No. 22-10772

In the United States Court of Appeals For the Fifth Circuit

Adam A. Malik; Malik & Associates, P.L.L.C.,

Plaintiffs - Appellants,

v.

United States Department of Homeland Security; U.S. Customs & Border Protection; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; Chris Magnus, Commissioner, U.S. Customs and Border Protection,

Defendants - Appellees

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division, 4:21-cv-0088-P

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Alejandro Mayorkas, Secretary, Department of Homeland Security ("DHS");

2. Chris Magnus, Commissioner, Customs and Border Protection ("CBP");

3. Merrick B. Garland, Attorney General of the United States;

4. Brian Stoltz, Assistant US Attorney, Counsel for DHS;

5. Chad E. Meacham, United States Attorney for the Northern District of Texas;

6. Adam Malik, Appellant;

7. Malik & Associates, P.L.L.C., Appellant; and

8. All clients of Appellants whose confidential attorney/client files and communications have been reviewed, analyzed, and copied by CBP, DHS, and other unknown parties.

Dated: November 9, 2022 */s/ Roy Petty*

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument to aid the Court because of the novelty and complexity of this matter as it relates to the factual assessment and the issues raised for appeal.

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STATEMENT OF JURISDICTION

Appellants are Adam Malik ("Mr. Malik"), a United States citizen and attorney licensed by the State of Texas, and his law firm, Malik & Associates, PLLC (collectively, the "Attorney"). Defendants are the U.S. Department of Homeland Security ('DHS"), U.S. Customs & Border Protection ("CBP"), Alejandro Mayorkas who is the Secretary of DHS, and Chris Magnus who is the Commissioner of CBP (collectively, the "government").

This action arises under the First and Fourth Amendments to the Constitution of the United States and the Administrative Procedure Act ("APA"), 5 U.S.C § 701 *et seq. The Attorney* was compelled to bring this action to comply with the Texas Disciplinary Rules of Professional Conduct ("TDRPC").

The District Court had jurisdiction under the First Amendment to the Constitution, the Fourth Amendment to the Constitution, 5 U.S.C. § 701, *et seq.* and 28 U.S.C. § 1331, as the Attorney has been and continues to sustain serious harm because of the government's actions in violation of the Constitution, laws, or treaties of the United States. *See e.g., United States v. Aigbekaen*, 943 F.3d 713(4th Circ. 2019) (the

search of electronic devices at the border held unconstitutional as a ruse to obtain a warrantless forensic search.)

The District Court had authority to grant relief pursuant to 28 U.S.C. § 1331, the APA, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et. seq.,* and the All Writs Act, 28 U.S.C. § 1651. Under Fed.R.Civ.P. 65, the District Court had authority to issue the temporary restraining order and permanent injunction requested in the Attorney's Complaint. This Court has jurisdiction under 28 U.S.C. § 1291 to review the decision of the District Court (the "Decision").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court's decision should be vacated in its entirety and remanded as unreviewable.
2. Whether the District Court erred in holding that the Attorney does not have standing to contest the warrantless search and forensic examination of his iPhone.
3. Whether the District Court erred in denying the Attorney's motion to modify the scheduling order to reopen discovery on the basis of the letter of Senator Ron Wyden dated March 8, 2022 and in denying Attorney's motion for reconsideration of the denial.
4. Whether the District Court erred in granting summary judgment when there are disputed issues of material fact remaining.

STATEMENT OF THE CASE

1. Introduction

While perhaps not apparent from the vanilla and understated nature of the opinion of the District Court, under the holdings of this case, all multi-national corporations will be wary of doing business in Texas, Louisiana, and Mississippi. According to the Decision, our government may seize confidential business information (or any electronic device to later download that information) at any international port of entry or departure within our judicial circuit without a warrant or any suspicion that the information is evidence of a violation of a law enforced by CBP.

Confidential information subject to seizure and exposure includes trade secrets, e.g., pharmaceutical drug pricing data, developments of drugs, launch instructions, manufacturing processes, details regarding financial arrangements, initial public offerings, and mergers.

As is directly at issue in this case, the seized and examined confidential information includes more than 2,000 client files and 70,000 confidential emails of the Attorney which the government obtained from a forensic examination of the Attorney's iPhone.

Seized and examined files include a client's confession of his intent to engage in tax and immigration fraud, a client's concern about anticipated problems that could lead to the revocation by DHS of the L1A visas of his employees, communications concerning ongoing litigation against the government, and confidential communications with clients who are the subject of ongoing criminal investigations by the government and the FBI.

Commingled with the seized and examined information is 369 KB of data that was automatically downloaded to the iPhone by its programs after seizure but before forensic examination.

The government claims to have seized and examined the trove of confidential files solely to know the particulars of the Attorney's alleged legal representation[1] of one client with a Pakistani name that is almost

[1] "[T]his was strictly part of the inspection process to try to determine that relationship between [the alleged arms dealer] and Mr. Malik to see if [the alleged arms dealer] was attempting to establish other means to get a visa to return to the United States." Deposition of Pequano. ROA.976.

"The sole purpose of the - - to - - the referral of Mr. Malik was to determine if [the alleged arms dealer] was trying to set up businesses and trying to reenter the United States. ROA.977-978.

as common as "John Smith" in English.[2] Allegedly through an internet search, the government determined that the Attorney had a client with the same name as a person whom it suspected of being an international arms dealer. As was discovered after searching the 2,000 client files and more than 70,000 emails, Mr. Malik's client is not the same person. Compare ROA.658. with ROA.1503.

The location of the government's copies of the Attorney's client files and emails is not clear. The government's forensic extraction report indicates that the contents of the iPhone were extracted to one thumb drive and to one hard drive "for archive."[3] The former Chief CBP Office of the DFW Airport, Michael Shane Pequano, says that he received two thumb drives from the CBP filter team and sent them to "Houston." ROA.674.

Vanessa Gaytan, the Chief CBP Officer assigned to the Houston Port of Entry (not DFW where the iPhone was seized[4]), says that CBP,

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[2] A search of Linkedin.com shows that more than 200 people have the same name as the alleged arms dealer. ROA.947.

[3] ROA.670.

[4] Gaytan fails to explain why she would know such supposed information and no foundation is laid for her alleged knowledge. ROA.703.

one of the two principal appellees, did not transfer the files to "law enforcement agencies."[5] Her declaration contradicts her deposition in which she states that she had no idea whether the iPhone was sent to the FBI and made several "I don't know" statements about what happened to the iPhone and what Dallas CBP could have done with the iPhone. She clarified that all she did "was filter the information" and that she read none of the reports about the iPhone. ROA.198.

Gaytan states that the master copy of the data was sent to the U.S Attorney's Office. ROA.703. No one, however, said what happened to the missing thumb drives.

The Decision erroneously found that the government was justified in maintaining a copy of the confidential information, in part, because "Mr. Malik (undisputedly) requested a litigation hold." (Parenthesis in original). Mr. Malik never made such a request. Instead, he requested that the government "place a litigation hold on the search and all

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[5] ROA.703. Forensic examiner trainee, Anniebth Labiosa, similarly says that the agency that conducted the forensic extraction did not provide any data "to any other law-enforcement agency." ROA.667.

further seizure and review of all data . . . until a district court judge rules on our request for a preliminary injunction." ROA.57.

