U.S. Court of Appeals Case Nos. 20-1077 & 20-1081

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GHASSAN ALASAAD; NADIA ALASAAD; SUHAIB ALLABABIDI; SIDD BIKKANNAVAR; JEREMIE DUPIN; AARON GACH; ISMAIL ABDEL-RASOUL, a/k/a Isma'il Kushkush; DIANE MAYE ZORRI; ZAINAB MERCHANT; MOHAMMED AKRAM SHIBLY; MATTHEW WRIGHT,

Plaintiffs-Appellees/Cross-Appellants

v.

CHAD F. WOLF, Acting Secretary of the U.S. Department of Homeland Security, in his official capacity; MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; MATTHEW T. ALBENCE, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Honorable Denise Jefferson Casper
Case No. 1:17-cv-11730-DJC

CORRECTED BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that National Association of Criminal Defense Lawyers does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

Dated: August 14, 2020

/s/Michael J. Iacopino
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CERTIFICATE OF COMPLIANCE WITH RULE 29(A)(4)(E)

Counsel for the parties did not author this brief in whole or in part. The parties have not contributed money intended to fund preparing or submitting the brief. No person other than Amicus Curiae or its counsel contributed money to fund preparation or submission of this brief.

Dated: August 14, 2020

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and more than 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in cases that involve surveillance technologies and programs that pose new challenges to personal privacy. The NACDL Fourth Amendment Center offers training and direct assistance to defense lawyers handling such cases in order to help safeguard privacy rights in the digital age. NACDL has also filed numerous *amicus* briefs in this Court and the Supreme Court on issues involving digital privacy rights, including: *Carpenter v. United*

States, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014); and *United States v. Jones*, 565 U.S. 400 (2012).

NACDL has a particular interest in this case because many of NACDL's members represent, or are themselves, individuals like the Appellees who have had their devices searched at the border without a warrant. NACDL's concerns about warrantless searches of electronic devices at the border date back at least a decade, when it litigated against the government to prevent those searches, including of its own members. *Abidor v. Napolitano*, 990 F. Supp. 2d 260, 274 (E.D.N.Y. 2013) (ultimately dismissed due to lack of standing). NACDL has also filed amicus briefs in multiple cases challenging device searches at the border. *See* Brief of the National Association of Criminal Defense Lawyers and the Electronic Frontier Foundation as Amici Curiae in Support of Defendant-Appellee, *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013); Brief of Electronic Frontier Foundation et al. as Amici Curiae in Support of Defendant-Appellant, *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); Brief of Electronic Frontier Foundation et al. as Amici Curiae in Support of Defendant-Appellant, *United States v. Molina-Isidoro*, 884 F.3d 287 (5th Cir. 2018).

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief in accordance with Rule 29(a)(2).

ARGUMENT

Criminal defense lawyers who cross the border for work carry devices with material protected by one of the oldest recognized privileges for confidential information – the attorney-client privilege. The government's unconstitutional practice of warrantlessly searching travelers' devices as they cross the border puts this privilege – and associated Fourth and Sixth Amendment rights – in jeopardy.

By requiring the government to get a warrant to search devices at the border, this Court would ensure that border agents cannot rummage through lawyers' devices – which constitute their virtual law office – without judicial supervision. To protect privileged material, the Fourth and Sixth Amendments demand direct judicial control over potentially privileged material or, at minimum, a judicially supervised "taint team" to filter privileged information and keep it away from investigators. Only a warrant requirement will ensure that the government follows these constitutionally-required precautions.

I. CONFIDENTIALITY IN THE ATTORNEY-CLIENT RELATIONSHIP IS ESSENTIAL TO THE RULE OF LAW

The attorney-client privilege is "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). That privilege, the duty of confidentiality, and the work product doctrine are the building blocks of the attorney-client relationship, which in turn is essential to

our legal system and the rule of law.[1] The privilege "encourages full and frank disclosure that better enables the lawyer to represent the client and better enables the client to conform his conduct to the law." *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 70-71 (1st Cir. 2011). For "[p]roper preparation of a client's case," the lawyer must be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). It is essential to not only the lawyer and client, but to our entire system of justice. *See id.*; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the privilege "promote[s] broader public interests in the observance of law and administration of justice").

