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
District Court No. 4:21-CV-88-P

BRIEF FOR APPELLEES

LEIGHA SIMONTON
UNITED STATES ATTORNEY

Brian W. Stoltz
Assistant United States Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8600
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov

Attorneys for Appellees

STATEMENT REGARDING ORAL ARGUMENT

At issue in this appeal is the district court's resolution of cross-motions for summary judgment on claims challenging the government's border search of a traveler's cell phone. Because the relevant portions of the record are not complex and the legal issues are straightforward ones, the government respectfully submits that this appeal can be decided on the papers without the need for oral argument.

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STATEMENT OF JURISDICTION

In this case involving claims challenging the government's border search of a cell phone, the district court's federal-question jurisdiction was invoked under 28 U.S.C. § 1331. (ROA.12.) Judgment was entered on July 14, 2022, (ROA.7, 493), with a notice of appeal then timely filed on August 11, 2022 (ROA.8, 547). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The government has longstanding and broad authority to search persons or items encountered at the border, and in this particular case U.S. Customs and Border Protection (CBP) conducted a border search of a cell phone in plaintiff-appellant Adam Malik's possession upon his return from a trip abroad. After Malik filed suit challenging the search, the district court determined that Malik lacked standing for many of his backward-looking equitable claims and that the search was in any event lawful, even if a showing of reasonable suspicion were assumed to be required. Did the district court err in granting summary judgment to the government on these grounds?[1]

2. Malik asked the district court to modify the scheduling order to permit a new period of discovery after discovery had closed and the parties had

[1] This issue is responsive to issues 1, 2, and 4 in Malik's brief.

filed cross-motions for summary judgment. The basis for this request was a recently released letter from a U.S. Senator raising questions about the use of administrative subpoenas by a different federal agency (not CBP) to obtain data from wire-transfer companies about money transfers between certain border-state locations and Mexico. In a case where the pleaded claims all involved the separate issue of CBP's border search of a cell phone, did the district court abuse its discretion in denying Malik's request to modify the scheduling order to take discovery on this unrelated issue?[2]

STATEMENT OF THE CASE

Because this case implicates the government's border-search authority, this brief will first provide a review of the relevant legal framework, before then discussing the specific facts of the case and the district court's ruling.

1. The government has broad authority to conduct searches at the border.

Courts have repeatedly held that the government's interest in searching persons and items is at its "zenith" at the border.[3] *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). As a result, although searches must be reasonable, "the Fourth Amendment's balance of reasonableness is

[2] This issue is responsive to issue 3 in Malik's brief.

[3] The "border" includes any "functional equivalent" of the border including international airports. *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993).

qualitatively different at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Therefore, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* (citations omitted). "[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Flores-Montano*, 541 U.S. at 152–53 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)). As the Supreme Court has explained, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border," in part because "the expectation of privacy [is] less at the border than in the interior." *Montoya de Hernandez*, 473 U.S. at 539, 540.

Consistent with these principles, CBP has issued a policy directive to govern its officers' searches of electronic devices at the border. (ROA.1109.) The directive distinguishes between "basic" and "advanced" border searches of electronic devices. (ROA.1112–13.) An "advanced search" is "any search in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but

to review, copy, and/or analyze its contents." (ROA.1113.) A "basic search" is "[a]ny border search of an electronic device that is not an advanced search." (ROA.1112.) A basic search may be conducted "with or without suspicion," and an advanced search may be conducted in "instances in which there is reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern." (ROA.1112, 1113.)

2. CBP interviews Malik upon his return from a trip abroad after uncovering a possible connection to an international arms dealer and noting discrepancies in Malik's passport applications.

Turning back to the specific facts of this case, on January 3, 2021, Malik was due to arrive at DFW Airport on a flight from Costa Rica. (ROA.1126, 1287.) Malik is a naturalized U.S. citizen, originally from Pakistan, who lives in the Dallas area and practices law at his own law firm.[4] (ROA.12, 1284–85.)

