did not “render [the search] so disconnected from the purpose of the border search exception that it falls outside the scope of that exception.” The search was thus within the scope of the exception and reasonable under the Fourth Amendment.

The First Circuit’s holding in Qin reaffirmed its holding in Alasaad v. Mayorkas that the scope of the border exception is to conduct searches for “contraband, evidence of contraband, or . . . evidence of activity in violation of the laws enforced or administered by CBP or ICE.” In Alasaad, the First Circuit expressly rejected the Cano standard that the Ninth Circuit takes, finding it too narrow because it “fail[ed] to appreciate the full range of justifications for the border search exception.”

Like the First and Fourth Circuits, a district court in the D.C. Circuit interpreted the border exception’s scope to be limited to “ongoing or imminent criminal activity.” Its analysis, however, was distinct from the Fourth Circuit’s because it considered the nature, duration, and location of

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109 United States v. Qin, 57 F.4th 343, 345 (1st Cir. 2023).
110 Id. at 347–48.
111 Id. at 352–53.
112 Id. at 353.
113 Id. at 351.
114 Id. at 351–52.
115 Id. at 352.
116 Id. at 351–52.
117 Id. at 346–47 (quoting Alasaad v. Mayorkas, 988 F.3d 8, 19–21 (1st Cir. 2021)).
118 Alasaad, 988 F.3d at 21.
the search to determine whether it was a border search—somewhat resembling the First Circuit’s duration analysis. In *Kim*, the defendant was suspected of previously committing an export crime, and consequently, Department of Homeland Security (DHS) agents planned in advance to search his laptop upon his departing international flight.\(^{120}\) The district court interpreted the border exception’s purpose as to protect territorial integrity and national security,\(^ {121}\) but it conducted a more explicit reasonableness balancing test of weighing the government’s interests in the search against the degree of intrusion into the defendant’s privacy.\(^ {122}\)

On the government’s end of the balancing, the court found that the government’s interest was only to prevent export violations because the defendant was exiting the country; thus, the governmental interests associated with entrants into the country were not applicable.\(^ {123}\) On the other end, the court looked at the nature, duration, and location of the electronic search.\(^ {124}\) When analyzing the nature of the search, the court considered whether it was manual or forensic. Here, although the search may not have been a full forensic examination, additional software was utilized, and thousands of emails and other files were examined and copied, rendering the search a hybrid of both manual and forensic.\(^ {125}\) Further, despite the laptop being seized at the border, it was transported 150 miles before it was opened and searched,\(^ {126}\) and the duration of the search was an unlimited period of time.\(^ {127}\)

In light of the government’s sole interest in preventing export violations balanced against the nature, duration, and location of the search, the search, being “for the purpose of gathering evidence in a pre-existing investigation, was . . . disconnected from . . . the considerations underlying the breadth of the government’s authority.”\(^ {128}\) The search was not within the scope of the border exception, and therefore, was unreasonable under the Fourth Amendment.\(^ {129}\) Notably, a district court in the Fourth Circuit also relies on the nature, duration, and location of the search, but it does so to reach the

\(^{120}\) *Id.* at 35, 38–39.

\(^{121}\) *Id.* at 55.

\(^{122}\) *Id.* at 56.

\(^{123}\) *Id.*

\(^{124}\) *Id.* at 49.

\(^{125}\) *Id.* at 57.

\(^{126}\) *Id.*

\(^{127}\) *Id.* at 52.

\(^{128}\) *Id.* at 59.

\(^{129}\) *See id.*
conclusion that reasonable suspicion is required for a forensic search, not for the basis of whether the search itself was a border search. 130

Lastly, the Seventh Circuit has consistently punted on both the scope and requisite suspicion in a forensic search at the border. 131 But in a recent case, United States v. Carpenter, a district court in that circuit held that the border exception’s scope is to search for evidence of an ongoing or imminent crime. 132 Like the Fourth Circuit in Aigbekaen, the district court relied on Riley, concluding that “[a]pplying the border-search exception to searches with the sole aim of investigating domestic crime would ‘untether’ the exception from its purposes.” 133 Relying on the Supreme Court’s analysis for the drug checkpoints in City of Indianapolis v. Edmond, the district court distinguished special governmental interests in protecting the border from the typical interest in law enforcement. 134 The decision could be an indication that the Seventh Circuit may finally address, rather than punt, the question.

Overall, of the courts that apply a border exception scope limiting warrantless searches to ongoing or imminent criminal activity, most do not conduct an in-depth reasonableness balancing test. Instead, they employ a more direct interpretation of the border exception’s purpose and whether officials’ intent behind the search was for that purpose. In contrast, a few district courts incorporate the nature, duration, and location of the search into the analysis to determine whether that conduct moved the search beyond the scope of the border exception. But at their core, both analyses implicate the more fundamental question of whether a search constitutes a border search. One way of looking at it is that the latter analysis simply considers the conduct of officials in the search to determine the search’s purpose rather than their intent in conducting the search.