Thirty days after the close of discovery, Senator Ron Wyden of Oregon, released a letter dated March 8, 2022 (Wyden I),[6] that he had sent to the DHS Inspector General inquiring into the improper use of customs subpoenas and the use of nongovernmental servers by DHS to store financial information of U.S. citizens seized by the customs subpoenas. The Senator states that the nongovernmental organization is known as TRAC and that it allows various federal agencies and law enforcement to access the seized data. Reading Wyden I, TRAC is not a "law enforcement agency," creating a gaping hole in the Gaytan Declaration about the whereabouts of the seized confidential information. Gaytan's careful choice of words may imply that not only TRAC but other non-law enforcement agencies may possess the confidential information.

The use of nongovernmental servers by CBP and DHS to store seized electronic information was unknown to the Attorney and not reasonably discoverable prior to the close of discovery.

[6] ROA.949-952. Reproduced at *Record of Excerpts*, Tab 6, p. 35.

Based upon the Wyden revelation of the use of nongovernmental servers by CBP and DHS, the Attorney timely moved the District Court to allow him to seek discovery on the use of these nongovernmental servers by CBP and DHS. The District Court denied the motion. The Attorney moved for reconsideration and that motion was denied as well.

After the Decision, Senator Wyden released a second letter on September 15, 2022 (Wyden II)[7] confirming what the Attorney had argued in his motions to reopen discovery.

> In a June 20, 2022 briefing to my office, CBP estimated that it forensically examines and then saves data from 'less than 10,000" phones per year – which typically includes text messages, call logs, contact lists, and in some cases, photos and other sensitive data – in a central database. CBP confirmed during this briefing that it stores this deeply personal data taken, without a warrant signed by a judge, from Americans' phones for 15 years and permits approximately 2,700 DHS personnel to search this data at any time, for any reason.

Gaytan never mentioned anything about a "central database" of cellphone contents. If the Attorney's data is in that central database, which possibly is maintained by TRAC, an organization that is not a "law enforcement agency," it will stay in that database for 15 years and

[7] Reproduced at *Record of Excerpts*, Tab 7, p. 40.

may be perused by 2,700 DHS personnel. What is left open is whether local law enforcement and other federal agencies (and their contractors) also have access to the central database as explained in Wyden I.

2. Statement of relevant facts

On January 3, 2021, Mr. Malik, a Texas attorney who practices primarily immigration law, and his brother arrived at the DFW airport on an international flight. ROA.315. Mr. Malik deplaned and entered the customs inspection area. ROA.17.

Mr. Malik was directed to a secondary inspection area at 6:59 p.m. ROA.572. At that point, neither Mr. Malik nor his property were free to leave. CBP Officer Allen Brock questioned Mr. Malik about his approved Global Entry application and Mr. Malik's passport applications. ROA.1480-1481. Officer Brock was satisfied with Mr. Malik's answers. ROA.1480.

A few minutes later, at approximately 7:25 p.m., Officer Cannon began interviewing Mr. Malik. Officer Cannon asked Mr. Malik whether he was an attorney and had a law firm. He asked whether Mr. Malik knew somebody with a particular name. Mr. Malik had a client with that name. ROA.1574.

Mr. Malik told Officer Cannon "I can't answer those questions because that's attorney-client privilege." ROA.1485. At "some point shortly after 7:25 p.m.," Officer Cannon told Mr. Malik to empty his pockets and to place his iPhone on the table. ROA.1599. Officer Cannon indicated that Mr. Malik was not free to "pick up the phone or take the phone off the table." ROA.1488.

After further questioning to elicit information on Mr. Malik's suspected client, CBP told Mr. Malik the iPhone had been seized and indicated that it would be searched. The government contends that the iPhone was formally detained by Sullivan at 8:00 p.m. ROA.1599.

The iPhone was turned off at 9:57 pm. ROA.1011. From 7:40 p.m. through 9:57 p.m, the iPhone uploaded 177KB of data and downloaded 369 KB of data. Id. The Attorney's expert witness said, for comparison, the size of his expert report was 24.7 KB. ROA.1015.

On January 25, 2021, the Attorney filed the Complaint. alleging the unlawful warrantless seizure of the Attorney's iPhone by CBP at the Dallas/Fort Worth International Airport and the subsequent search of that device. The Complaint also sought a declaration that the procedures for a filter team conducted under CBP Directive 3340-049A

(the "Directive") was unlawful. A copy of the Directive is found at ROA.39.

At the time the Complaint was filed, DHS had held the iPhone for 22 days. ROA.11; ROA.23. Rather than wait for the decision of the District Court on the Complaint, in the absence of any exigent circumstances, the government completed its forensic examination of the iPhone for another month.

On March 30, 2021, CBP received the extracted data from the RCFL. ROA 672.

CBP utilized a filter team composed of two CBP attorneys and Gaytan. ROA.1501. There was no objections period provided nor any opportunity by the Attorney's clients to object to the review of their confidential information and data. The filter team made unilateral determinations of privilege without input or agreement by Attorney or his clients before releasing the allegedly nonprivileged data.

3. The Decision of the District Court

The parties filed cross-motions for summary judgment. The District Court found that it had jurisdiction over only the claim for

expungement of the confidential information. The Court stated that because the government had "reasonable suspicion" to seize the confidential information, and did so in accordance with the CBP Directive, there was no constitutional violation. Consequently, according to the District Court, it must deny the claim for expungement.

As to reasonable suspicion, the District Court found that the "totality of the circumstances of the information known by the Government at the time of the search—whether verified or refuted by extensive discovery—is more than sufficient to give rise to reasonable, particularized suspicion specific to Mr. Malik." ROA.1809.

The District Court neglected to mention or address the Attorney's claim that the government violated the Fourth Amendment by searching and seizing confidential information that was downloaded to the iPhone after its seizure." ROA.31.

The Complaint and the briefs filed in the lower court address the attorney-client and attorney work product privileges ("attorney confidentiality privileges") in relationship to Constitutional protections and the unethical and arguably unconstitutional membership of the

alleged "filter team." The decision of the District Court fails to address those arguments in anything other than a summary and dismissive manner in footnote eight. The District Court summarily found that all actions of the government complained of by the Attorney are "reasonable." ROA.536.

The summary finding of reasonableness is not reviewable by this Court without doing its own analysis in the first instance. This Court should vacate the decision in its entirety and remand to the District Court for a reasoned decision on the attorney confidentiality privileges, the composition of the filter team, and the search and seizure of data downloaded to the iPhone after its seizure. Such a decision should be supported by findings of fact and conclusions of law capable of review by this Court. The remand order should also provide for reopened discovery on the relevant factual issues revealed by Wyden I and II.

The Decision implicitly and improperly recognizes a new exception to the attorney confidentiality privileges without discussion.[8] The government neither has contended nor provided evidence that the

[8] In *Jarman,* the only case involving an attorney cited by the Decision at footnote eight and discussed by Appellants *infra,* the attorney was a criminal and the crime/fraud exception applied. That is not the case here.

crime/fraud exception or any other alleged exception to the confidentiality obligations and privileges of an attorney applies.[9]

The Decision further implicitly and improperly recognizes that the government may seize an electronic device at the border and allow that device to scoop up automatic downloads of confidential information to be searched.

