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

BRIEF OF AMICUS CURIAE
THE HARVARD IMMIGRATION AND REFUGEE CLINIC
IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

Dated: August 7, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Harvard Immigration and Refugee Clinic states that it is not a corporation.

Dated: August 7, 2020

/s/ Christopher T. Bavitz

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

For over thirty-five years, the Harvard Immigration and Refugee Clinic ("HIRC") at Harvard Law School has been a leader in the field of immigration law. HIRC assists in developing theories, policy, and national advocacy related to asylum and immigration law. HIRC has filed briefs as *amicus curiae* in numerous cases before the U.S. Supreme Court, the federal district and circuit courts, the Board of Immigration appeals, and various international tribunals. HIRC has an interest in the appropriate development of immigration law. HIRC submits this brief out of concern that the government's policy will cause profound chilling effects on the speech of immigrant communities.[1,2]

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amicus curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] Pursuant to Fed. R. App. P. 29(a)(2), *amicus curiae* certifies that all parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Courts and scholars have uniformly recognized that personal electronic devices such as cell phones, tablets, and laptop computers are essential to everyday life, and individuals have a strong expectation of privacy in the contents in their devices. The Supreme Court has made that expectation of privacy explicit in its decisions in *Riley v. California*, 537 U.S. 373 (2014), and *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

Yet, the U.S. Customs and Border Protection ("CBP") and Immigration and Customs Enforcement ("ICE") aim to create a constitutional free zone by continuously conducting warrantless, suspicionless searches of travelers' electronic devices at the border. In 2009, CBP and ICE published directives regarding digital border searches, granting border patrol agents broad authority to conduct warrantless device searches. These policies met with significant backlash. *See* Yule Kim, Cong. Research Serv., RL34404, *Border Searches of Laptop Computers and Other Electronic Storage Devices* (2009), https://fas.org/sgp/crs/homesec/RL34404.pdf. The policies broadly state that device searches can be conducted without individualized suspicion and that reasonable suspicion is required only in specific circumstances. *Id.* While CBP did update its policies in 2018, this update merely promised an increase in transparency, accountability, and oversight. *See* CBP, *CBP Releases Updated Border Search of Electronic Device Directive and*

FY17 Statistics (Jan. 5, 2018), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and. The search policy, including warrantless and suspicionless searches of electronic devices, is still in place. *See* CBP, *Border Search of Electronic Devices* (Jan. 4, 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

These warrantless, suspicionless searches have profound chilling effects on speech, including constitutionally protected political speech, and deter the free exercise of expression and association. These chilling effects are more pronounced in immigrant communities, significantly impacting the professional and personal lives of millions of Americas. In light of these invasive and unnecessary searches and seizures at the border, *amicus curiae* asks this Court to hold that all border searches of electronic devices require a warrant and probable cause or, at the very least, reasonable suspicion.

ARGUMENT

I. Personal electronic devices are an integral part of everyday life and hold vast amounts of private information.

Personal electronic devices such as cell phones and laptops are commonplace throughout the United States. Cell phones, in particular, are an integral part of life not only due to the information they contain, but also their nearly uniform usage across the country. In 2014, the Supreme Court observed that cell phones are such "a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). Four years later, the Court stated more directly that carrying a cellphone is "indispensable to participation in modern society." *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018). As of 2019, 96 percent of Americans own cell phones, with 81 percent of those Americans owning smart phones. *See Smartphone Ownership*, Pew Research Center (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/.

Electronic devices are not just ubiquitous, they are also capable of storing a vast amount of information. Cell phones carried today, with storage capacities between 64 and 256 gigabytes, contain between 40 million and 120 million physical pages of information, which would take up between 1 and 3 floors of the Harvard Law School library. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 199 Harv. L. Rev. 531, 542 (2005). In *Riley*, the Court emphasized that the

term "cell phones" may be a misnomer because of the immense storage capacity of the devices: they "are in fact minicomputers that also happen to have the capacity to be used as a telephone." 578 U.S. at 393. The information cell phones contain is "detailed, encyclopedic, and effortlessly compiled." *Carpenter*, 138 S. Ct. at 2216. Notebook computers and tablets can hold multiple terabytes of information—an order of magnitude more than a cellphone.