3. Searches for Evidence of Domestic Criminal Activity

Of the potential border exception scopes, a scope allowing searches for evidence of prior domestic criminal activity is the broadest and most expansive. No circuit has directly held that this is the proper scope, however,

131 See United States v. Skaggs, 25 F.4th 494, 500 (7th Cir. 2022) (resolving the case on good faith exception grounds); United States v. Wanjiku, 919 F.3d 472, 479 (7th Cir. 2019) (same).
133 Id. at *8 (citing United States v. Aigbekaen, 943 F.3d 713, 721 (4th Cir. 2019) (quoting Riley v. California, 573 U.S. 373, 386 (2014))).
134 Id. at *12–13.
a district court in the Second Circuit did so in *Bongiovanni*.\textsuperscript{135} In *Bongiovanni*, border officials searched a retired DEA agent’s cell phone when he arrived at the Baltimore/Washington International Airport from his trip to the Dominican Republic.\textsuperscript{136} The officials did so upon a DHS agent’s request due to a pre-existing investigation into the defendant’s illegal conduct while he was a DEA agent in New York.\textsuperscript{137} According to the district court, the cell phone search for a “domestic criminal investigation unrelated to his international travel did not take the search outside the scope of the border exception to the warrant requirement.”\textsuperscript{138} The court therefore interpreted the border exception’s scope to include searches for prior domestic criminal activity that might not be related to the individual’s trip or the border at all.\textsuperscript{139}

Notably, despite holding several times that forensic cell phone searches at the border do not require any suspicion,\textsuperscript{140} the Eleventh Circuit has never indicated that the border exception is constrained by the exception’s justifications.\textsuperscript{141} The omission begs the question of whether, according to Eleventh Circuit, there is any limitation, or if, like in *Bongiovanni*, the scope extends to searches for evidence of prior domestic criminal activity.

\textbf{B. Requisite Level of Suspicion}

Like the matter of the border exception’s scope, the circuits are also split on whether border officials must have any level of suspicion to conduct forensic cell phone searches. Also like the border exception’s scope, some circuits have punted on the question of a requisite suspicion, oftentimes resolving cases on good faith exception grounds.\textsuperscript{142} There is a consensus among the lower courts, however, that manual searches at the border require no suspicion because they are nonintrusive and routine.\textsuperscript{143} The Eleventh Circuit is the only one to definitively hold that forensic searches at the border require no level of suspicion at all.\textsuperscript{144} The First, Fourth, and Ninth Circuits,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{136} Id. at *2, *8, *15.
  \item \textsuperscript{137} See id. at *8–9.
  \item \textsuperscript{138} Id. at *30.
  \item \textsuperscript{139} See id.
  \item \textsuperscript{140} See infra Section IV(B)(ii).
  \item \textsuperscript{141} See United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018); United States v. Vergara, 884 F.3d 1309, 1310–11 (11th Cir. 2018).
  \item \textsuperscript{142} See United States v. Cotterman, 709 F.3d 952, 969–70 (9th Cir. 2013); United States v. Aigbekaen, 943 F.3d 713, 725 (4th Cir. 2019).
  \item \textsuperscript{143} See Alasaad v. Mayorkas, 988 F.3d 8, 18 (1st Cir. 2021); United States v. Cano, 934 F.3d 1002, 1012 (9th Cir. 2019); *Touset*, 890 F.3d at 1233–34.
  \item \textsuperscript{144} See *Touset*, 890 F.3d at 1229.
\end{itemize}
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however, generally require reasonable suspicion for forensic cell phone searches, even when a search is within the border exception’s scope.145 The courts that require reasonable suspicion consider a variety of factors: (1) the quantity of information stored on a cell phone; (2) the qualitative nature of that stored information; and (3) the comprehensive nature of forensic searches.

1. Forensic Cell Phone Searches Require Reasonable Suspicion

Three circuits—the First, Fourth, and Ninth—and several district courts require border officials to have reasonable suspicion to conduct a forensic search. This suspicion is linked to the exception’s scope. For the Ninth Circuit, which adopts the *Cano* standard, this means officials must reasonably suspect the cell phone itself contains digital contraband before conducting the forensic search. For the Fourth Circuit, it means officials must reasonably suspect the individual is engaging in ongoing or imminent criminal activity at the border.

In both of its seminal forensic border search cases, the Ninth Circuit relied on all three factors when requiring reasonable suspicion: (1) the quantity of information on a cell phone; (2) quality of the information; and (3) the comprehensive nature of forensic searches.146 In *Cano*, which was the landmark case that the Ninth Circuit adopted the digital contraband scope,147 the defendant’s cell phone was manually and forensically searched after officials discovered thirty pounds of cocaine in the spare tire of his trunk at the border.148 The court found that even when searches are within the exception’s scope, they “are so intrusive that they require additional justification.”149 It did so in reliance on three ideas. First, it used the Supreme Court’s finding in *Montoya de Hernandez* to establish that there are constraints under the border exception.150 The Ninth Circuit interpreted the Court to have required reasonable suspicion in *Montoya de Hernandez* and that “a more intrusive, nonroutine search must be supported by ‘reasonable suspicion.’”151

145 *See* United States v. Qin, 57 F.4th 343, 349 (1st Cir. 2023); United States v. Kolsuz, 890 F.3d 133, 146 (4th Cir. 2018); *Cotterman*, 709 F.3d at 962.
146 *See* *Cotterman*, 709 F.3d at 962, 964–65; *Cano*, 934 F.3d at 1015–20.
147 *See supra* Section IV(A)(i).
148 *Cano*, 934 F.3d at 1008.
149 *Id.* at 1011, 1020.
150 *See* *id.* at 1012.
151 *Id.* at 1012 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537–41 (1985)).
Second, the Ninth Circuit relied on its own precedent in *United States v. Cotterman*, where it found a forensic laptop search at the border required reasonable suspicion. There, the “comprehensive and intrusive nature of a forensic examination” was nonroutine to trigger a requirement of reasonable suspicion. Third, the Ninth Circuit paralleled the intrusiveness of forensic laptop searches with the Supreme Court’s view of the intrusiveness of manual cell phone searches in *Riley* because of the vast quantity of sensitive information that digital devices contain, generally. Consequently, combined with the Ninth Circuit’s interpretation of the border exception’s scope, officials “must reasonably suspect that the cell phone to be searched itself contains contraband” to conduct a forensic search at the border. Notably, the Ninth Circuit in *Cano* articulated *Montoya de Hernandez* to state that “a more intrusive, nonroutine search must be supported by ‘reasonable suspicion.’” But the Supreme Court did not make such a definitive holding. In fact, it expressly stated it was not holding what level of suspicion was required for nonroutine border searches.