Malik had come to the attention of CBP officers earlier that day when they were reviewing passenger manifests of inbound international flights. (ROA.1126.) Specifically, CBP Officer Travis Cannon recognized Malik's name from an ongoing investigation of an individual from Pakistan suspected

[4] Malik's law firm is the second plaintiff-appellant and apparently owned the cell phone that Malik was carrying. (ROA.14.) For ease of reference, this brief will simply refer to the phone as Malik's phone and will generally refer to the arguments of both plaintiffs-appellants collectively, as those of "Malik."

of engaging in illegal international arms dealing. (ROA.1126.) This arms dealer had been arrested in Pakistan in 2019 in connection with the smuggling of weapons and ammunition into that country. (ROA.1126, 1157–60.) According to a published news report, the smuggling was undertaken as part of a large organized network and involved such items as automatic rifles, sniper rifles, and long-range armor-piercing bullets, with the illegal shipments reportedly originating in the United States and Great Britain. (ROA.1158.)

Cannon began looking into this matter because the arms dealer was known to have connections to the Dallas area and had departed from DFW Airport on the trip that had resulted in his 2019 arrest. (ROA.1126.) The arms dealer had also returned to DFW Airport in March 2020, after he had already been arrested in Pakistan, and sought entry into the United States at that time. (ROA.1126.) The fact that this individual apparently avoided serious prosecution in Pakistan and was able to travel freely out of the country within a year of his arrest suggested to CBP that he may have high-level connections within the Pakistani government, and a news report had also hinted at this possibility. (ROA.1126, 1159.)

CBP ultimately denied the arms dealer entry into the United States at DFW Airport in March 2020, but before placing him on an outgoing flight, CBP interviewed him and performed a border search of his phone.

(ROA.1126.) CBP officers thereafter developed information indicating that the arms dealer does have some affiliations or associations with members of the Pakistani intelligence service (known as the ISI). (ROA.1126.)

Malik's name came up while Cannon was researching the nature and extent of the arms dealer's connections to the Dallas area. (ROA.1127.) Cannon found several Texas business entities with an individual matching the arms dealer's name identified as the manager, and the address for each of these businesses was the address of Malik's law firm. (ROA.1127, 1129, 1285, 1324.) In addition, Malik's mother was listed as a second individual associated with some of the businesses, either as a manager or registered agent. (ROA.1127, 1130–31, 1284, 1324.)

Aside from the potential links to the arms dealer, Cannon also determined that Malik had visited certain countries considered to be "countries of interest" to CBP because of links to terrorism and other transnational criminal activity, had applied for U.S. passports on at least six different occasions between 2004 and 2018, and had given different names and birth dates for his parents on some of the passport applications, as well as different locations as the place of his own birth. (ROA.1127.) In Cannon's experience, all this was highly unusual and raised questions about Malik's travel activities and whether he had correctly disclosed his relevant background information

and family ties on his passport applications. (ROA.1127.)

Upon learning that Malik was on an incoming international flight to DFW Airport, Cannon had another CBP officer place a "1-day lookout" in CBP's passenger screening system so that Malik would be referred for a "secondary" inspection when he arrived at the customs inspection area. (ROA.1127, 1132, 1320, 1328–29.) Cannon provided some background information that was recorded in the "remarks" section of the system when the 1-day lookout was created, which contemporaneously memorialized Cannon's reasons for placing the lookout. (ROA.1127, 1132, 1320.) These remarks were that:

- Malik was a "[c]o-traveler to 1day lookout (brother)" (referring to the fact that Malik was traveling with his brother—who is discussed in more detail below—and that there was already a 1-day lookout in place for the brother).
- Malik was "linked to" the arms dealer who had previously come to CBP's attention in Dallas.
- Malik had a "nexus to COI [countries of interest] on prior travels."
- There were "[i]nconsistencies in POB [place of birth] and parents names on [passport] applications."

(ROA.1132.)

3. CBP seeks to conduct a border search of a phone carried by Malik.

When Malik arrived at DFW Airport he was directed to the secondary

inspection area and, beginning at approximately 7:25 p.m., was interviewed by Cannon. (ROA.1124, 1289.) Cannon asked some questions about Malik's travel and gave the name of the arms dealer under investigation by CBP, asking if Malik knew him. (ROA.1290, 1325–26.) Malik did not answer, but instead referred to the attorney-client privilege. (ROA.1290, 1325.) Cannon—who was aware that Malik is an attorney—then made a statement to the effect of, "I assume that means he's your client if you're saying it's attorney-client privilege." (ROA.1325; *see also* ROA.1290.) Malik's response was that he could neither confirm nor deny that. (ROA.1325.)