Genuine issues of material fact remain unaddressed. This Court should find that the most important of them has been waived by the government in its entirety by refusing to address the privilege issues in their briefing before the lower court. The government specifically acknowledges that its failure to brief the matter was intentional.[10] ROA.138.

SUMMARY OF THE ARGUMENT

The District Court committed reversible error by summarily consolidating all the Attorney's arguments regarding the unconstitutional

[9] The Decision's discussion of the border search exception is *dicta* in the procedural posture of a ruling on summary judgment.

[10] "Defendants are filing a summary-judgment motion against all claims asserted by Plaintiffs and request that their summary-judgment materials – other than the motion itself, **which does not contain any substantive facts or arguments** – be filed and kept under seal. (emphasis added) ROA.573.

conduct of the government in the warrantless search of the iPhone at the border and dismissing them in bulk in footnote eight of the decision as "reasonable."[11] The District Court does not explain how it found the government's examining the Attorney's files solely to learn the particulars of the Attorney's legal representation to be "more than sufficient to give rise to reasonable, particularized suspicion specific to Mr. Malik."

Material facts remain in issue regarding both the attorney confidentiality privileges and the filter team composition. The Decision should be vacated in full and remanded.

The District Court abused its discretion and thereby erred in denying the Attorney's timely motion to reopen discovery pursuant to the revelations of Wyden I, and in denying the Attorney' Motion for Reconsideration of the denial. The Attorney's Motion met the requirements this Court set forth in *Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257 (5th Cir. 1991)* for reopening of discovery to demonstrate

[11] The Decision reads as a decision on the merits and other than deeming the governmental conduct "reasonable" does not explain or analyze the presentation of material facts remaining in dispute by Attorney, requiring the Decision to be vacated.

material facts remaining in controversy. Particularly considering the further revelations of Wyden II, this matter should be remanded to the District Court as well for further discovery relevant to the issues raised by Wyden I and II.

STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment *de novo*, applying the same legal standards as the district court." *Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005). On review of a grant of summary judgment, "[t]he evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant." *Minter v. Great Am. Ins. Co. of N.Y.*, 423 F.3d 460, 465 (5th Cir.2005). Typically, "[s]ummary judgment is proper when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Condrey*, 429 F.3d at 562 (quotation omitted); see also Fed.R.Civ.P. 56(c). "We also review *de novo* the district court's interpretation of state law and give no deference to its determinations of state law issues. *See Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 239–40, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)."

Tradewinds Env't Restoration, Inc. v. St. Tammany Park, LLC, 578 F.3d 255, 258 (5th Cir. 2009).

For this Court to review the findings of the District Court, the District Court must make reasoned findings that allow this Court to determine that the judge below properly applied the law to the facts. *Isquith for & on Behalf of Isquith v. Middle S. Utilities, Inc.*, 847 F.2d 186, 210 (5th Cir. 1988); *Also see International Shortstop, Inc. v. Rally's,* 939 F.2d 1257 (5th Cir. 1991). This Court properly may go outside of its traditional role as a reviewing court and decide issues in the first instance. *Isquith* at 210.

ARGUMENT

The Court improperly dismissed Counts I-VIII of the Complaint finding lack of subject matter jurisdiction. The Court properly dismissed Counts IX, X, and XI of the Complaint as moot. The Court improperly denied Count XII (expungement) of the Complaint finding that the Attorney's rights were not violated. Material facts are in dispute and summary judgment was improperly granted.

1. The District Court decision should be vacated in its entirety and remanded as unreviewable

The conceptual lens for this Court's review is provided by *Isquith for & on Behalf of Isquith v. Middle S. Utilities, Inc.*, 847 F.2d 186 (5th Cir. 1988). Footnote eight of the Decision is summary and not capable of reasonable review. This Court should vacate the Decision in its entirety and remand to the District Court for the issuance of a reviewable decision.

In *Isquith*, this Court vacated and remanded the district court decision because the lower court failed to consider the plaintiff's arguments.

> In fact the court did not address *any* point raised by the defendants' motions except in broad generalities. Essentially, the district court gave three reasons for its decision. First, while specifically declining to "parse each statement or to scrutinize each alleged omission upon which plaintiffs rely," the district court found that "a reasonable potential investor who would have read any of [the] documents [upon which plaintiffs base their claims] as a whole would have been fairly informed about the negative investment factors which plaintiffs contend were misstated or omitted by defendants." Consequently, the court found, "no reasonable fact-finder could conclude that the information published by defendants was misleading to such an extent as to make them liable to purchasers of [Middle South's] stock.

Id. at 198-200.

The *Isquith* Court further found that by "refusing to even consider plaintiffs' complaints about the form of Middle South's disclosures, the court erred." *Id.*at 201 As a result of the district court's failure to consider plaintiffs' arguments in that regard other than in that summary manner, the *Isquith* Court held

> [b]ecause we do not know how the district court arrived at its conclusion that Middle South's disclosures were adequate as a matter of law, we are seriously handicapped in reviewing that conclusion; any attempt to do so would necessarily result in our conducting a separate and independent evaluation of all of Middle South's disclosures. Of course, since we are reviewing a summary judgment, we have the power to make such an independent evaluation. (citations omitted) We decline, however, to exercise that power today.

Id. at 210. The *Isquith* Court then held that the appropriate remedy was to vacate the decision and remand to the district court. *Id.* at 209-211.

The Decision here suffers from that same infirmity and raises that same issue for this Court. The decision of the District Court did not address any point raised by the Attorney in his motions, responses, and replies except in the most cursory and summary fashion in footnote eight.

> To the extent Mr. Malik challenges the length of time the Government detained Mr. Malik at DFW Airport; the length of time it took to search, and then return, his cell phone; or the way the Government dealt with any information consisting of attorney–client privilege; the Court concludes that the Government's actions were reasonable. See, e.g., *United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017) (noting that several months or even years between the seizure of electronic evidence and the completion of the Government's review of it is reasonable); Id. at 267 n.3 (collecting cases); *United States v. Kolsuz*, 890 F.3d 133, 136 (4th Cir. 2018); cf *United States v. Cotterman*, 709 F.3d 952, 969-70 (9th Cir. 2013) (en banc) (recognizing that the existence of password-protected files is also relevant to assessing the reasonableness of the scope and duration of a search).

Decision, fn. 8, ROA.536.

First, the District Court failed to explain what reasonable suspicion standard it applied to find the seizure, copying, and examination of the confidential information to be "reasonable, particularized suspicion specific to Mr. Malik." The government claims that it seized the privileged data solely to learn the particulars of the Attorney's legal representation of his client (How the immigration attorney was going to get a visa from the government for his client).

The Directive requires CBP to have "reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in

which there is a national security concern" to conduct an advanced search of an electronic device." Directive § 5.1.4., ROA.43. CBP cannot point to the privileged materials evidencing either a violation of the law or a national security concern because it merely wanted to fish through the files of the Attorney.