The duty of confidentiality has particular significance for criminal defense lawyers. The American Bar Association emphasizes the importance of protecting client confidentiality, stating that "defense counsel should work to establish a relationship of trust and confidence with each client" and explain "the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense." ABA, Standards for Criminal Justice, Defense Function,

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[1] The American Bar Association ("ABA") Model Rules of Professional Conduct, which most states have adopted, prohibit attorneys from "reveal[ing] information relating to the representation of a client" absent the client's consent, except under narrowly circumscribed conditions. ABA, Model Rules of Professional Conduct ("MRPC"), Rule 1.6(a) (1983).

Standard 4-3.1(a) (4th ed. 2017). Even the possibility of intrusion on this confidence can create a "chilling effect" on a client's "willingness to communicate candidly with their attorneys." *See Grubbs v. O'Neill*, 744 F. App'x 20, 23 (2d Cir. 2018).

A. Criminal defense lawyers must adopt new technology despite risks to confidentiality

Criminal defense lawyers are operating in a world where cell phones are "'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society." *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (citing *Riley v. California*, 573 U.S. 373, 385 (2014)). Many incarcerated clients can only regularly communicate with their lawyer by email. Courts require electronic filing and have criticized and sanctioned lawyers that fail to use online legal research tools, such as Westlaw and LexisNexis, to find and evaluate relevant authority.[2] As a practical matter, digital technologies are here to stay, and the COVID-19 pandemic has only reinforced their importance.[3]

Ethically, defense lawyers should be technologically competent and "keep abreast of changes in the law and its practice, including the benefits and risks

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[2] *See, e.g.*, Local Rule 25(a) (mandating use of the electronic filing system by attorneys); Ellie Margolis, *Surfin' Safari-Why Competent Lawyers Should Research on the Web*, 10 Yale J. L. & Tech. 82, 92-93 (2007) (collecting cases).

[3] *See, e.g., United States Court of Appeals for the First Circuit, Order of the Court (Apr. 20, 2020),* https://www.ca1.uscourts.gov/sites/ca1/files/ElectronicAppendicesOrder.pdf (order moving certain paper filing requirements to electronic filing due to the COVID-19 pandemic).

associated with relevant technology." ABA, MPRC, Rule 1.1, Comment 8.[4] And as the ABA now recognizes, "unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients." ABA, Formal Opinion 477R at 1 (May 22, 2017).

Simply put, the practice of law today requires using digital technologies. Indeed, many criminal defense lawyers use their digital devices – laptop computers, flash drives, smart phones, and digital recording devices – as a virtual law office. *See* Alexander Paykin, *2019 Practice Management*, ABA (Nov. 6, 2019) (reporting increase in use of laptops and remote access software);[5] John G. Loughnane, *2019 Cloud Computing*, ABA (Oct. 16, 2019) (reporting steady growth in use of "cloud computing");[6] Nicole Black, *7 Types of Tech Tools to Help Lawyers Set Up Virtual Offices*, ABA Journal (Mar. 19, 2020);[7] *see also* Compl. at 18-19, *Abidor v. Napolitano*, 990 F. Supp. 2d 260 (E.D.N.Y. 2013). Lawyers use these devices to take

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[4] This "technological competence" rule has been explicitly adopted by at least 38 states. Robert Ambrogi, *Tech Competence*, LawSites (2018), https://www.lawsitesblog.com/tech-competence.

[5] *Available at* https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/practicemgmt2019.

[6] *Available at* https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/cloudcomputing2019.

[7] *Available at* https://www.abajournal.com/web/article/law-in-the-time-of-coronavirus-what-tools-do-lawyers-need-to-set-up-virtual-offices.

notes, record interviews, perform legal research, draft legal documents, and communicate with clients, witnesses, law firm staff, investigators, and/or co-counsel. Digital devices have the kinds of "advanced computing capability, large storage capacity, and Internet connectivity," *see Riley*, 573 U.S. at 379, that allow a diligent attorney to work virtually anywhere at any time. *Compare Carpenter*, 138 S. Ct. at 2220 ("[C]arrying [a cell phone] is indispensable to participation in modern society."), *with Abidor*, 990 F. Supp. 2d at 277 ("[I]t would be foolish, if not irresponsible, for plaintiffs to store truly private or confidential information on electronic devices that are carried and used overseas."). A lawyer's "record of all his communications with [a client] for the past several months," for example, could naturally be found in both his file cabinet and the note-taking app on his smart phone. *See Riley*, 573 U.S. at 394-95.