Despite having a broader border exception scope than the Ninth Circuit, the Fourth Circuit also requires officials to have reasonable suspicion for a forensic search to be reasonable under the Fourth Amendment. It similarly relied on all three factors—the quantity of information contained in a cell phone, its quality, and the comprehensive nature of forensic searches. In *Aigbekeaen*, the forensic cell phone search that was based on a pre-existing sex-trafficking investigation was a “highly intrusive search[]” that qualified as “nonroutine” and thus required “individualized suspicion.” Quantitatively, cell phones “store vast quantities of uniquely sensitive and intimate personal information . . . .” Qualitatively, modern digital devices contain “unusually sensitive data regarding one’s relationships, personal interests and preferences, prior internet searches, location history, and much more.” The court required the officials to reasonably suspect ongoing or

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152 Id. at 1015 (citing United States v. Cotterman, 709 F.3d 952, 962 (9th Cir. 2013)).
153 *Cotterman*, 709 F.3d at 962.
154 *Cano*, 934 F.3d at 1015 (citing Riley v. California, 573 U.S. 373, 393–97 (2014)).
155 *Id.* at 1020.
156 *Id.* at 1012 (emphasis added) (citing *Montoya de Hernandez*, 473 U.S. at 537–41).
157 The Court stated: “It is also important to note what we do not hold. Because the issues are not presented today, we suggest 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.” *Montoya de Hernandez*, 473 U.S. at 541 n.4.
158 See United States v. Aigbekeaen, 943 F.3d 713, 720 (4th Cir. 2019).
159 See *id.* at 720–23.
160 *Id.* at 720 (quoting United States v. Flores-Montano, 541 U.S. 149, 152 (2004)).
161 *Id.* at 721 (citing United States v. Kolsuz, 890 F.3d 133, 145 (4th Cir. 2018)).
162 *Id.* at 723 (citing Riley v. California, 573 U.S. 373, 395–96 (2014)).
imminent criminal activity, but resolved the case on good faith exception grounds.  

The Fourth Circuit’s decision in Aigbekaen merely affirmed its holding in Kolsuz five years prior. In Kolsuz, officials forensically searched the defendant’s cell phone after discovering firearm parts in his luggage. The search revealed 896 pages of the defendant’s sensitive information, including contacts, emails, text messages, photographs, videos, browser history, call logs, and a precise history of GPS coordinates. Relying on the reasoning in Riley, the Fourth Circuit found that forensic cell phone searches reveal a mass quantity and intimate quality of information. Further, unlike how a traveler can “mitigate the intrusion” in a typical luggage search by simply leaving certain items at home, one cannot do the same with his personal information on his cell phone. The Fourth Circuit therefore found forensic searches of cell phones are so intrusive to require individualized suspicion to constitute a reasonable search under the Fourth Amendment. That standard was met here; the officials clearly had reasonable suspicion of contraband smuggling because of the firearm parts discovered in his luggage.

Unlike the Fourth and Ninth Circuits, the First Circuit has not expressly stated that forensic searches categorically require reasonable suspicion. It has directly held, however, that nonroutine electronic searches require such a level of suspicion. The First Circuit’s decision thus depends on the routine-nonroutine distinction, and what determines a search’s classification in those categories is how invasive or intrusive the search is. Certain criteria are relevant when categorizing a search as nonroutine: (1) whether searches are manual, (2) whether the reviewed data is “resident on the device,” and (3) whether officials viewed deleted or encrypted files. In Qin, where the defendant’s electronics were forensically searched after his trip to China because agencies were already investigating his business of prior export violations, the First Circuit did not directly classify

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163 See id. at 723–25.
164 Kolsuz, 890 F.3d at 136.
165 Id. at 139.
166 Id. at 145–46 (citing Riley, 573 U.S. at 393–96).
167 Id. at 145.
168 Id. at 146–47; see also United States v. Saboonchi, 48 F. Supp. 3d 815, 816 (D. Md. 2014) (finding a forensic search of a cellphone revealing violations of export restrictions is highly invasive to constitute nonroutine and require particularized and reasonable suspicion).
169 Kolsuz, 890 F.3d at 143.
171 See id. at 347 n.3 (citing Alasaad v. Mayorkas, 988 F.3d 8, 18–19 (1st Cir. 2021)).
172 Id.
the search as nonroutine.\(^{173}\) It did, however, hold that the search did not violate the Fourth Amendment because officials had reasonable suspicion that the defendant was violating export laws.\(^{174}\) Reasonable suspicion was based on the defendant’s “past expression of interest in violating the export laws, the nature of his clients, the products he was interested in exporting, his lie to the agents at the airport, and the concealment of his end users.”\(^{175}\) The First Circuit did not expressly categorize forensic searches as nonroutine in *Qin* because it did not need to. The government did not dispute the defendant’s contention that the search was nonroutine, and the challenge on appeal was not *whether* reasonable suspicion was required but that the officials *did not have* reasonable suspicion.\(^{176}\) However, an analysis under the factors the First Circuit utilizes to determine whether a search is routine or nonroutine will likely lead most forensic searches to constitute nonroutine searches and require reasonable suspicion.