Cannon finished the interview and told Malik to empty the contents of his pockets on a table for inspection. (ROA.1289, 1325.) Among these contents was Malik's phone, which Malik placed on the table. (ROA.1290.) Cannon told Malik that he wanted to look at the phone (which was locked) in order to perform a "basic" search (referring to the terminology used in the CBP electronic border-search directive), but Malik stated that he would not agree to that. (ROA.1124, 1291, 1325–27.) At that point, Cannon told Malik to leave the phone on the table and left the room. (ROA.1290, 1325–26.)

Meanwhile, Malik's brother had also arrived on the same flight from Costa Rica and was himself the subject of a 1-day lookout and had also been referred for a secondary inspection. (ROA.1127.) Although Malik is a

naturalized U.S. citizen, his brother is not—he is instead a citizen of Pakistan and Great Britain. (ROA.1127, 1284.) After leaving Malik, Cannon interviewed Malik's brother and performed a basic search of the brother's phone, by manually reviewing things like text messages and images. (ROA.1127–28.)

Cannon's search of Malik's brother's phone identified several potentially concerning items. First, there were a number of items indicating that the brother was in contact or affiliated with representatives of the Pakistani military and/or ISI. (ROA.1128, 1149, 1152.) These kinds of contacts with a foreign intelligence service would be significant standing alone, but were particularly noteworthy here given that the arms dealer CBP was investigating had previously been identified as having similar contacts. (*See* ROA.1149.) Second, the phone contained images of dead human bodies. (ROA.1128.) Third, there were materials associated with a cleric whom Cannon believed was possibly associated with radical elements. (ROA.1128.) Due to materials found on Malik's brother's phone as well as other related factors, CBP refused the brother entry into the United States. (ROA.1128.)

Cannon updated his supervisor, Supervisory CBP Officer Aaron Sullivan, about what he had seen on Malik's brother's phone. (ROA.1128.) Sullivan then went to ask Malik whether he was willing to let CBP look at his

phone. (ROA.1291, 1349.) Malik again said that he would not agree to that and that he would not provide Sullivan with the passcode to the phone, which was still locked. (ROA.1291, 1349.) Sullivan conferred with his own supervisor over the phone, and then decided, with his supervisor's concurrence, to detain Malik's phone to conduct a border search. (ROA.1144, 1349.)

Sullivan gave the phone to another CBP officer to be safeguarded pending its shipment to a lab. (ROA.1121.) This officer powered the phone off at approximately 9:45 p.m. that night (January 3, 2021) and placed it in a secure file cabinet. (ROA.1121–22.) AT&T records later produced by Malik confirmed that the last instance of network connectivity by the phone was at approximately 9:40 p.m. on the night of January 3, 2021.[5] (ROA.1239.)

4. Because Malik's phone was locked, CBP sends the phone to a lab to make the phone's data accessible for a border search.

CBP sent the phone to a CBP lab in El Paso to attempt to bypass the passcode and access the phone's data. (ROA.1121, 1137.) However, the El Paso lab was unsuccessful, so the phone was sent to a lab in Houston with

[5] This is shown in the records as 03:40:00 UTC on January 4, 2021 (UTC is six hours ahead of Central Time). (ROA.1239.) The AT&T records also show, consistent with Malik's testimony, that on January 4, 2021, Malik activated a different phone on this same AT&T account to replace the detained phone, and began using that phone. (ROA.1239 (use of iPhone 7 rather than iPhone 8); *see also* ROA.1294–95.)

more advanced resources. (ROA.1137.) This lab—known as the Greater Houston Regional Computer Forensics Laboratory—is operated by the FBI in conjunction with other law-enforcement partners (including CBP) to provide assistance to law-enforcement agencies in accessing data on electronic devices for use in their investigations. (ROA.344–54, 1137.) A CBP employee assigned to the Houston lab accepted custody of Malik's phone upon its transfer to that lab. (ROA.1137, 1139.)