In short, lawyers cannot simply avoid the risks, including those to confidentiality, by not adopting digital devices. The risks must be mitigated, including through restrictions on governmental intrusions on confidentiality.

II. WARRANTLESS DEVICE SEARCHES AT THE BORDER INTRUDE ON THE CONFIDENTIALITY BETWEEN CRIMINAL DEFENSE LAWYERS AND THEIR CLIENTS

For many criminal defense lawyers, their work compels them to cross the border with their devices. Their cases may have an international dimension, their

clients may live abroad,[8] or they may otherwise have to travel abroad to gather evidence and engage in other case-related activities, such as mitigation investigations. The government's warrantless search practices, however, pose a serious and ongoing threat to client confidences and work product. The harm from disclosure of confidential material during searches at the border is acute for criminal defense lawyers and their clients because disclosure to a litigation adversary – the government - is likely.

Defense teams must travel abroad for cases with an international dimension, such as drugs, extradition, trade, terrorism, or immigration. *See United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) ("[attorney-client] privilege covers communications to non-lawyer employees"). In *United States v. Valencia-Trujillo*, a defense investigator was searched at the border after traveling abroad for a case involving a foreign national client charged with drug-related offenses. No. 8:02CR00329 T17EAJ, 2006 WL 1793547, at *1, *6 (M.D. Fla. June 26, 2006), *report and recommendation adopted*, No. 8:02-CR-329-T-17-EAJ, 2006 WL 8434326 (M.D. Fla. June 28, 2006). Despite the investigator's assertion that his documents were "highly confidential and contained information compiled in preparation for Defendant's trial," border agents seized them, including "notes of his

[8] ABA guidance provides that "[d]efense counsel should make every reasonable effort to meet in person with the client." ABA, Standards for Criminal Justice, Defense Function, Standard 4-3.3(b).

interviews with potential defense witnesses, photographs relating to Defendant's case, a handwritten 18-page summary of defense counsel's trial strategy, financial records, and various other documents relating to the case." *Id*. at *6.

The International Prison Transfer Program provides for representation and repatriation of U.S. citizens who are sentenced and imprisoned in foreign countries. *See* 18 U.S.C. §§ 4100-4115. It requires defense counsel and even magistrate judges to travel abroad. *See, e.g.*, *Smythe v. U.S. Parole Comm'n*, 312 F.3d 383, 384 (8th Cir. 2002) ("A United States Magistrate Judge and two public defenders traveled to Panama" after citizen "requested a transfer to serve the remainder of his sentence in the United States" per United States–Panama treaty) (citing 18 U.S.C. § 4108-09).

White collar criminal defense lawyers often represent businesses that deal in international commerce. In *United States v. Modes*, a lawyer representing a business which imported products and his investigator were searched upon their return from a legal trip abroad. 787 F. Supp. 1466, 1468 (Ct. Int'l Trade 1992); *see also United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989) (reciting same facts). The two traveled abroad to question a shipper after being notified that their client was under a customs investigation. *Modes*, 787 F. Supp. at 1468. Despite their invocation of the attorney-client privilege, a border agent seized their briefcase with the legal files on the case, though the court ultimately denied suppression based on the independent source doctrine. *Id*. at 1468-69, 1478-79. Similarly, in *Looper v. Morgan*, a lawyer

representing a multinational business was searched upon his return from a legal trip abroad. Civil Action No. H-92-0294, 1995 U.S. Dist. LEXIS 10241, at *4, *7-*9 (S.D. Tex. June 23, 1995). Despite the lawyer's invocation of the attorney-client privilege as to documents in his briefcase, a border agent searched it, and materials deemed privileged by the court were returned to the lawyer without inspection. *Id*. at *8, *54.

NACDL previously reported that at least fifty of its members represented "terrorism suspects who are either foreign nationals or who have allegedly engaged in illegal terrorist activity abroad," and they had to travel abroad to "meet with witnesses, foreign counsel, experts, journalists, and government officials." Compl. at 17, *Abidor* 990 F. Supp. 2d 260. Government surveillance of remote communications is an acute threat in these cases, which makes traveling abroad for in-person communication even more necessary.