Lastly, although the Second Circuit has not required reasonable suspicion for forensic searches at the border, a district court in that circuit recently has—the same district court that extended the scope of the border exception to searches for evidence of prior domestic crime.\(^{177}\) The manual and forensic searches of the retired DEA agent’s cell phone in *Bongiovanni* resulted in border officials copying pages of the cell phone’s contents, and it was the copying of the information from a cell phone that made the search nonroutine.\(^{178}\) The district court emphasized that copying information from a cell phone was more invasive than the permitted copying of information from a journal because the Supreme Court’s decision in *Riley* places a heightened privacy interest on cell phones and their uniqueness.\(^{179}\)

The district court also interpreted Second Circuit precedent as suggesting a requirement of reasonable suspicion when it stated that “[a] border search is valid under the Fourth Amendment, even if non-routine, if it is supported by reasonable suspicion.”\(^{180}\) The district court therefore addressed the question left open by the Second Circuit, concluding that a forensic search constituted a nonroutine search.\(^{181}\) But although the search was within the border exception’s scope and forensic search is nonroutine,

\(^{173}\) *See id.* at 351.

\(^{174}\) *Id.*

\(^{175}\) *Id.* at 350.

\(^{176}\) *See id.* at 347, 347 n.4.

\(^{177}\) *See United States v. Bongiovanni, No. 1:19-CR-227, 2022 U.S. Dist. LEXIS 222781, at *41 (W.D.N.Y. Aug. 4, 2022); see also supra Section IV(A)(iii).*

\(^{178}\) *Bongiovanni,* 2022 U.S. Dist. LEXIS 222781, at *32–33.

\(^{179}\) *Id.* at *33–34.

\(^{180}\) *Id.* at *37 (quoting United States v. Irving, 452 F.3d 110, 124 (2d Cir. 2006)).

\(^{181}\) *Id.* at *35.
the court held that the officials did not have reasonable suspicion because merely being the subject of a domestic investigation is not a sufficient basis.\textsuperscript{182} Despite the search violating the defendant’s Fourth Amendment rights, the court did not suppress the evidence of the search because the good faith exception applied.\textsuperscript{183}

Every court that requires reasonable suspicion heavily depends on the Supreme Court’s articulation of the unique quantitative and qualitative nature of cell phones in \textit{Riley}. They also, at the very least, consider the powerful nature of forensic searches and primarily do so by citing developed lower court case law. The combination of these factors leads the courts to classify forensic searches as nonroutine and require reasonable suspicion.

2. Forensic Cell Phone Searches Require No Suspicion

Of the circuits, only the Eleventh Circuit has directly held no reasonable suspicion is required for a forensic search at the border.\textsuperscript{184} The court rejected the factors that other courts found persuasive and primarily relied on a categorical people-property distinction.\textsuperscript{185} In \textit{Touset}, the defendant was identified by several private organizations as an individual who engaged in child pornography.\textsuperscript{186} Those companies notified the government, and CBP stopped the defendant upon his international arrival at the Atlanta International Airport and conducted manual and forensic searches on the laptops.\textsuperscript{187} The laptop forensic searches revealed child pornography, but the Eleventh Circuit held no reasonable suspicion is required for any electronic forensic search.\textsuperscript{188}

The court’s reasoning began with the fact that the Supreme Court has never required reasonable suspicion for a border search of property, thus distinguishing forensic cell phone searches from the search of the body in \textit{Montoya de Hernandez}.\textsuperscript{189} Next, it analogized forensic searches of electronics to the drilled and disassembled gas tank in \textit{Flores-Montano}, which the Supreme Court held did not require any level of suspicion.\textsuperscript{190}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{182} See id. at *39–40.
\item \textsuperscript{183} Id. at *45–46.
\item \textsuperscript{184} See United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018); United States v. Vergara, 884 F.3d 1309, 1310–11 (11th Cir. 2018).
\item \textsuperscript{185} See Touset, 890 F.3d at 1234.
\item \textsuperscript{186} Id. at 1230.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. at 1230–31.
\item \textsuperscript{189} Id. at 1233.
\item \textsuperscript{190} Id.
\end{enumerate}
\end{footnotesize}
Electronic devices are no different because a car at the border containing boxes of documents would still be searched.¹⁹¹ When determining if a search is highly intrusive to require reasonable suspicion, the Eleventh Circuit considers “only the ‘personal indignity’ of a search, not its extensiveness,” defining such indignity solely in terms of one’s physical body.¹⁹² The search was therefore reasonable under the Fourth Amendment.¹⁹³ All other courts that have made definitive holdings on forensic searches at the border, besides the Eleventh Circuit, find the quantitative and qualitative uniqueness of cell phones and the comprehensive nature of a forensic search persuasive in their analyses.

V. ANALYSIS

A circuit split on the constitutionality of how the border exception relates to forensic cell phone searches creates negative ramifications. First, CBP is without direction as to the constitutionality of the policies it issues and the actions its agents take. Consequently, by virtue of a split, one of two options occur. If the Fourth Amendment does in fact require reasonable suspicion, the rights of all the individuals whose cell phones have been and are still being forensically searched are being violated. On the other hand, if reasonable suspicion is not required, CBP is not securing the border to the fullest extent of its power because, at the very least, some CBP officials refrain from forensically searching cell phones to not violate the law. This is evidenced by the recent internal CBP policy complying with the reasonable suspicion standard.¹⁹⁴

The second ramification of a circuit split is the inconsistencies it creates in evidentiary outcomes as a result of the vastly differing interpretations among the lower courts. Nearly all the defendants challenging forensic searches at the border seek suppression of evidence discovered in that search. A certain fact pattern for a traveler arriving at the border in California under the Ninth Circuit’s interpretation will result in evidence being suppressed, while the evidence in the same fact pattern for a different traveler arriving in Florida under the Eleventh Circuit’s would be permitted at trial.