The Decision states that Mr. Malik's brother was another reason for the search but Pequano, the Chief CBP Officer who was in charge of the search, disputes that finding.[12] As argued in the lower court, CBP had no knowledge of anything negative about the brother until after it had determined to forensically examine the iPhone. ROA.1635-1636.

Second, the District Court failed to address the two-hours of confidential information automatically download to the iPhone after its seizure and warrantless examination. That data resided on servers in the United States and could have been obtained only by application and issuance of a judicial warrant upon probably cause but for the government keeping the iPhone connected to the internet to scoop-up the Attorney's confidential information.

[12] See fn. 1, infra.

The Decision further implicitly and improperly recognizes that the government may seize an electronic device at the border and then, without a judicial warrant, allow that device to scoop up two-hours of automatic downloads of confidential information to the iPhone that were pulled from remote servers in the United States.

Third, an issue of material fact remains in dispute regarding the biased filter team composition which the Decision does not even summarily address. Even footnote eight does not address the Attorney's extensive arguments regarding the biased and unethical composition of the filter team utilizing only employees of CBP who examined every word of the iPhone in full.

Neglecting the filter team argument is even more disturbing when considering footnote six of the Decision in light of the revelations of Wyden I and II. In footnote six, the District Court intimates, with no discussion of the Attorney's claims of attorney-client confidentiality issues, that it is proper for the government to maintain and utilize the confidential information from the Attorney's iPhone upon CBP's sole determination of "probable cause."

> Fn 6. The CBP Directive does state that "any copies of the information held by CBP must be destroyed" if "there is no probable cause to seize the device or the information contained therein." CBP DIRECTIVE No. 3340-049A 5.4.1.2. That instruction, however, is specific to information that does not establish probable cause. The Government is not required—per the CBP Directive—to destroy all information. *Because the CBP Directive allows the Government to retain certain information upon a finding of probable cause at its own discretion, the litigation hold cannot be the only reason that information is (or might be) retained.* Accordingly, the Court concludes that the CBP Directive does not afford Mr. Malik full redress of his alleged injuries." (emphasis added)

Decision fn.6. ROA.533. The complaints of Senator Wyden clearly mean that there is a material issue of fact remaining in dispute regarding the Directive and its application to this matter.

Fourth, the District Court failed to address the Attorney's evidence that the alleged international arms dealer was not an arms dealer and had not shipped any arms from the United States as claimed.

Fifth, the District Court erred in viewing all facts and reasonable inferences in favor of the government and not in the light most favorable to the Attorney. "In determining whether to grant summary judgment, courts are to view all facts and reasonable inferences drawn

from the record 'in the light most favorable to the party opposing the motion.'" *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 234 (5th Cir. 2016).

This Court cannot review the summary findings of the District Court regarding the proper application of law to facts on the issues briefed by the Attorney. The Decision reads as a decision on the merits in which the District Court summarily resolves all issues in dispute in favor of the government rather than a ruling on summary judgment which requires viewing all facts and reasonable inferences in the light most favorable to the Attorney.

This Court, therefore, will be forced to undertake a review of the arguments and evidence in their support in the first instance on the issues ignored and summarily denied by the District Court in review of the Decision. Significantly, the authority relied on in the Decision is based almost solely on criminal law, rather than civil law, other than the Court's decision on standing which finds criminal cases unpersuasive. Rather than undertake review in the first instance, this

Court should take the same course as the *Isquith* Court, vacate the decision in full, and remand to the District Court with instructions.

2. The District Court erred in holding that the Attorney does not have standing to contest the warrantless search and forensic examination of the iPhone

2.1 The Attorney has standing to bring this action

The government successfully contended, *inter alia*, that because this is not a criminal case, the Attorney does not have standing. "Outside the context of a criminal trial, the Government is generally free to use evidence obtained in an unlawful search." Decision at 3. The Decision's logic breaks down because attorney-client privileged information generally may not be used in civil proceedings. *See, e.g.*, Federal Rule of Evidence 501.

> But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

Hickman v. Taylor, 329 U.S. 495, 512, 67 S. Ct. 385, 394, 91 L. Ed. 451 (1947)(addressing attorney work-product privilege). "Although the

privilege may at times prevent the government from obtaining useful information, 'this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice.'" *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021)(quoting Judge J. Elrod).

Parties long have had standing to challenge administrative searches.[13] In fact, pending before this Court is a case of another attorney whose cell phones were seized at DFW airport who was not found to lack standing. *Anibowei v. Wolf*, 20-10059. He challenges the three ICE and CBP agency directives related to border searches and seizures of his cell phones.

The leading case on the issue of warrantless administrative searches is *Camara v. Municipal Court of City and County of San*

[13] See, e.g., *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320–21, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305 (1978)

Francisco.[14] ROA.1386. The *Camara* Court found standing in the absence of a criminal case in the context of warrantless administrative searches.

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Camara, 387 U.S. 523, 530.[15]

The government argued that Plaintiffs "lack standing because they seek only equitable relief and yet cannot show any continuing harm or likelihood of a similar alleged harm in the future." ROA.598. The government's possession of the confidential information is continuing harm to the Attorney and to his clients.

In *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021), a civil case arising under the Federal Rules of Criminal Procedure seeking the return of privileged documents seized

[14] Id.

[15] *Camara* involved a tenant who refused to consent to an inspection of his property and then sued to enjoin prosecution for violation of a housing code. *Camara,* 387 U.S. at 525-28, 87 S.Ct. at 1729-30. The *Camara* Court reasoned that administrative searches for housing code violations significantly intrude upon the interests protected by the Fourth Amendment and, therefore, administrative searches which are not authorized by a warrant violate the traditional safeguards provided by the Fourth Amendment and are unconstitutional. *Id.* at 532-34, 87 S.Ct. at 1733.

by the government, the Court found that "the government's ongoing intrusion on Harbor's privacy constitutes an irreparable injury that can be cured only by Rule 41(g) relief. "Harbor remains injured as long as the government retains its privileged documents. That injury can only be made whole by the government returning and destroying its copies of the privileged material." *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th at 600. The Attorney suffers the same continuing harm suffered by Harbor.

2.2 The Attorney demonstrated multiple concrete and particularized injuries in fact

The government successfully argued that "[t]he 'irreducible constitutional minimum' of standing requires a plaintiff to show (1) a concrete and particularized injury in fact which is actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's conduct; and (3) that the injury will likely be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). ROA.598.

The Attorney has demonstrated the following injuries in fact:

(1) The Attorney is likely subject to discipline by the State Bar of Texas for violation of Rules 1.05 (Confidentiality of Information) and 8.04 (Misconduct) because of the government's search, examination, and retention of his files of more than 2,000 clients and 70,000 confidential emails. ROA.1380.

(2) The Attorney is exposed to tort claims by his 2,000 clients who may sue him for breach of fiduciary duty. *See Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-9 (Tex. App. 1991), *writ denied* (July 1, 1992)(reversing summary judgment against plaintiff on his claim for breach of fiduciary duty when defendant attorneys wrongfully disclosed employee's privileged statements to the district attorney); *Id.*

(3) The government unlawfully obtained and examined and still possesses

(A) privileged files of more than 2,000 of Attorney's clients,

(B) personal communications of the Attorney expressing his thoughts and opinions, and

(C) personal medical records of the Attorney.