With such immense storage capacity, personal electronic devices are unique in the types of information they contain. People use electronic devices for various tasks, including, messaging, calling, emailing, taking and storing pictures, browsing the internet, social media, and navigation. *See* Aaron Smith, Pew Research Ctr., *U.S. Smartphone Use in 2015, Chapter Three: A "Week in the Life" Analysis of Smartphone Users* (2015), https://www.pewresearch.org/internet/2015/04/01/chapter-three-a-week-in-the-life-analysis-of-smartphone-users/. As a result, such devices contain intimate information like "medical records, location data, information regarding political beliefs or religious convictions, and details about intimate relationships—stretching back for decades." Laura K. Donohue, *Customs, Immigration and Rights: Constitutional Limits on Electronic Border Searches*, 128 Yale L.J. Forum 961, 1008 (2019).

Courts have recognized the unique nature of personal electronic devices. As early as 2013, this Court recognized that electronic devices' immense storage

capacity set them apart from other personal effects. *See United States v. Wurie*, 728 F.3d 1, 9 (1st Cir. 2013) (noting that cell phones contain more information than physical containers). Other courts soon followed suit. *See, e.g.*, *United States v. Kolscuz*, 890 F.3d 133, 145 (4th Cir. 2018) (finding the privacy concerns of electronic devices are a "matter of scale: [t]he sheer quantity of data stored on smartphones and other digital devices dwarfs the amount of personal information that can be carried over a border—and thus subjected to routine border search—in a luggage or car"); *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (recognizing that electronic device searches implicate substantial privacy interests where "[e]ven a car full of packed suitcases with sensitive documents cannot hold a candle to the sheer, and ever-increasing, capacity of digital storage"); *see also United States v. Kim*, 103 F. Supp. 3d 52, 54 (D.D.C. 2015) (finding that "[o]ne cannot treat a[n electronic device] like a handbag simply because you can put things in it and then carry it onto a plane").

The result is individuals carrying an ever-increasing amount of private information with them wherever they go—including when they cross international borders. Searches conducted by U.S. officials at airports and border crossings have significantly increased since 2015. *See* Deb Riechmann, *U.S. Searches of Phone, Laptops at Airports Rising, Suit Says*, AP News (Apr. 29, 2019), https://apnews.com/9cab32c02ca4474ea80fa88e16ba7967. Currently, the

government is expanding its digital search practices and policies to border searches—with a projected quadruple increase in the number of digital searches conducted at the border since 2015. *See* Kaveh Waddell, *The Steady Rise of Digital Border Searches,* The Atlantic (Apr. 12, 2017), https://www.theatlantic.com/technology/archive/2017/04/the-steady-rise-of-digital-border-searches/522723/. As travelers have more and more personal information exposed through warrantless, suspicionless electronic device searches[3] at the border, these practices will have significant chilling effects, especially on certain vulnerable populations.

II. This Court can and should consider the chilling effect of unlawful electronic device searches at the border on free speech.

The intensely private nature of personal electronic devices raises important First Amendment issues. Warrantless, suspicionless border searches will inevitably deter free expression—especially protected political expression—among targeted groups. This "chilling effect" created by unlawful searches causes a direct injury to

[3] *Amicus* agrees with Plaintiffs-Appellees that there is no meaningful distinction between "manual" and "forensic" searches in terms of invasiveness or the chilling effects they cause. Although the government argues for a lower standard in the case of "manual searches," in which "officers simply look at pictures, videos, texts, or call logs on a device," Appellee Br. at 13, this distinction misunderstands the unusually invasive nature of electronic device searches. As the Court recognized in *Riley*, "[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to . . . brief physical search[es]." *Riley*, 573 U.S. at 386.

affected parties, highlighting the overbroad and unnecessary nature of CBP and ICE's electronic border search policies.