¹⁹¹ Id.
¹⁹² Id. at 1234.
¹⁹³ Id. at 1229.
The Supreme Court has rejected many petitions for cert over the years, but it should resolve the split and uncertainty in the lower courts. The solution should account for all involved parties’ interests—CBP’s interest in being able to do its job; the Nation’s interests in a safe border; separation of powers concerns; and traveling individuals’ Fourth Amendment interests—criminal defendant or not. The optimal approach that properly balances all involved interests is that which the Fourth Circuit takes. The border exception to the normal warrant requirement should be limited to the purpose of preventing ongoing or imminent criminal activity at the border. Yet, within that exception, officials should only forensically search a cell phone if they reasonably suspect the individual is engaging in that ongoing or imminent criminal activity.

A. The Border Scope is Limited to Searches for Evidence of Ongoing or Imminent Criminal Activity at the Border

As the state of the current case law in Section IV(A) illustrates, three different scopes to the border exception exist—the Cano standard for digital contraband, ongoing or imminent crime at the border, and prior domestic crimes. The approach to prevent ongoing or imminent criminal activity at the border strikes the appropriate balance of all involved interests. It adheres to travelers’ Fourth Amendment rights by constricting customs officials from operating beyond their role and in a law enforcement capacity. Simultaneously, it gives deference to what the legislature determines is illegal at the border and ensures that courts do not overstep their Article III role.

The Cano standard scope is too narrow because it excludes searches for evidence of contraband and limits them only for the purpose of finding the digital contraband itself. Searches for child pornography, which constitute a large amount of criminal activity at the border, would be protected, but little else would. Cell phone searches—either manual or forensic—for evidence of export violations, weapons smuggling, or human trafficking occurring at the border in real-time would not be protected. Thus, the Cano standard does not

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196 See United States v. Aigbekaen, 943 F.3d 713 (4th Cir. 2019). The First Circuit often reaches the same conclusion, but its analysis runs through an extra and mostly unnecessary step of using a factor test to classify an electronic search as routine or nonroutine. See Alasaad v. Mayorkas, 988 F.3d 8, 17–19 (1st Cir. 2021). Under the factor test, most forensic searches are nonroutine to require reasonable suspicion.

197 See supra Section IV(A).

198 See U.S. CONST. art. III.

199 United States v. Cano, 934 F.3d 1002, 1018 (9th Cir. 2019).
account for the full range of border violations or harmful items customs agents are supposed to intercept, which the First Circuit acknowledges.200 Nor can customs agents operate within their full statutory authority. Because 19 U.S.C. § 482(a) allows officials to search for “merchandise which was imported contrary to law,” it naturally encompasses the ability to search for both violations at the border themselves and evidence of those border violations.201 For example, when conducting luggage searches, officials have the power to search for evidence of child pornography. Not only may they search the luggage for potential physical photos (the contraband itself), but they may search the luggage for evidence that the individual might be transporting the photos, such as condoms, syringes, and injectable testosterone.202 The distinction between contraband and evidence of contraband in a cell phone search is similarly baseless. As the First Circuit articulates it, if the government’s power to prevent crime at the border is at its zenith, “it follows that a search for evidence of either contraband or a cross-border crime furthers the purposes of the border search exception to the warrant requirement.”203

On the other end of the spectrum, an approach that extends the border exception to searches for evidence of prior domestic crimes—as the district court in the Second Circuit does—is too broad.204 This broad scope plainly exceeds the primary purpose constraint on warrant exceptions the Supreme Court articulated in City of Indianapolis v. Edmond, Arizona v. Gant, and Riley v. California. The border exception’s purpose is limited to identifying travelers that are lawfully allowed to enter the country and verifying that their belongings may also lawfully enter.205 Neither Congress nor the Supreme Court have articulated general law enforcement and public peace as the reason for the border searches. There might be a finer line in whether the border exception’s purpose—in the context of a forensic search—is for contraband or evidence of contraband. But there is no ambiguity that searches for prior domestic criminal activity are unrelated to the border, therefore, exceeding the exception’s underlying justifications.

200 Alasaad, 988 F.3d at 21.
201 19 U.S.C. § 482(a).
202 See United States v. Wanjiku, 919 F.3d 472, 487–89 (7th Cir. 2019) (officials discovered condoms, syringes, and injectable testosterone in the defendant’s luggage, which established reasonable suspicion that the defendant was transporting child pornography).
203 Alasaad, 988 F.3d at 19.
205 E.g., Carroll v. United States, 267 U.S. 132, 154 (1925); United States v. Ramsey, 431 U.S. 606, 620 (1977) (“The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country.”).
The scope is further problematic because it puts border and customs officials in a position to act beyond the scope of their duties, as the CBP officials did in *United States v. Aigbekaen* when they searched for evidence of the defendant’s prior domestic crime. Both border officials and law enforcement are restricted to their respective roles in what they can do. The only individuals permitted to conduct border searches are border officials because “[t]he authorizing statute limits the persons who may legally conduct a ‘border search’ to ‘persons authorized to board or search vessels.’” Authorized individuals include customs and immigration officials, but not general law enforcement officers such as police officers or FBI agents. Along with general law enforcement stepping into border officials’ role, border officials would exceed their duties in a search for prior domestic crime because that is a law enforcement function and border officials do not have the statutory authority to operate in that capacity. As the Ninth Circuit iterated, “customs agents are not general guardians of the public peace.”

If a search for prior domestic criminal activity was the border exception’s scope, the exception would swallow the rule. Customs officials, acting as law enforcement, could simply wait until suspected domestic criminals exit or re-enter the country to seize their cell phones and aid in searching for incriminating evidence of domestic crimes. It is effectively applying the border warrant exception to the interior. If the Supreme Court understood that to be how the Founders intended the Fourth Amendment to operate in the domestic criminal context, it would have interpreted the amendment in a way that allows criminal domestic searches in the interior without a warrant based on probable cause. But it did not because unlike the government’s power at the border to prevent ongoing crime, its power in combatting domestic criminal activity is not at its zenith. Instead, the Court has required a warrant based on probable cause for domestic searches, except in the narrow *Terry* stop circumstance or another narrowly carved out exception.