(4) The Attorney's professional reputation has been damaged. Some of the privileged material was of the most sensitive nature,

e.g., confessions to crimes and other violations of law, and reviewed by the government responsible for prosecuting those crimes, particularly in light of the District Court findings at footnote six that appear to approve of the maintenance and use of the confidential information regarding the clients from the iPhone. Some of the privileged material was reviewed by governmental officers who are the opposing party in immigration removal proceedings and U.S. district court proceedings. Some of the privileged material was reviewed by governmental officers who are the adjudicators of immigration applications; ROA.1381.

(5) The government continues to punish the Attorney for asserting attorney-client privilege by not reinstating his participation in the Global Entry Program, by harming the chances of future immigration by Malik's brother; and by preventing his United States citizen mother, and former client, from reentering the United States because of her fear of CBP due to the incidents of this case. *Id.*

(6) The government made derogatory entry about the Attorney into the Treasury Enforcement Communications System (TECS),

which may be used against him and his family at any time in the future. *See* ROA.1541-ROA.1544.; ROA.1381. In fact, the derogatory entry recently was used against Mr. Malik upon his arrival at the Miami International Airport and led to his being handcuffed by CBP.

(7) The public, judiciary, and attorney bar have been harmed by the government's improper intrusion into the communications between attorneys and clients which have been protected for 600 years. The Decision gives Clients and potential clients a disincentive to provide truthful information to attorneys and an incentive to withhold potentially harmful information because truthful information and confessions may be taken by prosecutors and opposing counsel from their attorneys' electronic offices at the border in the jurisdiction of this Court to the client's detriment without consequences or recourse. *Id.*

Harbor Healthcare Sys., L.P. v. United States, 5 F.4th 593 (5th Cir. 2021) is on point and the Attorney has standing by virtue of the government's possession of the privileged records of himself and his clients. The continuing harm raised in this case is more egregious than

that found in *Harbor*. In *Harbor*, the law firm's records were seized pursuant to judicial process, the records concerned only Harbor, and records were not seized from any outside law firm. In contrast, here, the records were seized without judicial process or review and included records downloaded to the iPhone for two hours after the seizure. The records belong to more than 2,000 individuals and companies who had no knowledge that their records could be seized, examined by 2,700 employees of the government with no oversight and retained for 15 years with no notification or any opportunity to object.

2.3 The warrantless search is unreasonable and violates the Constitution because Congress authorizes border searches only in accordance with federal regulations and the Directive is not a regulation.

The Fourth Amendment prohibition against unreasonable searches and seizures safeguards the privacy and security of individuals against arbitrary invasions by governmental officials. *Camara,* 387 U.S. 528. Governmental agencies have unsuccessfully argued for exceptions to the Fourth Amendment's warrant requirement based on similar

concerns for public safety, health, and welfare rather than as a search for criminal behavior.

In *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 320–21, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305 (1978) the Supreme Court held that the Occupational Safety and Health Act, which empowers Department of Labor agents to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations, is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent.

The Department of Labor urged that, analogous to the government's argument here regarding the breadth of the border search exception, an exception from the search warrant requirement had been recognized for "pervasively regulated businesses" and for "closely regulated" industries "long subject to close supervision and inspection." The Supreme Court held, in response to the Department of Labor's argument,

> [p]robable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or

> administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Marshall v. Barlow's, Inc., 436 U.S. 307, 320, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305 (1978)(emphasis added), *quoting Camara v. Municipal Court,* 387 U.S., at 538, 87 S.Ct., at 1736. ROA.1393-1394.

Congress conferred power on the government to conduct searches only in limited circumstances. No statute or regulation addresses forensic examinations of electronic devices. The statute that comes the closest to granting search authority is 19 U.S.C. § 1582 ("all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations).[16] The Directive is not a regulation and should be declared unlawful in all aspects, including the formulation of a filter team.

Because border examinations may be intrusive, the inspections, examinations, and searches are limited by 19 U.S.C. § 1467. The examination must be "for the purpose of assuring compliance with any

[16] 8 U.S.C. § 1357(c) is not applicable because that provision is part of the Immigration & Nationality Act and applies only to non-U.S. citizens. Mr. Malik is a U.S. citizen.

law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce." *Id*. The context of § 1467 is that any search or examination is to ensure the passenger's compliance with the law, regulation or instructions.

CBP purported to conduct the forensic examination of the iPhone for the sole purpose of determining what type of visa an immigration attorney would seek for his client. CBP did not search the iPhone to assure Mr. Malik's compliance with any law, regulation, or instruction that the CBP is authorized to enforce. Therefore, the forensic examination of the iPhone without a warrant pursuant to the Directive was not authorized by federal regulation, and was violative of the statute, and unlawful.

2.4 CBP was required to obtain a judicial warrant to seize the Attorney's confidential information.

The Supreme Court's decisions in both *Camara* and *Marshall* have largely been overruled by legislative action and enactment of privacy protective standards. But the courts had to intervene before this change came about. This Court was similarly required to intervene

in *Harbor* to protect the privacy rights of the company to its privileged documents. The same type of Court intervention is required here.

This Court should reverse and render a judgment that a judicial warrant is required at this time for the search of an attorney's confidential client files and communications at the border. Further, the Court should reverse and determine that the downloading of confidential information from remote servers within the United States for two hours to the seized iPhone absolutely requires a warrant.

The Directive has no reasonable administrative standard for inspecting an attorney's confidential client files and communications while protecting client confidentiality. The Directive does not have Congressional approval as articulated by the Wyden letters as well as by the government's own admission. ROA.623.

The Decision does not address the filter team other than in the facts, so only the catch-all nature of footnote eight could be a holding on that issue. The Decision cites several cases in footnote eight as grounds for finding all government conduct regarding the attorney-client privilege reasonable.

Only J*arman*, cited by the lower court, however, involved an attorney. Unlike the Attorney, *Jarman* was himself a criminal. The crime/fraud exception to the attorney confidentiality privileges applied and to equate this case to *Jarman,* the government necessarily would need to have charged the Attorney with a criminal offense or at least claim that the Attorney is a criminal himself, not the attorney of a suspected criminal. No such charges or claims have been made against Mr. Malik in this case and no other exception to the attorney confidentiality privileges applies.

The government failed to demonstrate any "reasonable suspicion of a violation of the laws administered by DHS" on which the Directive relies for CBP to use as justification under *Jarman* to search the iPhone. Wanting information on how an immigration attorney is going to apply for a visa for his client is not "reasonable suspicion of violation of laws administered by DHS." The District Court clearly erred in equating the two situations.

The Directive should be found unconstitutional in application under the specific facts of this case. Judicial warrants, perhaps with a reduced showing as to probable cause as in *Camara* and *Marshall,*

should be required for the search of electronic devices containing confidential information as required by the Supreme Court in *Riley*.