The Houston lab was able to bypass the phone's passcode and access its data. (ROA.1137, 1140–42.) This resulted in the generation of a Cellebrite report containing the data extracted from the phone (essentially, a copy of the phone's contents in a readable computer file). (ROA.1137, 1140.) The data was then transferred to CBP, along with the phone itself. (ROA.1137–38, 1141–43.) The CBP employee at the Houston lab who had initially accepted custody of the phone there facilitated this transfer of the phone and its contents back to CBP. (ROA.1137–38, 1143.) This employee attested that the Houston lab had not retained any data from Malik's phone and also had not provided any data to any other law-enforcement agency.[6] (ROA.1138.) "This was

[6] Malik has suggested that the statement that no data from the phone was transferred to "any other law-enforcement agency" reflects artfully chosen language to conceal a transfer of data to some nongovernmental entity. To be clear, this did not occur and there is no basis for Malik's speculation in this regard. Malik first suggested some transfer of this type only *after* the close of discovery and *after* the government had submitted its summary-judgment declarations. (ROA.1719 n.2.) When the government moved for summary

consistent with the [Houston lab's] usual practices," the CBP employee explained, in that "the [lab] assists law-enforcement agencies with accessing data on phones or other electronic devices, but does not play any role in substantively reviewing or investigating the data, or in deciding what to do with such data." (ROA.1138.)

5. Before allowing the investigating CBP officer to conduct a border search of data from the phone, a filter team screens for privileged material.

With the data from Malik's phone now finally accessible, CBP did not simply provide it to the officers at DFW Airport to perform the border search. Instead, because Malik asserted that privileged material was on the phone, CBP assembled a filter team to first review the phone's data and screen out privileged material. (ROA.1144, 1174.) A supervisory CBP officer in Houston who had no involvement with Malik's inspection at DFW Airport was chosen to conduct the filter review, with the assistance of two senior CBP attorneys. (ROA.1174, 1337.)

The filter team was kept screened from the information known to the officers at DFW Airport about Malik, Malik's brother, and CBP's investigation

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judgment, there had never been any allegation, during over a year of litigation, that data from Malik's phone had been transferred to some non-law-enforcement agency (or anywhere else). Thus, the declarant's reference to there having been no such transfer was intended to convey that the data accessed by the Houston lab was given only to CBP—and to nobody else, either within government or outside of it.

of the arms dealer with ties to Dallas. (ROA.1174, 1336–39.) The filter team's only task was to review for privileged material to ensure that such material was not provided to the officers at DFW Airport for their planned border search. (ROA.1174, 1339, 1340.)

The filter review occurred over several weeks in the spring of 2021. (ROA.1174.) Ultimately, the filter team allowed the officers at DFW Airport to review a limited set of data from the phone, consisting of things like call logs, contacts, messages, and images/videos. (ROA.1174.) The filter team took a very conservative approach by erring on the side of caution to screen out any material that might possibly be related to Malik's work as an attorney. (ROA.1174, 1338, 1343–44.) For example, because many of the emails on the phone appeared to be work-related, the filter team withheld *all* emails from the data that the officers at DFW Airport were permitted to search. (ROA.1145, 1174.)

6. The investigating CBP officer conducts a border search of filtered data from Malik's phone, and the phone is returned to Malik.

Once the filter team finished its screening process, the CBP officer at DFW Airport who had interviewed Malik and his brother (Cannon) was selected to conduct the actual border search by reviewing non-privileged material designated by the filter team. (ROA.1128, 1145.) This occurred in early May 2021, and after the search was concluded, CBP sent the phone back

to Malik that same month. (ROA.1145.)

Cannon did not find anything within the data he reviewed that he believed warranted retaining or seizing by CBP. (ROA.1128.) Thus, consistent with the directive, once the search was completed, the phone was returned to Malik and the normal procedure would have also been to destroy any residual copy of data from the phone still within CBP's possession. (ROA.1114–15, 1145, 1174.) However, because Malik had by that point already filed suit, this remaining data was instead sent to the Civil Division of the U.S. Attorney's Office for purposes of this litigation.[7] (ROA.1174.) Malik had requested a "litigation hold" even before suit was filed (ROA.57), and once litigation began, he made a discovery request for a copy of the data collected from the phone (which the government provided) (ROA.358). CBP has not otherwise kept any data from Malik's phone, nor has any data from the phone been transferred elsewhere.[8] (ROA.1145, 1174, 1719–20.)