Criminal defense lawyers represent all people, regardless of background, and are constitutionally obligated to advise clients on immigration consequences. *See Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010). However, the government is reportedly targeting lawyers at the border who represent immigrants. Tom Jones et al., *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC San Diego (Mar. 6, 2019), https://www.nbcsandiego.com/news/local/source-leaked-documents-show-the-us-

government-tracking-journalists-and-advocates-through-a-secret-database/3438 (describing government database of targets for screening at the border, including attorneys); Julia Ainsley, *More Lawyers, Reporter Stopped and Questioned at Border by U.S. Officials*, NBC (Mar. 18, 2019)[9] (several attorneys were searched and one watched as border agent "scrolled through his [phone] contacts").

Even ordinary criminal cases can require travel abroad. Capital defense lawyers, for example, must "seek information that supports mitigation or rebuts the prosecution's case in aggravation," including when a client is a foreign national. *See* ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11(A) (2003). The client's consulate can help the lawyer by, among other things, "assisting in investigations *abroad*." *Id*., Guideline 10.6, commentary (emphasis added). Mitigation investigations involve "traveling to the country of origin" and often "remote, impoverished areas" to conduct multiple "in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history." *See* Gregory J. Kuykendall et. al., *Mitigation Abroad: Preparing A Successful Case for Life for the Foreign National Client*, 36 Hofstra L. Rev. 989, 1008 (2008) (quoting ABA, Supplementary Guidelines for the Mitigation Function of Defense

[9] *Available at* https://www.nbcnews.com/politics/immigration/more-lawyers-reporter-stopped-questioned-border-u-s-officials-n984256.

Teams in Death Penalty Cases, Guideline 10.11(C) (2008)). These investigations are often crucial in non-capital cases as well. *See United States v Booker*, 543 U.S. 220, 245, 249 (2005) (requiring courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in sentencing).

Even without a specific case, criminal defense lawyers must travel abroad for professional reasons. Many of them are employed by large U.S.-based law firms that maintain offices in multiple foreign countries and must travel abroad to collaborate on cases with their foreign colleagues. NACDL member Lisa Wayne, for example, reported that she "frequently travel[ed] to Mexico in connection with the Mexico Legal Reform Project . . . to provide oral advocacy training to Mexican attorneys." Compl. at 22, *Abidor*, 990 F. Supp. 2d 260. She used her laptop as her "traveling office" – taking notes of meetings and interviews, drafting legal memoranda, and staying in contact with her physical office in the U.S. about confidential matters. *Id*. She alleged that border agents searched her luggage and laptop upon one of her returns to the U.S., despite knowing she was a lawyer. *Id*. at 23-24.

Moreover, criminal defense lawyers and their clients may also simply travel abroad for personal reasons and then be subjected to a search of their devices containing privileged material – as happened in this very case. *Alasaad v. Nielsen*, 419 F. Supp. 3d 142, 149-150 (D. Mass. 2019) (client's phone was searched at border on multiple occasions, and after stating that it contained attorney-client

communications, client "observed a CBP officer viewing communications between her and her lawyer"); *see Janfeshan v. U.S. Customs & Border Prot.*, No. 16CV6915ARRLB, 2017 WL 3972461 at *1-*2, *12 (E.D.N.Y. Aug. 21, 2017) (upon return from trip abroad visiting family, client's phone containing conversations with lawyer was seized) (denying motion to dismiss Fourth Amendment claim); *Arjmand v. Dep't of Homeland Sec.*, No. LACV1407960JAKMANX, 2018 WL 1755428 at *2, *6 (C.D. Cal. Feb. 9, 2018) (client's phone containing attorney-client privileged material searched on multiple occasions upon returning from trips abroad with family) (partially dismissing lawsuit with leave to amend); *Anibowei v. Barr*, No. 3:16-CV-3495-D, 2019 WL 623090 at *2, *7 (N.D. Tex. Feb. 14, 2019) (lawyer's phone containing privileged material searched on multiple occasions at border) (dismissing claim for injunctive relief on sovereign immunity grounds with leave to replead); *United States v. Lin Lyn Trading*, 149 F.3d 1112, 1113, 1116 (10th Cir. 1998) (client's notepad documenting conversations with legal counsel seized at border) (suppressing evidence from search).

Criminal defense lawyers face an impossible situation: they must travel abroad to provide competent representation, but doing so risks disclosure of confidential information to an adversary. This situation exists because the

government is unconstitutionally searching devices at the border, and the courts must resolve it.