2.5. The Attorney has prudential standing to bring his claims for declaratory judgment

"A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, *exercised in the public interest*. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief.' *Eccles v. Peoples Bank of Lakewood Vill.*, 333 U.S. 426, 431 (1948) (citations omitted)(italics added). ROA.602-603.

The attorney-client privilege serves to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). This privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.,* 101 S.Ct. at 682, *citing Trammel v.United States,*

445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). *Securities and Exchange Commission v. Microtune, Inc., et al.*, 258 F.R.D. 310 (N.D. Texas, 2009). ROA.1382. *Also see, United States v. Ritchey,* No. 1:21-CR-6-HSO-RPM, 2022 WL 3023551 (S.D. Miss. June 3, 2022)("It is well-established that protection of the attorney-client privilege typically supports the public interest. *See, e.g., Philip Morris Inc.*, 314 F.3d at 622 (quotation omitted) (noting that the attorney-client privilege is an "institutionally significant status or relationship' with deep roots in our nation's adversary system".)

The need for equitable relief here is clear and is not remote or speculative. Wyden I and II make clear that the government likely has databased the entire contents of the Attorney's iPhone. The Attorney's expert witness on national security contends as such. ROA.1760. It may well be that the Attorney's client files and communications are available to 2,700 employees of DHS. The allegation is well-founded and deserving of discovery which could not have been contemplated prior to Wyden I.

The government provided no evidence that a copy of the iPhone was not retained by the FBI when Gaytan picked up the device and a

thumb drive from the FBI or that the data was not provided to TRAC or DOMEX or databased in the Automated Targeting System.

Wyden I and II make clear that CBP searches and copies the contents of over 10,000 cell phones per year, a claim that directly contradicts Gaytan's statement regarding the "normal procedure" of handling cell phone data.[17] The contents of the iPhone as described by Gary Hale, are likely within that database with no court oversight and no Congressional authorization. Senator Wyden's letters clearly show that Congress never authorized the Directive. The public interest supports a finding of prudential standing here. The District Court erred in holding that the Attorney does not have standing.

The government argues that the Attorney has no standing because another search of the iPhone is unlikely to happen. The decision to search the Attorney's electronic devices in the future is solely within the sole control of the government and the government cannot assure the Court that his electronic devices would not again be forensically examined. ROA.500-502.

[17] See Declaration of Vanessa Gaytan, ROA.703.

In *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 324 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011), this Court considered voluntary cessation of conduct by a defendant in relationship to an argument under the mootness doctrine.

Sossamon explains the "voluntary cessation" exception to the mootness doctrine:

> [T]he voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case: If the defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief.

Id.

For analogous reasons, this Court should not accept the government's argument that the conduct is unlikely to recur where it is solely within their control as to the timing of any further searches and there has been no change of policy regarding the search of electronic devices and cell phones of attorneys who are not themselves suspected of crimes.

Cognizant that new factual evidence cannot be submitted on appeal, the Attorney makes an offer of proof that on June 19, 2022, at Miami International Airport after the close of briefing in this matter, CBP handcuffed and detained the Attorney at secondary inspection after an international flight.

The government has not publicly announced any change in its loose policy of seizing and forensically examining confidential information. The government has not indicated that it removed Mr. Malik's or his brother's names from the TECS database or any other database in which their information was wrongfully placed. Those actions by the government should be required for this Court to affirm the District Court's decision that the complained of conduct is not subject to repetition as should be required for the dismissal of this action. *See Kovac v. Wray*, 449 F.Supp.3d 649, 654 (N.D. Tex. 2020) ("Although the Fifth Circuit lightens this burden for government defendants, the burden remains. A government defendant must still present evidence of its formally announced changes in official policy regarding the plaintiff whose claims the government asserts should be dismissed for mootness.")

If the government is to be believed that the conduct complained of is not likely to happen again, the government should be required to announce a formal change in policy regarding the seizure and forensic examination of confidential information.

Wyden I and II show that Congress is identifying CBP abuses in looking into this issue and is demanding answers from the government, who do not appear to be responding satisfactorily in the view of Senator Wyden. The Directive is an improper use of government power and exceeds the rule-making power of DHS absent Congressional approval.

The Fourth Amendment generally requires a warrant. The Supreme Court also requires a warrant for the search of electronic devices by any other law enforcement agency. *Riley v. California,* 573 U.S. 373, 134 S.Ct. 2473 (2014). That is the law that should be applied here. Applying *Riley* to this case, at least as to the two hours of confidential information downloaded to the iPhone after its seizure, a warrant would have been required to view that downloaded confidential information. However, because that downloaded information was commingled with the confidential information on the iPhone, and not

readily segregable, the government should have obtained a judicial warrant to forensically examine the iPhone.

Nevertheless, the Decision's holding on the "border search exception" is a decision on the merits and not a decision on summary judgment. It is dicta in this posture and should not be adopted by this Court.

A declaration that the search of client files and an attorney's confidential information at the border falls outside the permissible scope of the "border search exception" and requires a warrant for the search has been shown to be eminently reasonable, exercised in the public interest and not an expansion of this Court's traditional equitable powers.

This case is ripe for review and involves an important issue of first impression. Discovery and the facts herein show this was instead an impermissible ruse wherein government agents admittedly wanted to interrogate Mr. Malik and search his iPhone for information about how their subject of interest intended to obtain a visa to reenter the United States because of their incorrect suspicion that the Attorney represents an "undesirable" client apparently directly adverse to CBP and their

assertion based on the Directive that their search authority at the border is unfettered and completely unlimited by the attorney confidentiality privileges.

3. The District Court erred in denying the Attorney's motion to modify the scheduling order to reopen discovery on the basis of Wyden I and in denying Attorney's motion for reconsideration of the denial

Discovery in this matter closed on February 11, 2022. The motions deadline was March 14, 2022. Wyden I was not written until March 8, 2022 and Wyden II not until September 15, 2022. The Attorney timely moved the District Court to Modify the Scheduling Order and permit additional discovery pursuant to Wyden I on March 14, 2022. ROA.442-450.

A district court is allowed broad discretion to manage discovery, and this Court reviews only for whether the district court abused its discretion. *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 220 (5th Cir. 2000). The Attorney in his Declaration describes in detail how the additional discovery will create a genuine dispute as to a material fact as required by *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1266

(5th Cir. 1991) as to when further discovery should be permitted. ROA.1448-1449.

> The nonmoving party must show how the additional discovery will defeat he summary judgment motion, that is, will create a genuine dispute as to a material fact (citation omitted) and "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts."

Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d at 1267.

To reverse the District Court's decision, 'there must be "unusual circumstances showing a clear abuse." *Alabbassi v. Whitley*, No. 21-20070, 2022 WL 101975, at *4 (5th Cir. Jan. 11, 2022), *cert. denied sub nom. Alabbassi v. Wormuth*, No. 22-162, 2022 WL 9551027 (U.S. Oct. 17, 2022).

Unusual circumstances here show clear abuse. The Wyden letters were written after the close of discovery. They clearly identify issues relevant to the current litigation. The Attorney has shown in his declaration precisely the material facts he expects to show from further discovery due to the revelations of Wyden I. ROA.938-940 ¶¶ 31-35.