A. Courts and scholars have recognized the chilling effect of searches on free speech.

Chilling effects are defined as the discouragement of one's legitimate exercise of their legal rights by the apparent threat of legal repercussions. *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969). In this case, warrantless seizures and searches of individuals' electronic devices—acts that are, themselves, violations of the Fourth Amendment—chill First Amendment rights: if people know that their personal devices can be searched without reason, they are more likely to avoid free discourse and free association.

The Supreme Court has found, time-and-again, that First Amendment chilling effects are legally cognizable, even when they fall short of a direct prohibition on speech. *See, e.g.*, *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Laird v. Tatum*, 408 U.S. 1, 12 (1972) ("[G]overnmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights."). Thus, this Court can and should recognize the chilling effects of border searches.

Many courts have found that invasions of privacy can chill speech. In *Ozonoff v. Berzak*, 744 F.2d 224, 228–30 (1st Cir. 1984), this Court recognized the chilling effect of an Executive Order that permitted a "loyalty test" of U.S. citizens who sought to work for international organizations. Other courts have recognized that police investigations, when undertaken for retaliatory purposes, can chill protected speech. *See Duncan v. City of San Diego*, 401 F. Supp. 3d 1016, 1038 (S.D. Cal. 2019) (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013), *abrogated on other grounds by Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)); *see also Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007) (noting that threat of police search and seizure would chill expression of controversial views); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053 (Colo. 2002), *as modified on denial of reh'g* (Apr. 29, 2002) (noting chilling effect of search warrant for list of books purchased by customers of bookstore).

At least one court in this Circuit has recognized the chilling effect of border searches. In *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass., Mar. 28, 2012), the District Court of Massachusetts declined to dismiss a First Amendment claim that involved the search of electronic devices at the border. The court held that, in addition to independent Fourth Amendment issues, the detention and search of a political figure was potentially unlawful under the First

Amendment. As the court explained, it may be constitutionally problematic to allow federal border officials to "seize personal electronic devices containing expressive materials, target someone for their political association and seize his electronic devices and review the information pertinent to that association and its members and supporters simply because the initial search occurred at the border." *Id.* at 11. This suggests a tight connection between First Amendment claims and violations of the Fourth Amendment.

The close relationship between surveillance and chilling effects is also supported by empirical research. A survey of Muslim Americans after 9/11 showed that up to 71% of respondents believed "that the government [was] monitoring the activities of Muslims in the United States" after 9/11,[4] with an additional 11% of respondents claiming that this suspected surveillance altered their general behavior, and 8% of respondents claiming that it altered their behavior on the internet. Dawinder S. Dishu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim Americans*, 7 U. Md. L.J. Race Relig. Gender & Class 374, 390 (2007). Studies of general online traffic also support this proposition. One 2016 study empirically demonstrated that increased

[4] *Amicus* notes that this fear is well-founded, given the existence of programs like NSEERS that disproportionately targeted Arabs and Muslims. *See* Nadeem Muaddi, *The Bush-Era Muslim Registry Failed. Yet the US Could Be Trying It Again*, CNN (Dec. 22, 2016), https://www.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/index.html.

awareness of online surveillance regimes decreased the amount of traffic generated by Wikipedia articles relating to DHS "terrorism" keywords (phrases like "dirty bomb," "suicide attack," "nuclear enrichment" and "eco-terrorism"). *See* Jonathon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 Berkeley Tech. L.J. 117, 144 (2016).

These studies demonstrate what common sense plainly suggests, and what courts have repeatedly recognized: as government surveillance and data-gathering increases, the ability of individuals to freely express themselves decreases. The result is a constitutionally unacceptable situation that systematically restricts free speech.