III. SEARCHES OF DEVICES WITH CONFIDENTIAL MATERIAL AT THE BORDER MUST BE JUSTIFIED BY A WARRANT AND JUDICIALLY SUPERVISED

This case provides the Court an opportunity to address the government's ongoing intrusions into the attorney-client relationship at the border. Plaintiffs' proposed remedy – requiring a warrant based on probable cause to search an electronic device at the border – triggers the judicial supervision that is necessary when the government's search power comes into contact with the attorney-client privilege. Moreover, the serious Fourth and Sixth Amendment interests harmed by searches of devices with confidential material at the border compel a warrant requirement.

A. Judicial supervision and strict protections are necessary

U.S. Customs and Border Protection ("CBP") policy on device searches fails to adequately protect privileged information and attempts to circumvent judicial supervision. *See* CBP, CBP Directive 3340-049A at 5-6 (Jan. 4, 2018). It vaguely provides that CBP officers will "ensure the segregation of any privileged material from other information examined during a border search to ensure that any privileged material is handled appropriately." *Id*. The policy does not require officers to turn over potentially privileged material to the courts for review or even seek judicial supervision of this "segregation" process. *Id*. CBP handles it entirely in-

house, through "the establishment and employment of a Filter Team composed of legal and operational representatives." *Id*. The policy does not specify how the Filter Team would operate, leaving it to the discretion of CBP counsel. *Id*. This displacement of judicial supervision by executive branch lawyers is unconstitutional.

This Court and others have held that when the government risks intruding on the attorney-client privilege, such as during the search of a law office, judicial supervision and strict protections of privileged material are necessary. *United States v. Derman*, 211 F.3d 175, 181 (1st Cir. 2000) ("The particularity of the warrant and the breadth of the search . . . are matters that should be considered with special care in the context of a law office because of the pervasiveness there of privileged items."); *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 181 (4th Cir. 2019) ("[T]he magistrate judge erred in assigning judicial functions to the Filter Team, approving the Filter Team and its Protocol in ex parte proceedings without first ascertaining what had been seized in the Law Firm search, and disregarding the foundational principles that serve to protect attorney-client relationships."); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 960-61 (3d Cir. 1984) (criticizing the "rampant trampling of the attorney-client privilege and, equally important, the work product doctrine" in search of law office and holding that warrant was overbroad in authorizing search of "*all* client files, open or closed, to

determine which personal injury files to seize") (emphasis in original); *People v. Hearty*, 644 P.2d 302, 313 (Colo. 1982) ("[R]igid adherence to the particularity requirement is appropriate where a lawyer's office is searched.")

The same concerns apply to the search of a lawyer's virtual law office. And while there is a crime-fraud exception to the attorney-client privilege, there is not a border search exception. The Fifth Circuit "admonished" the government in the *Modes* case for its "outrageous and reprehensible behavior" of warrantlessly seizing a briefcase with legal files at the border. 787 F. Supp. at 1479 (citing *Wilson*, 864 F.2d at 1223); *but see id*. at 1478-79 (denying suppression based on independent source doctrine). The court in *Valencia-Trujillo* similarly criticized the government's "bizarre" and "ill-advised" warrantless seizure of the defense investigator's legal notes at the border. No. 8:02CR00329 T17EAJ, 2006 WL 1793547, at *9-*10 (finding search did not violate Fourth Amendment because notes were returned and no Fifth Amendment violation because conduct was not sufficiently "outrageous"). The *Looper* court found that requiring "a warrant in advance of reading, duplicating, or seizing any privileged document should not impose an undue burden" on the government, even at the border. Civil Action No. H-92-0294, 1995 U.S. Dist. LEXIS 10241, at *15-*16.

A warrant requirement would interpose a neutral and detached judge to prescribe the procedures by which the government searches a virtual law office.