No amount of diligence would have allowed the Attorney to conduct the discovery relevant to the Wyden letters prior to the close of

discovery and the District Court erred in denying the Attorney's Motion to Reopen Discovery.

Good cause[18] was shown for reopening discovery because reopening of discovery is necessary to avoid unfair prejudice to the Attorney. Before Wyden I, the Attorney had no reason to question DHS employees regarding any third party document retention systems outside the control of CBP and the FBI such as TRAC on which the Attorney's data might continue to be stored and made available to more than 2,700 CBP employees as identified in Wyden II, or that the Automated Targeting System or DOMEX might have been the source of the lookout placed on Mr. Malik, both of which the government's seven employees whose depositions were taken had failed to reveal in discovery, despite appropriate questioning which should have elicited the information.

[18] The Fifth Circuit applies a four-factor balancing test to determine whether good cause exists to modify a scheduling order by weighing (1) the explanation for the failure to adhere to the deadline at issue; (2) the importance of the proposed modification to the scheduling order; (3) the potential prejudice; and (4) the availability of a continuance to cure such prejudices." *Geiserman v. MacDonald*, 893 F.2d 787, 790-92 (5th Cir. 1990). ROA.1660.

Wyden II, as well as the District Court's intimation with approval that the information in the Attorney' cell phone can properly be retained and used by the government against the Attorney's clients solely upon their own determination of "probable cause"[19] demonstrates that the Attorney' concerns are warranted and provides further reason for this Court to remand to the District Court for further discovery on the issues revealed by the Wyden Letters.

No amount of diligence by the Attorney would have allowed his counsel to know that he should be asking about the government's potential use of a third-party entity to store and disseminate information they have retained in this case as well or about the seizure and transfer of personal financial information of U.S. citizens as reported by Wyden I and as apparently contravenes prohibition on the targeting of U.S. persons for intelligence gathering in violation of Title 50 of the U.S. Code. *See* ROA.932-941. Declaration of Adam Malik, ¶ 35,

[19] ROA.553. fn. 6 "Because the CBP Directive allows the Government to retain certain information *upon a finding of probable cause at its own discretion*, the litigation hold cannot be the only reason that information is (or might be) retained." There is no allegation of criminal activity by Mr. Malik so this statement appears to be the District Court approval of the use of confidential client information taken from Appellants' phone against their clients upon a determination solely by CBP that there is "probable cause" to retain the information.

Exhibit 1, Wyden I, ROA.949-952. Wyden II shows this concern is well-founded.

Whether that storage and dissemination of information of U.S. citizens pursuant to alleged customs authority complained of by Senator Wyden also includes information such as that extracted from the Attorney's iPhone is of extreme importance to the Attorney in this matter and his 2,000 clients whose confidentiality has potentially been compromised. The maintenance of the integrity of the adversarial judicial system of the United States as well as the Attorney's individual and representative confidentiality rights and obligations under the Texas Disciplinary Rules of Professional Conduct are weighty factors militating for the grant of the additional discovery timely requested by the Attorney.

The line of discovery outlined at paragraphs 31-35 of his Declaration, (ROA.938-940) is likely to lead to the discovery of material facts remaining in dispute and information potentially sufficient to demonstrate to this honorable Court a pattern and practice of overreach and disregard of Fourth Amendment protections against search and

seizure of property and data of US persons at the border due to an overly broad interpretation of the border search exception to the Fourth Amendment by the government without Congressional or judicial approval.

In addition, Rule 40.1(b) of the Local Rules of the Northern District of Texas precludes the Attorney from filing more than one motion for summary judgment unless otherwise directed by the presiding judge which causes further potential harm to the Attorney if remand is granted solely for the purposes of a new decision and the Attorney is forced to proceed without an opportunity to address the issues raised in Wyden I in discovery and in a dispositive motion.

After the District Court summarily denied the Attorney's Motion to Modify Scheduling Order, because of the importance of the issue and because the District Court summarily denied the Motion without allowing the Attorney a Reply brief as permitted by the FRCP and the Local Rules of the Northern District of Texas, the Attorney moved for Reconsideration of the denial. The issues raised by Wyden I are directly relevant to this litigation. The government has done everything possible in this case to conceal their actions from oversight, including failing to

identify either Homeland Security Investigations or the Automated Targeting System as the source of the targeting of Mr. Malik in this matter as revealed by the Wyden Letters and reinforced by the Attorney's expert, Gary Hale.

Because of the importance of the issues raised by Wyden I, and the inability or refusal of the District Court to understand the relationship of the issues to this litigation, the Attorney retained Gary Hale, an expert in the national security matters at issue in this case, to explain the relationship to and significance of the information disclosed by Wyden I to the issues in contention in this case and moved for Reconsideration. ROA.1670-1684.

The District Court improperly and summarily denied the Motion for Reconsideration without a reasoned decision which is therefore not proper for review by this Court as a reviewing Court but is proper for this Court to decide in the first instance should the Court decide on that course of action. *Isquith, supra.* The District Court abused its discretion and thereby erred in denying their Motion to Modify Scheduling Order based on the revelations of Wyden I, as well as his Motion for

Reconsideration of that issue, without a reasoned basis for the denial when the requirements of *Int'l Shortstop* for additional discovery have been met and exceeded. The denial should be reversed, and this matter remanded to the District Court for further discovery and a new decision.

4. The District Court erred in granting summary judgment because disputed issues of material fact remain

This is a civil case that straddles the border between civil and criminal much like *Harbor*. Moreover, the District Court has recognized at its footnote six, the potential criminal and immigration implications of the search of the Attorney's iPhone on the Attorney's clients who are directly adverse to the government in their legal matters. All confidential information of those clients which Mr. Malik is required to maintain confidentially was disclosed through review of the entire contents of the iPhone by directly adverse CBP attorneys and Gaytan who admits to reading every word of the 2,000 client files and 70,000 attorney emails. ROA.923; ROA.924.

The government successfully argued that the Attorney could meet the requirements of "prudential standing" only if this were a criminal case with a suppression motion rather than a civil lawsuit. ROA.603.

The Decision holds, again without any discussion of the applicability of the confidentiality obligations of an attorney to his clients, that "the seizure and search – *conducted in accordance with CBP's Directive* – does not violate the Fourth Amendment. For its part, the CBP Directive is consistent with current Fifth Circuit precedent, which explained that "only two of the many federal cases addressing border searches of electronic devises have ever required any level of suspicion," and "both required only reasonable suspicion . . . for [] more intrusive forensic search[es]." *Molina-Isidoro*, 884 F.3d at 293. The CBP Directive does not conflict with any applicable law." ROA.572. (emphasis added.) This is contrary to the government's argument that the Directive gives no substantive rights and is an internal policy document only. ROA.623.

In addition, the Decision incorrectly describes this Court's precedent decision on the Fourth Amendment. This Court, in *Molina-Isadoro*, unequivocally left open the Fourth Amendment question in the

context of a criminal suppression motion and did not decide the question. *United States v. Molina-Isidoro*, 884 F.3d at 290.