B. This Court can consider the chilling effects of border searches on free speech.

The United States has long held that the protection of political speech is uniquely important to the health and safety of our democracy. Political expression is "imperative . . . to the end that government may be responsive to the will of the people" and lies "at the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). As a result, the Supreme Court has held that "political speech must prevail against laws that would suppress it by design or inadvertence . . . . Laws burdening such speech are subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Federal*

Elections Commission, 558 U.S. 310, 340 (2010) (citation omitted); *see also Mills v. Alabama*, 384 U. S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

In order to succeed on a First Amendment claim based on chilling effects, a party must show they have "'sustained, or [are] immediately in danger of sustaining, a direct injury as the result of that action.'" *Laird*, 408 U.S. at 13 (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937)). CBP and ICE's actions result in such a "direct injury." The factual history of border searches underscores the objective and concrete "harm" that the government imposes on the political speech of border-crossers. According to DHS whistle-blowers, journalists, attorneys, and citizen activists involved in the 2019 "migrant caravan" controversy were compiled into a government "database of targets." Tom Jones, Mari Payton, and Bill Feather, *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/. These citizens were subject to extensive searches at the

border, just like those at issue in this case. Twenty journalists were subject to warrantless investigations of their electronic devices. *Id.* In some cases, DHS went so far as to flag passports with "alerts," preventing at least two photojournalists from entering Mexico to report on the caravan at all. *Id.* Others targeted because of their involvement with the migrant caravan included activists, an immigration attorney, and a pastor. Tom Jones, Mari Payton, Bill Feather, and Paul Krueger, *Human Rights Organization Call For End to Controversial Border Surveillance*, NBC San Diego (July 3, 2019), https://www.nbcsandiego.com/news/local/international-human-rights-organization-demands-immediate-end-to-controversial-us-government-border-surveillance-tactics/130887/. These actions strongly suggests that the government sought to actively deter criticism of the current border regime by subjecting dissenters to repeated, invasive searches.

This behavior goes well beyond a "subjective chill." *Laird*, 408 U.S. at 13. By actively detaining and investigating citizens for political criticism, border agents are committing a tangible harm, with real ramifications for the free exercise of political speech. *Cf. Ozonoff*, 744 F.2d at 229 ("[T]he extent of [plaintiff's] injury is likely augmented by whatever disruption, delays, or reputational harms might flow from an FBI field investigation."). The potential chilling effect on political speech is clear. As Kitra Cahana, one of the journalists flagged at the

border, observed: "[T]he uncertainty of having an alert placed on your passport and not knowing where and when that's going to prevent you from doing your work is really problematic." Jones, Payton, and Feather, *supra*. By creating a constitution-free zone at the border, the government seeks unfettered access to investigate suspected political targets, including mandatory or coercive searches of their most private personal records and correspondences. The resulting regime creates a bona fide surveillance state, in which any citizen can be stopped, subjected to a private records search, and added to a government list directly as a result of their political activism or affiliation. This system is constitutionally intolerable, and significantly burdens the essential rights to political expression. *See Meyer v. Grant*, 486 U.S. 414, 425 (1988) (holding that political speech is "an area in which the importance of First Amendment protections is 'at its zenith'" (citation omitted)).

However, even if this court does not reach Appellants' First Amendment claim, the chilling effect caused by electronic border searches can aid the court in evaluating a substantive Fourth Amendment claim. As the Court has made clear time and time again, the "ultimate touchstone of Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). In order to evaluate reasonableness, courts should look to "the nature of the privacy interest upon which the search at issue intrudes," *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995), as well as the "character of the intrusion that is complained

of," *id.* at 658. Border searches that substantively deter meaningful political expression clearly burden a significant privacy interest and therefore help differentiate unconstitutional searches and seizures.

Precedent supports the link between chilling effects and the Fourth Amendment. For instance, in *Riley*, the Supreme Court relied on the fact that cell phones reveal "where a person has been" and form a "revealing montage" of a person's life, in order to characterize their qualitative difference from other devices. 573 U.S. at 396. Similar language is used across the Court's Fourth Amendment jurisprudence. Cases involving GPS surveillance refer to the important freedoms of association and expression implicit in personal privacy. *See United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J. concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations"). Likewise, in *Carpenter*, the Court noted that cell tower surveillance intrudes on the "privacies of life." 138 S. Ct. at 2217 (citation omitted).

Implicit in these decisions is an understanding that invasions of privacy impede the fundamental protections of free speech and association, which permit individuals broad freedoms in religious, sexual, and political contexts. It is this First Amendment liberty that creates "the nexus matrix, the indispensable

condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Consequently, invasive searches that impinge this right—and grant the government near-comprehensive access to the "sensitive records" —are not permissible. *Riley v. California*, 573 U.S. at 396..