Those procedures must include determining "whether a lawyer's communications or a lawyer's documents are protected by the attorney-client privilege or work-product doctrine." *In re Search Warrant*, 942 F.3d at 176. Multiple courts have held that this is a "judicial function" and that a "magistrate judge (or an appointed special master) — rather than [an executive branch] Filter Team — must perform the privilege review of the seized materials." *See id*. at 181 (collecting cases). These courts reasoned that there is an "inherent conflict in authorizing [an executive branch] filter team to decide privilege claims," whereas "a magistrate judge and a special master are judicial officers and neutral arbiters." *Id*. at 181 n.19; *see Looper*, Civil Action No. H-92-0294, 1995 U.S. Dist. LEXIS 10241, at *15-*16, *54 ("[T]he courts, rather than individual Customs officials, are in the better position to make the decisions that cases such as this require," such as "determin[ing] which, if any, of the documents in Looper's briefcase are privileged.") These protections should be determined in an adversarial proceeding so that the court is "fully informed of the relevant background on the [law office] and its clients" and on "the nature of the seized materials." *See In re Search Warrant*, 942 F.3d at 178-79 (blaming *ex parte* proceeding for result that 99.8% of the seized emails, which were being reviewed by the government filter team, were not related to the client under investigation, and many contained other clients' privileged information); *see also Looper*, Civil Action No. H-92-0294, 1995 U.S. Dist. LEXIS 10241, at *13 (noting that the client, "whose

interests truly suffer from such a search [of a lawyer at the border] . . . will rarely be present" to defend those interests).

In other words, courts have rejected the approach used by CBP, *i.e.*, "a Filter Team composed of legal and operational representatives [of CBP]." *See* CBP, CBP Directive 3340-049A at 5. Judicial supervision, if not outright judicial control over privileged materials, is necessary. Through a warrant, a judge would "provide sufficient criteria . . . to distinguish the evidence sought from other materials, including privileged materials." *See Derman*, 211 F.3d at 181. The judge would "emphasize[] that client files for persons or entities other than [the targeted entities] *cannot* be opened or seized pursuant to the warrant." *See id.* (internal quotations omitted) (emphasis in original). The "privilege team" would be guided not by the executive branch's own discretion, but by the rules set out in a judicially authorized warrant. *See id.*

For criminal defense lawyers, to whom the government is a litigation adversary, the risk for and potential harm from abuse is simply too high when the government is allowed to freely intrude on confidentiality in the attorney-client relationship. *See United States v. Mastroianni*, 749 F.2d 900, 906 n.2, 908 (1st Cir. 1984) (the government should "justify the need for the informant's attendance [at defendant's meeting with his attorney] before a neutral magistrate" because "[t]he advantage that the government gains in the first instance by insinuating itself into

the midst of the defense meeting must not be abused" and emphasizing the role of a "neutral magistrate"). Due to the government's claims of extraordinary search power, these lawyers can no longer rely on typical technical protections for their virtual law offices, such as encryption and password-protection.[10] CBP policy now claims, without legal justification, that devices must be "presented in a manner that allows CBP to inspect their contents." CBP, CBP Directive 3340-049A at 7.[11] Even deleting privileged material may not keep it from the government's grasp, as a so-called "advanced search" can uncover deleted data. *See Alasaad*, 419 F. Supp. 3d at 165. Lawyers cannot consistently rely on "cloud" storage, which has its own ethical concerns[12] and may not be practical if their destination lacks reliable and safe internet connectivity. *See, e.g., supra* Sec. II.A (discussing work in "remote, impoverished areas").

Criminal defense lawyers who seek to protect their work product and clients' confidences cannot be left to the mercy of government discretion or available technology. A warrant requirement for device searches at the border would trigger

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[10] *See, e.g.*, Michael Price, *National Security Watch*, The Champion (Mar. 2010), 34-MAR Champion 51 (Westlaw).

[11] This refers to compelled decryption. NACDL, Compelled Decryption Primer (May 2019), https://www.nacdl.org/getattachment/92b2b75a-8fb0-456c-9498-e23eaa7893b3/compelleddecryptionprimer.pdf.

[12] *See* New York City Bar, *The Cloud and the Small Law Firm: Business, Ethics, and Privilege Considerations* (Nov. 2013) at 13-14 n.21 https://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf (collecting ethics opinions on cloud computing).

judicial involvement, permit defense lawyers with the opportunity to assert privilege, and allow for courts to impose the necessary safeguards.

B. Fourth and Sixth Amendment rights must be protected

CBP's warrantless border searches of devices with confidential material are a violation of the Fourth Amendment right to privacy and, for criminal defense lawyers and their clients, the Sixth Amendment right to counsel. A warrant requirement would end this practice and protect these basic constitutional rights.