This Court has left undecided the Fourth Amendment question regarding the warrantless search of cell phones at the border in a criminal case. It has thus far not addressed the issue in the context of a civil case such as this one where the Defendants have demonstrably used a ruse to search an attorney's phone at the border in order to avoid that pesky attorney-client confidentiality right which is at the very heart of the American litigation system. This Court is called upon now to either make that decision in the first instance in this case or remand to the District Court for a reasoned decision on this issue. The cost of suppression, excluding the evidence from the truth-finding process, should not ever be relevant here if the rights of the Attorney' clients are properly considered, and the true cost is the destruction of the adversary legal system of the USA. There is a disputed issues of material fact regarding the propriety of the composition of the filter team.

The District Court acknowledged the use of a filter team in setting out the facts in its decision but did not address the Attorney's arguments regarding the filter team issue at all in its decision.[20]

As noted *supra, Jarman* is the only case cited in footnote eight that involves an attorney. It is not a border search case, and the attorney was the criminal. That is not the case here and the citation does nothing to explain the District Court's reasoning in footnote eight, ROA.536, how the use of a biased filter review team composed only of employees of CBP is "reasonable" for examining the 2,000 client files and attorney communications.

The government posited a straw horse argument with alternatives for searching privileged information which are not the only options and which disingenuously do not include following the Supreme Court's decision in *Riley* by requiring a warrant for the search at the border of electronic devices. ROA.610-611.

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[20] As previously stated, Appellants must assume for purposes of this argument that, in footnote 8 of the District Court decision, ROA.536, where the Court stated, "or the way the Government dealt with any information consisting of attorney–client privilege" is intended to include Appellants arguments regarding the impropriety of the filter team. This Court would have to guess what the District Court intended in order to affirm the lower court decision.

The filter team was based on the guidance of the Directive and was composed of two CBP attorneys and Gaytan. ROA.623. The composition under the Directive is unethical at a minimum and arguably illegal both facially under the Directive and in application. ROA.923.

The Attorney's counsel was not allowed input into either the filter team composition or protocol prior to the search or prior to the submission of allegedly non-privileged materials to the Dallas Tactical Terrorism Response Team.

In *Ritchey*, *supra,* the search was with a judicial warrant issued on probable cause and both the government and defendant therein agreed that filter review was required, but the defendant challenged the process, as the Attorney has in this case. The *Ritchey* Court found the filter team process improper and issued a preliminary injunction as the Attorney's Complaint seeks. The Attorney's Complaint also seeks a special master which was improperly denied.

The District Court never conducted a hearing on the Attorney's request for injunctive relief and appointment of a special master and

erred in failing to do so and in failing to grant injunctive relief. The District Court did note the use of the filter team in the facts of the decision. ROA.527. However, the Decision does not discuss the issues raised by the Attorney regarding the filter team and its composition in any way. There is no reasoned decision on the issue for this Court to review. The District Court decision should be vacated and remanded for the lower court to specifically decide the filter team issues raised by the Attorney in light of the decision in *Ritchey*.

The *Ritchey* court held that

> while the Government is not obligated to implement a filter team, **the absence of an adequate protocol—or filter team altogether—may transgress constitutional boundaries**, *United States v. Neill*, 952 F. Supp. 834, 839–40 (D.D.C. 1997), create the appearance of impropriety, *Baltimore Law Firm*, 942 F.3d at 182, or require the Court to impose a modified filter team protocol, *In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278, 2020 WL 5658721, at *4–*8 (S.D. Fla. Sept. 23, 2020).

Ritchey, at 6 (emphasis added).

The Attorney and their clients were given no opportunity for input into CBP's filter team protocol despite filing the Complaint, and despite raising attorney client confidentiality issues and contesting filter team

review. The Attorney's clients were never notified prior to the search. ROA.923-924. The *Ritchey* Court found that those inadequacies undermine the adequacy of the current filter team protocol. *Ritchey*, at 7. This case raises precisely the same issue.

Relevant here and citing this Court's decision in *Harbor*, *Ritchey* found it to be well-established that

> an adverse party's review of privileged materials seriously injures the privilege holder." *Baltimore Law Firm*, 942 F.3d at 175 (collecting cases). *See also Harbor Healthcare Sys., L.P.*, 5 F.4th at 593; *United States v. Philip Morris Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003); *Klitzman, Klitzman & Gallagher*, 744 F.2d at 960. When a filter team protocol inadequately protects the attorney-client privilege, there is a significant likelihood that the opposing party, the prosecution team, will review privileged materials and cause irreparable harm. *Baltimore Law Firm*, 942 F.3d at 175.

Id.

All filter team members in this case were CBP employees who read every word of the privileged materials, is an adverse party. ROA.923-924.

For that reason, *inter alia,* here the District Court abused its discretion in failing to issue an injunction as prayed and thereby erred requiring reversal and remand because, as in *Ritchey*

> the equities weigh heavily in Ritchey's favor. First, the filter team did not give the appearance of a neutral nonparty. *See,*

> *e.g.*, Doc. [81], Ex. 2–3. Furthermore, Ritchey was not fully informed about the filter team protocol until March 16, 2022. Doc. [72], Ex. 8. Finally, the Government did not provide Ritchey with an opportunity to object before it produced certain materials that it unilaterally deemed non-PPM to the prosecution team. Doc. [76], Ex. 3. For these and other reasons identified above, there is a substantial risk of harm to Ritchey's attorney-client privilege. On the other hand, the Government may be slightly delayed in bringing Ritchey to trial, inconvenienced if the Court temporarily halts it from moving forward with aspects of its case, and incur some additional costs in properly filtering the seized materials. …
>
> It is well-established that protection of the attorney-client privilege typically supports the public interest. *See, e.g.*, *Philip Morris Inc.*, 314 F.3d at 622 (quotation omitted) (noting that the attorney-client privilege is an " 'institutionally significant status or relationship' with deep roots in our nation's adversary system"). As described above, the existing filter team protocol will only undermine Ritchey's privilege. Superseding this filter team protocol with one that adequately protects Ritchey's privilege will serve the public interest. This prong weighs in Ritchey's favor.

Ritchey at 8.

While *Ritchey* is currently on appeal to this Court, the district court properly decided the case. The reasoning of *Ritchey* applies here. This Court should order the government to state the location of all contents of the iPhone, expunge all contents of the iPhone wherever located, prohibit the use of any seized information from being used in

any criminal or immigration case or investigation. Alternatively, this case should be remanded to the District Court with instructions to issue a reasoned decision regarding the filter team composition under the guidance of *Ritchey*.

CONCLUSION AND PRAYER FOR RELIEF

A declaration that the search of the iPhone falls outside the permissible scope of the "border search exception" and requires a warrant for the search has been shown to be eminently reasonable, exercised in the public interest and not an expansion of this Court's traditional equitable powers and should be granted. This case is ripe for review and involves an important issue of first impression. The Decision should be vacated in its entirety and remanded to the District Court as prayed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

Dated: November 10, 2022 */s/ Roy Petty*

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,720 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point font.

3. Any required privacy redactions have been made pursuant to Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the brief has been scanned for viruses using Bitdefender Endpoint Version 7.7.1.216 and is free of viruses.

Dated: November 10, 2022 */s/ Roy Petty*