In order to justify their invasive search policy, Appellees argue that the government is uniquely privileged at the border, especially in the prevention of contraband. *See, e.g. United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). True, the power of U.S. border officials to search for contraband is substantial. *United States v. Flores-Montano,* 541 U.S. 149, 152 (2004). But while the government might have a real interest in restricting illegal merchandise from crossing the border, it would strain credibility to claim that the extensive searches of electronic devices in this case were directed towards preventing illegal material from entering the country. Dangerous "digital contraband" does not usually enter the country on the physical hard-drives of cellular devices, but over the internet—a far more convenient route for smuggling digital material. *See* Richard Wortley and Stephen Smallbone, *Child Pornography on the Internet*, Center for Problem Oriented Policing, Arizona State University (May 2012), https://popcenter.asu.edu/sites/default/files/ child_pornography_on_the_internet.pdf.

Consequently, the government may not plausibly claim that its search and seizure of electronic devices is reasonably limited to the goal of preventing digital contraband from entering the United States. In order to comply with the First Amendment values of free speech and association, electronic device searches at the border should be restricted to cases in which the government has probable cause and a warrant, or at least reasonable suspicion.

III. The chilling effects of warrantless, suspicionless device searches have an undue impact on immigrant and minority populations.

The chilling effects of invasive border searches are likely to be felt most starkly by immigrant and minority communities. Under the current administrative guidelines, border agents have largely unmitigated control over searches and seizures of individuals coming into U.S. ports of entry, without meaningful procedural safeguards protecting against arbitrary or suspicionless searches. The resulting system of surveillance chills the First Amendment protected activities of many citizens and non-citizens crossing the border.

A. Immigrant and minority populations are subject to increased scrutiny at the border.

Given the increase in surveillance in recent years, *see* Waddell, *supra*, immigrants, friends of immigrants, undocumented individuals, noncitizens, and minority groups are all at a heightened risk for unconstitutional scrutiny at the border. *See* Michael T. Luongo, *Traveling While Muslim Complicates Air Travel,*

N.Y. Times (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html. Indeed, civil liberty groups have flagged the increased risk of border searches for ethnic Arabs, Muslims, and non-white immigrants, particularly after 9/11. *See id.* In particular, individuals wearing religious or culturally significant clothing (like hijabs, headscarves, and turbans) are at a greater risk for CBP and ICE investigations—and therefore bear the brunt of invasive and unconstitutional border searches. *See id*.; *see also Fact Sheet: Know Your Rights While Traveling*, Muslim Advocate (Sept. 27, 2019), https://muslimadvocates.org/files/2017.09.27_Border-search-fact-sheet_updated.pdf.

Evidence shows a pernicious explanation for the increased scrutiny of many immigrants or immigrant-affiliates. Many CBP and ICE policies incentivize implicit forms of racial profiling and detain individuals based on "suspicious" aspects of their appearance, like turbans, headscarves, or physical and behavioral traits frequently associated with ethnic Arabs, Muslims, and non-white immigrants. *See* Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues,* ACLU Blog (Feb. 8, 2017), https://www.aclu.org/blog/national-security/discriminatory-profiling/new-documents-show-tsa-program-blamed-profiling. In fact, the Transportation Security Administration stated that individuals wearing head

coverings or loose fitting and bulky garments may undergo additional security screenings. *See* Luongo, *supra.* The resulting procedural system creates a world in which border agents are more likely to subject non-white immigrants (and their friends and families) to surveillance and searches as well as to seizures of their electronic devices.