Simply because an individual is physically at the border does not change the constitutional constraints on the government’s authority as it relates to searches for domestic crime. Under the broadest scope, a search could be completely unrelated to the border, yet subject to the exceptions of the border. In contrast, the border exception being limited to preventing ongoing or

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206 See *United States v. Aigbekaen*, 943 F.3d 713, 718 (4th Cir. 2019).
208 *Id.*
209 *United States v. Cano*, 934 F.3d 1002, 1013 (9th Cir. 2019) (quoting *United States v. Diamond*, 471 F.2d 771, 773 (9th Cir. 1973)).
imminent criminal activity is narrowed in a way that preserves individual privacy interests under the Fourth Amendment. At the same time, that scope is not too narrow to prevent officials from protecting the border, unlike the Cano standard that limits forensic searches only to searches for digital contraband.212

Finally, it naturally follows that the principle of separation of powers supports a scope limited to searches for ongoing or imminent criminal activity. Courts must interpret and apply the law as it exists, not as they desire it to be.213 Because the statutory justifications of border officials’ role under 19 U.S.C. § 482(a) do not justify either the Ninth Circuit’s overly narrow scope in Cano or the overly broad scope of prior domestic crime,214 it naturally follows that ongoing or imminent criminal activity at the border is the proper scope. Courts are bound by Article III of the Constitution to interpret and apply that law, not create, expand, or abridge it. Expanding the scope to searches for evidence of prior domestic crime or limiting it to searches for digital contraband alone steps into the Article I legislative role.

However, applying a scope of ongoing or imminent criminal activity is not immutable. If citizens dislike the scope of the border exception, they have the power to change that through their elected representatives. Congress has the legislative power to amend 19 U.S.C. § 482 and any other border-related statutes to either expand or abridge the scope. Courts should not circumvent the legislative process by making their own policy decisions that contravene their Article III role to interpret and apply the Constitution and federal law. Courts applying the statutory scope of the border exception as limiting searches to ongoing or imminent criminal activity properly adheres to the principle of separation of powers and simultaneously promotes the intended democratic process.

B. Forensic Cell Phone Searches Require Reasonable Suspicion

When the purpose of a forensic search exceeds the scope of the border exception, the normal Fourth Amendment analysis—probable cause—applies. Even within the scope of the exception, however, forensic cell phone searches should require individualized and reasonable suspicion. Supreme Court precedent in United States v. Ramsey, as well as the suggestions of potential reasonable suspicion in Montoya de Hernandez and Flores-

212 Cano, 934 F.3d at 1018.
214 See supra notes 199–209 and accompanying text.
Montano, illustrate there is some limit to what and how the government may search and seize at the border. 215 This is consistent with the broad protections the Constitution affords the People. The invasiveness of a search is what pushes the limits of the border exception. Forensic searches fall within this category because both the search and the object of the search (cell phones) are far different from other searches and items to make the search highly intrusive.

1. Cell Phones Implicate Heightened Privacy Interests

Both the quantitative and qualitative uniqueness of cell phones implicate heightened privacy interests. 216 Quantitatively, their storage abilities are vast. At the time of the Court’s 2014 ruling in Riley v. California, the majority opinion noted that a sixteen-gigabyte phone “translates to millions of pages of text, thousands of pictures, or hundreds of videos.” 217 But more recently, especially with the expansion of iCloud storage, an Apple iPhone’s storage can contain over 1024 gigabytes of data. 218 Consequently, the modern Apple iPhone contains almost sixty-four times the capacity that the Supreme Court in Riley found had privacy consequences by exposing cell phones to a warrant exception as if they were any other item. 219

The large quantitative capacity reaching up to 1024 gigabytes interplays with the unique qualitative aspects of cell phones. Qualitatively, cell phones offer astounding precision and detail of private information. They contain addresses, prescriptions, bank statements, and videos, 220 differing from searches and seizures of cars, wallets, and luggage. An individual’s browsing history reveals personal interests and concerns. 221 Location features track precise minute-by-minute movements. 222 Photos and videos might contain

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215 E.g., United States v. Ramsey, 431 U.S. 606, 620 (1977) (the government’s power at the border is still “subject to substantive limitations imposed by the Constitution”).


217 Riley, 573 U.S. at 394.


219 Compare Riley, 573 U.S. at 394–95 (explaining the consequential privacy intrusion of a sixteen-gigabyte cell phone), with Compare iPhone Models, APPLE, https://perma.cc/4A4V-DA2D (last visited Mar. 22, 2023) (describing the iPhone 13 as containing up to one terabyte of storage, which translates to 1,000 gigabytes).

220 Riley, 573 U.S. at 394–95.

221 Id. at 395–96.

222 Id. at 396.
the most intimate moments. Depending on their purpose, the “apps” one downloads can reveal sensitive information by tracking prayer requests and managing drug addictions.223 These were all bases for the Supreme Court’s refusal to extend the search-incident-to-arrest exception to even manual searches of the defendant’s cell phone in Riley.224 Although Riley was limited to its facts, this paper does not use Riley for the purpose of extending its holding to the border exception context. Rather, Riley is used to show how the Supreme Court has analyzed the uniqueness of cell phones in the Fourth Amendment context. But notably, in United States v. Ramsey, the Court likened the border exception to the search-incident-to-arrest exception.225