This Court has recognized that "the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel." *Greater Newburyport Clamshell All. v. Pub. Serv. Co. of New Hampshire*, 838 F.2d 13, 21 (1st Cir. 1988) (citing *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir.1973)); *see also Weatherford v. Bursey*, 429 U.S. 545, 563 (1977) (Marshall, J., dissenting) (quoting the same). Government intrusions on this privacy are a "threat to the effective assistance of counsel" because they result in "inhibition of free exchanges between defendant and counsel." *Bursey*, 429 U.S. at 554 n.4. The Supreme Court has warned that if the government "pervasively insinuate[s] itself into the councils of the defense," even a new trial may be insufficient to remedy the Sixth Amendment violation. *Hoffa v. United States*, 385 U.S. 293, 308 (1966); *see also Mastroianni*, 749 F.2d at 908 ("The burden on the government [to show a lack of prejudice] is high because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications."). This "pervasive insinuat[ion]" is precisely what

the government does when it searches a criminal defense lawyer's virtual law office, which may contain *all* of their confidential communications (or notes and records of them) with *all* of their clients. *See Hoffa*, 385 U.S. at 308. Moreover, the informant cases that the courts have previously confronted are qualitatively less chilling than today's electronic searches, "because the former intrusion may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present." *See Bursey*, 429 U.S. at 554 n.4. But criminal defense lawyers cannot avoid uninvited intrusions at the border, except through intervention by the courts to protect the Sixth Amendment right. *See Zweibon v. Mitchell*, 516 F.2d 594, 616 n.52 (D.C. Cir. 1975) (the government's desire to collect "privileged attorney-client communications concerning pending criminal trials . . . may prompt surveillance," and is an "abuse which prior judicial authorization may help to curb").

Given that the attorney-client privilege is "is one of the oldest recognized privileges for confidential communications," it is "clearly established" under the Fourth Amendment that attorneys and clients have a "reasonable expectation of privacy for their privileged attorney-client conversations." *See Swidler & Berlin*, 524 U.S. at 403; *Gennusa v. Canova*, 748 F.3d 1103, 1112-13 (11th Cir. 2014); *see also Application of U.S. for an Order Authorizing Interception of Oral Commc'ns at the Premises Known as Calle Mayaguez 212, Hato Rey, Puerto Rico*, 723 F.2d 1022,

1026 (1st Cir. 1983) ("[T]he clients and attorneys . . . may seek to exclude privileged material and its fruits at trial."); *DeMassa v. Nunez*, 770 F.2d 1505, 1506 (9th Cir. 1985) ("It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney.") (emphasis omitted). The search of a virtual law office at the border implicates this particular Fourth Amendment interest, in addition to the universal privacy interests that Plaintiffs have raised. Without judicial supervision and strict procedures to protect confidential material, such searches are overbroad and violate the Fourth Amendment as well as the Sixth. *See Klitzman, Klitzman & Gallagher*, 744 F.2d at 960.

IV. THIS COURT SHOULD REQUIRE A WARRANT FOR DEVICE SEARCHES AT THE BORDER

When criminal defense lawyers cross the border, they come into contact with a litigation adversary that claims incredible power to search them. For many of these lawyers, zealous representation of their clients requires traveling abroad and, in the digital age, using digital devices as a virtual law office. The Fourth and Sixth Amendment protections for these devices are no less than those for a physical law office.

Clients must be able to trust that, based on the attorney-client privilege and its protection of confidential material, their lawyers will be able to "assemble information" and "prepare [their] legal theories and plan [their] strategy without

undue and needless interference" while traveling across borders with their devices. *See Hickman*, 329 U.S. at 510-11. A warrant requirement will ensure the judicial scrutiny and supervision required to protect attorney-client privilege and safeguard the Fourth and Sixth Amendments.

CONCLUSION

For the foregoing reasons, this Court should hold that the Constitution requires the government to get a warrant before it searches an electronic device at the border. Should this Court decline to require a warrant, it should affirm the district court's holding that the government must have at least reasonable suspicion that a device contains digital contraband before searching the device.

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Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(a)(4)(G) and 31(g)(1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 28.1(e)(2)(A)(i) because it is written in 14-pt Times New Roman font and contains 4,724 words, excluding the portions excluded under Fed. R. App. P. 32(f). This count is based on the word count feature of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on August 7, 2020.

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