This focus on minority and immigrant travelers applies to electronic searches as well. Government policies make clear that immigration authorities are interested in the protected expressions of travelers. In 2018, the government began asking for the social media handles of immigrants and nonimmigrants through visa applications. *See* Susan Miller, *Monitoring Migrants in the Digital Age: Using Twitter to Analyze Social Media Surveillance,* 17 Colo. Tech. L.J. 395, 396-97 (2019). The request for social media presence is much more malicious than simply wanting more information to conduct a more rigorous background check; instead, government agents may be attempting a general increase in surveillance of immigrant populations through social media, and specifically through pseudonymous Twitter handles. *See id. a*t 397; *see also* Mana Azarmi, *Department of State's Extreme Vetting is a Backdoor Muslim Ban*, CDT (Oct. 4, 2017), https://cdt.org/insights/department-of-states-extreme-vetting-is-a-backdoor-muslim-ban/.

The experiences of travelers at the border reinforce the conclusion that border searches, including electronic device searches, target immigrants, non-citizens, and members of minority communities. For instance, a Palestinian student, Ismail Ajjawi, was stopped at Boston Logan International Airport and subsequently turned away from entering the United States. Ajjawi's phone was taken during interrogation, and each time he requested his phone, so he could inform his family about the situation, the officer refused. *See* Shera S. Avi-Yonah and Delano R. Franklin, *Incoming Harvard Freshman Deported After Visa Revoked*, Harvard Crimson (Aug. 27, 2019), https://www.thecrimson.com/article/2019/8/27/incoming-freshman-deported/. After forcing him to wait hours, the officer berated Ajjawi about his social media, including "people posting political points of view that oppose the U.S. on [his] friend[s] list." *Id.* According to Ajjawi, he never made any political posts and never reshared or liked the posts in question. *See id.* Nevertheless, Ajjawi was turned away for having acquaintances who transgressed the political values of individual federal agents.

Although Ajjawi was subsequently able to return to the United States to pursue his education, many others have been left stranded. Take the case of an Iranian student, Reihana Emami Arandi. She was traveling to the United States in order to pursue her graduate studies at Harvard University, when CBP officers

detained her after inquiring about her nationality. *See* Caleb Hampton and Caitlin Dickerson, *'Demeaned and Humiliated': What Happened to These Iranians at U.S. Airports*, N.Y. Times (Jan. 25, 2020), https://www.nytimes.com/2020/01/25/us/iran-students-deported-border.html. The officers proceeded to interrogate her regarding her religious and political beliefs as well as her opinions about political groups and events. *See Civil Rights Complaint Filed on Behalf of Deported Iranian Student*, Harvard Law Today (Feb. 4, 2020), https://today.law.harvard.edu/harvard-immigration-and-refugee-clinical-program-submits-civil-rights-complaint-to-dhs-regarding-treatment-of-deported-iranian-student/. The interrogations were discriminatory and arbitrary. . In addition, the officers took her laptop and cell phones (including both a smartphone and an older phone), requested the passwords, and went to a different room to inspect the contents of the devices. *Id.* After over eight hours of interrogation, she was sent back to Iran without explanation and barred from re-entering the United States for five years. *Id.*

The mere fact that immigrants and minorities are targeted for invasive questioning and searches should, itself, trouble this court. The fact that these searches implicate protected speech is even more disturbing. The combination of ethnically, politically, and religiously targeted searches implies that immigrant and

minority groups are more likely than other Americans to have their First Amendment rights chilled by electronic device searches at the border.

B. Risk of electronic device searches at the border disproportionately chills the speech of minority and immigrant travelers.

As noted, electronic device searches at the border, especially those that reveal expressive content such as social media postings, implicate the First Amendment. *See* Miller, 17 Colo. Tech. L.J. at 417. Because minorities, immigrants, and members of immigrant communities are more likely to be targeted for searches at the border, these chilling effects are likely to be felt more strongly by those communities. When the government searches for evidence of an individual's ideology, the government may prevent that person from freely expressing their opinions. Appellees' policies reinforce the fear immigrants and minorities routinely face.

Empirical studies have shown that government surveillance can chill political speech within immigrant and minority communities. A study focused on Muslim Americans, for example, attempted to determine whether knowledge of surveillance would, on a scale of unlikely to very likely, chill political speech. *See* Elizabeth Stoycheff, et al., *Privacy and the Panopticon: Online mass surveillance's deterrence and chilling effects*, 21 SAGE New Media & Society J. 602, 610 (2016). The study concluded that, when individuals detect surveillance, they generally decrease the frequency with which they would speak out politically,

and freely, online. *See id.* at 611–12. Parallel findings have been uncovered in the case of religious expression. Some Muslim women have specifically stated they avoid wearing headscarves or religious garb and "deliberately wear college shirts or something like that to kind of mitigate the potential discrimination." *See* Luongo, *supra.* Such searches can thus also hinder religious expression, a pillar of the general freedom of expression.