Although the government’s interests are at their zenith at the border,226 the individual’s Fourth Amendment privacy interests are at their zenith in the home.227 According to the Supreme Court, cell phones contain even more information and sensitive records than would be found in a home.228 Indeed, cell phones can be brought wherever, unlike the home. However, the Supreme Court made a shift in its Fourth Amendment analysis from a focus on location to a focus on the expectation of privacy, as Professor Crocker at South Carolina School of Law indicated.229 In Katz v. United States, the Supreme Court emphasized the Fourth Amendment’s protection was of “people, not places.”230 Accordingly, that same protection of people applies to cell phones, especially when those cell phones contain even more sensitive information than a home does—the height of individual privacy.231 As the Supreme Court said in Riley, “[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”232

223 Id.
224 Id. at 394–96, 401.
225 United States v. Ramsey, 431 U.S. 606, 621 (1977) (“[The border search exception] is a longstanding historically recognized exception to the Fourth Amendment’s general principle that a warrant be obtained, and in this respect is like the similar ‘search incident to lawful arrest’ exception . . . .”)

228 Riley, 573 U.S. at 396–97 (stating “[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is”).
230 Katz, 389 U.S. at 351.
231 See Riley, 573 U.S. at 396–97.
232 Id. at 403.
It is true that cell phones are a modern invention not specifically contemplated by the Founders, but they directly implicate things the Founders intended to secure. The Fourth Amendment guarantees individuals security in their ‘papers’ because the Founders intended to safeguard the type of private thoughts and ideas contained on a modern cell phone. More and more of these personal papers take a digital form, especially on cell phones. Because personal papers are inherently personal and private, they “go[] to the very core of the [F]ourth [A]mendment right of privacy.” The digital forms—cell phones—therefore implicate heightened privacy interests.

Cell phones implicating the ‘papers,’ as well as the Supreme Court’s comparison of cell phones to a home, both contribute to the analysis because a search’s reasonableness is determined by a balancing of the interest in the intrusion against the privacy interests. This type of sensitive information being at the core of the Fourth Amendment’s purpose weighs heavily toward the individual’s privacy interests, especially when the cell phones contain vast quantities of it.

2. Forensic Searches Are Highly Invasive

Not only does the object of the search (cell phones) implicate heightened privacy interests, but the forensic search itself is highly invasive of what the Fourth Amendment intended to protect due to the search’s comprehensive, detailed, and powerful nature. The intrusive nature of forensic searches starkly contrasts with that of manual ones, which courts have found are basic, routine, and nonintrusive. As the First Circuit put it, unlike forensic searches, manual searches “limit[] in practice the quantity of information” accessed.

The comprehensive and powerful nature of a forensic search allows it to unlock password-protected files, restore deleted files, access encrypted data, and sift through all previously viewed images and browsing history.

233 United States v. Cotterman, 709 F.3d 952, 964 (9th Cir. 2013).
237 See, e.g., Alasaad, 988 F.3d at 18; United States v. Cano, 934 F.3d 1002, 1012 (9th Cir. 2019); United States v. Touset, 890 F.3d 1227, 1232–34 (11th Cir. 2018).
238 Alasaad, 988 F.3d at 18.
239 See United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013).
Deleted text messages and photos and files, hidden apps, cloud connections, facial identification, geo locations, passwords, web search history, and more are all accessible. Mobile device forensic tools allow officials to “extract a full copy of data” onto a separate device, providing “a window into the soul.”

The forensic search of the defendant’s cell phone in the Fourth Circuit’s *United States v. Kolsuz* revealed 896 pages of the defendant’s sensitive information. And this is a minimal amount compared to the typical sixty-four-gigabyte smartphone that approximates to 33,500 reams of paper. But in response to even the 896 pages of information, the Fourth Circuit found that forensic analyses reveal an “unparalleled breadth of private information.”

Additionally, when officials searched the defendant’s laptops in *Cotterman* for child pornography, the Ninth Circuit analogized forensic searches’ power as though “a search of a person’s suitcase could reveal not only what the bag contained on the current trip, but everything it had ever carried.” It was the “comprehensive and intrusive nature of a forensic examination” that was nonroutine to trigger a requirement of reasonable suspicion, not just the object of the search containing sensitive information. In fact, one district court in the Fourth Circuit described forensic searches to have “the potential to be even more revealing” than the body cavity search in *Montoya de Hernandez*. Even the Eleventh Circuit that aimed to equate cell phones to mere containers of information made no attempt to diminish the power or nature of forensic searches.

The government’s power is certainly at its zenith at the border because of its strong interest in protecting the nation, weighing heavily in the balancing. On the other end, however, is also a formidable weight—Fourth Amendment interests. At the very least, there is some limit to the

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244 *Kolsuz*, 890 F.3d at 145.

245 *United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013).

246 *Id.* at 962.


248 See *United States v. Touset*, 890 F.3d 1227, 1237 (11th Cir. 2018).

government’s power at the border, according to the Court in United States v. Ramsey. Beyond that, privacy interests in a cell phone are significantly heightened by the quantitative and qualitative nature of the information. Applying the powerful and comprehensive forensic search to these already heightened privacy interests creates a significant intrusion into an individual’s Fourth Amendment interests. When balancing the promotion of the government’s interest in protecting its borders against conducting a highly invasive search into heightened privacy interests that are the equivalent to a home, the same suspicionless and warrantless standard is not reasonable. Rather, officials should have reasonable suspicion before conducting forensic searches, even when the primary purpose of that search is to prevent ongoing or imminent criminal activity.

Imposing a reasonable suspicion requirement would not prevent CBP from effectively securing the border. Reasonable suspicion is not a new standard, nor is it a high one. In fact, it is a “low threshold.” Courts have applied it for many years, even in the law enforcement context where the government has a strong interest in combatting crime. It is simply “a particularized and objective basis” or a “specific reasonable inference” when looking at the totality of circumstances. Applying reasonable suspicion is beneficial because it ensures officials will not conduct intrusive forensic searches based on an “inchoate and unparticularized suspicion or ‘hunch’ . . . .”