Border security has increased its use of warrantless and suspicionless searches on digital devices, such as laptops and mobile devices, specifically after 9/11. *See* Sunil Bector, *"Your Laptop, Please:" The Search and Seizure of Electronic Devices at the United States Border*, 24 Berkley Tech. L.J. 695, 695 (2009). These devices can contain significant amounts of personal data, information, and access to others' social media accounts. *See id.* at 695–97. Even if an officer releases a traveler, the traveler's information remains in a governmental database. *See id.* at 711. This database may contain a copied hard drive, including trade secrets, sensitive photographs of the traveler, and communications between the traveler and others (including privileged communications). *See id.* at 696. Such privacy interests can immediately be compromised once an individual's hard drive is uploaded to the government database. Therefore, increased searches create an impossible choice for immigrant and minority travelers: choosing between freedom of expression or privacy interests.

Immigrants' rights and civil rights groups, including *amicus curiae*, post information a alerting individuals to the possibility of government searches of electronic devices for social media activity at ports of entry. *See, e.g.*, HIRC, *Travel Restrictions Frequently Asked Questions* (May 27, 2020), http://harvardimmigrationclinic.org/files/2020/05/Travel-Restrictions-FAQs-5.27.2020-FINAL.pdf; Esha Bhandari, Nathan Wessler, and Noa Yachot, *Can Border Agents Search Your Electronic Devices? It's Complicated*., ACLU (Mar. 14, 2017), https://www.aclu.org/blog/privacy-technology/privacy-borders-and-checkpoints/can-border-agents-search-your-electronic; *Returning from Hajj During the Muslim Ban*, Muslim Advocates (2017), https://muslimadvocates.org/files/ReturningfromHajjKnowYourRights2017.pdf. However, "it is neither 'realistic nor reasonable to expect the average traveler to leave his digital devices at home when traveling.'" *Kolscuz*, 890 F.3d at 145 (quoting *United States v. Saboonchi*, 990 F. Supp. 536, 556 (D. Md. 2014)). The Electronic Frontier Foundation ("EFF") has also published advice regarding the protection of travelers' digital information. *See* EFF, *Digital Privacy at the U.S. Border: Protecting the Data On Your Devices* (Dec. 2017), https://www.eff.org/wp/digital-privacy-us-border-2017. EFF advises travelers that before they travel, they should remove digital information, leave devices at home, or fully encrypt their devices if they are able to do so. *See id.* EFF notes that agents

may ask travelers to unlock their devices, provide their passwords, or disclose their social media information. *See id.* If a traveler complies, then the agent can thoroughly look through and copy their sensitive digital information. *See id.* If a traveler declines, then devices may be seized, and the traveler can be subject to additional questioning, detention, and other escalations, *see id.*, including being turned away at the port of entry. The result is a circumstance where immigrants may change their pattern of behavior to prevent these circumstances from manifesting at the border.

The consequences of the status quo are governmental policies that chill speech and force immigrants and other travelers to rethink the quality and quantity of their political and personal expression. The resulting system creates an inherent tension between privacy and free expression. In order to avoid significant surveillance and to protect personal correspondence between travelers and their friends, family members, or communities, immigrants are forced to significantly curb their free expression online. The resulting choice: between freedom and privacy is discriminatory, limiting, and constitutionally unacceptable.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks that the court hold that CBP and ICE's warrantless, suspicionless electronic device search polices to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32(g), I hereby certify that:

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(b) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f), this document contains 5,261 words as calculated by the word count feature of Microsoft Office 365.

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Dated: August 7, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* the Harvard Immigration and Refugee Clinic in Support of Plaintiffs-Appellees/Cross-Appellants 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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