Additionally, CBP has been practicing this standard for several years because it made the reasonable suspicion part of its policies and regulations for border protection in 2018. The government issued a mandatory directive specifically requiring its own customs and border agents to have reasonable suspicion before conducting an advanced or forensic search. A low threshold comports with both CBP and the Nation’s interest in safe borders.

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250 See United States v. Ramsey, 431 U.S. 606, 620 (1977) (finding the government’s power at the border is still “subject to substantive limitations imposed by the Constitution”).

251 United States v. Castillo, 804 F.3d 361, 367 (5th Cir. 2015) (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)).


253 Terry v. Ohio, 392 U.S. 1, 27 (1968).


255 Terry, 392 U.S. at 27.


257 Id.
Although the Eleventh Circuit held suspicionless and warrantless forensic searches at the border were permissible under the Fourth Amendment, its reasoning rests on an over-simplification of the Supreme Court’s holdings. It relied on a categorical distinction between people and property, reasoning that it would not consider a search’s extensiveness but only the search’s personal indignity, which, unlike people, electronics do not implicate.258 According to the Eleventh Circuit, “it does not make sense to say that electronic devices should receive special treatment” when no other property does.259 But this reasoning is flawed for two reasons.

First, the Supreme Court’s holdings in *Flores-Montano*, *Montoya de Hernandez*, and *Riley* display that the extensiveness of a search is in fact what implicates one’s personal dignity.260 The Eleventh Circuit’s use of the term ‘extensiveness’ is merely a parallel to ‘intrusiveness,’ and it is the intrusiveness that implicates personal dignity. The highly intrusive rectal examination in *Montoya de Hernandez* is what was an “extreme invasion of personal privacy and dignity.”261 If the rectal examination in *Montoya de Hernandez* was a less intrusive (or extensive) search, such as a pat-down, far less dignity would be implicated. In the same way, but in a property-context, the criminal defendant’s personal dignity in *Riley* too was implicated by the forensic search because the “intrusion on privacy is not physically limited in the same way when it comes to cell phones.”262 If the cell phone search was manual, it would be less intrusive (or extensive), and thus, implicate far less dignity.

Second, treating electronics like any other property directly contravenes how the Supreme Court described electronics—as “quite different.”263 In support of its assertion that electronics are like any other property, the Eleventh Circuit lumped them into the standard for vehicles in *Flores-Montano* where warrantless and suspicionless vehicular searches were permitted.264 But the Supreme Court in *Riley* specifically rejected applying to electronics a standard for “‘circumstances unique to the vehicle context.’”265 Whereas vehicles entail reduced privacy expectations and increased law enforcement needs, “cell phone searches bear neither of those

258 See United States v. Touset, 890 F.3d 1227, 1233–34 (11th Cir. 2018).
259 Id. at 1233.
261 *Montoya de Hernandez*, 473 U.S. at 556.
262 *Riley*, 573 U.S. at 394.
263 Id. at 395; see also United States v. Kim, 103 F. Supp. 3d 32, 56 (D.D.C. 2015) (finding that “Riley indicates that the Fourth Amendment is not necessarily satisfied by a simplistic likening of a computer to a searchable ‘container’”).
264 See Touset, 890 F.3d at 1233 (citing *Flores-Montano*, 541 U.S. at 155–56).
265 *Riley*, 573 U.S. at 398 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).
characteristics. Rather, in holding in *Riley* that a suspicionless manual electronic search is prohibited even pursuant to the search-incident-to-arrest exception, cell phones do in fact receive special treatment, unlike any other property. In fact, the *Riley* court explained that the cell phone-container “analogy crumbles” when accounting for the phone’s vast capabilities. The comparison of cell phones to containers is therefore a superficial oversimplification that neglects the deeper nature of privacy and the principles set forth by established Supreme Court jurisprudence.

VI. Conclusion

The advancements of modern technology in a constantly developing world introduces nuance and uncertainty to interpreting the Fourth Amendment. It is impossible that the Founders considered forensic searches or cell phones when they drafted the Bill of Rights, but the principles of privacy, security, and dignity remain sound and readily applicable. Additionally, decades of Fourth Amendment jurisprudence supplements courts in their analyses, even if the principles must apply in a different context. The world of cell phones and forensic searches very well seem to be that different context, but as the Supreme Court alluded to in *Riley*, cell phones implicate the privacy, security, and dignity that exist in a home.

As vast as the government’s power is at the border under the warrant exception, it is still constrained by the Constitution. The two effects this should have on the constitutionality of warrantless forensic searches at the border is limiting the scope of the border exception and mandating that highly intrusive searches may require some level of suspicion. The Supreme Court should hear and resolve the circuit split on the matter and find that warrantless forensic cell phone searches require border officials to reasonably suspect the individual is engaging in ongoing or imminent criminal activity at the border. Not only would the statutory border provision, 19 U.S.C. § 482, support the scope and requisite suspicion, but the Supreme Court’s longstanding and recent precedent would as well.

Under this precedent, the competing interests at the border are properly accounted for. Individuals’ Fourth Amendment rights are protected because the government is unable to forensically access, copy, and analyze the modern-day American’s life via their cell phone without some objective basis. The Nation’s interest in keeping a secure border is still maintained because reasonable suspicion is a low standard for CBP to achieve. Finally,

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266 *Id.* at 398–99.
267 See *id.* at 401.
268 *Id.* at 397.
separation of powers is adhered to because courts are acting in their Article III role, rather than Congress’ Article I role. To the extent that citizens and their representatives believe the scope should be broader or narrower, they may change it through the democratic process.