[7] Malik's brief professes some confusion about exactly where and on what media the data is housed. (*See* Br. at 6–7.) To confirm, the data exists on two storage drives—the specific control numbers and other identifying information of which were provided to Malik in discovery (ROA.1141)—located at the Civil Division of the U.S. Attorney's Office. There was no data retained in CBP's possession, as confirmed by the attestations of two CBP declarants (*see* ROA.1145, 1174) and by the government's explanation in discovery that to the extent there were other temporary or working copies of the data in existence at any time (for example at the time of viewing it using some particular computer), such copies were not permanently saved or retained by CBP (*see* Defs.' Resp. to Pltfs.' Interrog. No. 16 (June 24, 2021)).

[8] The government explained in the district court, and reiterates here, that once this litigation is concluded, the data at the Civil Division of the U.S. Attorney's Office will be destroyed,

7. Meanwhile, Malik files suit seeking declaratory and injunctive relief, and after discovery the parties file cross-motions for summary judgment.

In the meantime, Malik had filed suit in the district court seeking equitable relief. (ROA.10.) Malik sought declarations that CBP had violated the First and Fourth Amendments and that its electronic border-search directive is unlawful, as well as injunctive relief. (ROA.36–37.) Among other things, Malik alleged that either reasonable suspicion, probable cause, or a warrant was required for the search, but was absent. (ROA.29.)

The government answered and the case proceeded into discovery. (ROA.89.) In discovery, the government disclosed the information it had become aware of indicating a possible link between Malik and the arms dealer whom CBP had been investigating. (ROA.1067, 1299.) Malik in response advised the government for the first time that he does know an individual by that name, but that his acquaintance is a different person (not the arms dealer) for whom Malik had "conducted [] business" and "set up some companies." (ROA.1067–68, 1299.)

The government and Malik each moved for summary judgment after

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and but for the existence of this litigation, all copies of any data from Malik's phone would have already been destroyed at the time the phone was returned to Malik in May 2021. (ROA.1719–20.)

discovery had concluded. (ROA.434, 436.) The government's motion generally argued that (1) Malik lacked standing for his claims and that (2) even on the merits, Malik's claims all failed because the phone search was a permissible exercise of the government's broad border-search authority. (ROA.1068–1103.)

8. The district court grants the government's motion for summary judgment, denies Malik's cross-motion, and enters final judgment.

After receiving the parties' summary-judgment responses and replies, the district court issued a thirteen-page memorandum opinion and order granting summary judgment in the government's favor and dismissing all of Malik's claims. (ROA.526.)

Considering its jurisdiction first, the district court found that Malik failed to establish standing for the majority of his claims because he was seeking declaratory relief related to past events (for example, declarations that the government violated the First and Fourth Amendments), but could not show a continuing or threatened future injury sufficient to support the exercise of Article III jurisdiction. (ROA.528–32.)

For one of Malik's claims, though, the district court did find an ongoing alleged injury based on the government's continued retention of data from the phone. (ROA.532–34.) This was Malik's claim for "expungement" of the data from the government's possession—the district court determined that the

government's possession of the data was continuous and ongoing and "could potentially be remedied with a favorable ruling," thus conferring standing. (ROA.533.) And in the district court's view, the government's explanation that the data was due to be destroyed under CBP's electronic border-search directive and had temporarily been preserved only due to the existence of litigation did not change this calculus. (ROA.533.)

Having found jurisdiction for this aspect of Malik's complaint, the district court proceeded to the merits of Malik's challenge to the search of his phone. (ROA.534–37.) The district court mapped the contours of the "border-search exception" under which searches at the border are not subject to the same rules that traditionally apply to searches elsewhere (such as requirements for a warrant, probable cause, or reasonable suspicion). (ROA.534–55.) Instead, "'[r]outine searches of the persons and effects of entrants are . . . not subject to any requirement of reasonable suspicion, probable cause, or warrant,'" the district court explained, and nonroutine searches require "only . . . reasonable suspicion, not the higher threshold of probable cause." (ROA.534, 535 (quoting *Montoya de Hernandez*, 473 U.S. at 538, and citing *United States v. Molina-Isidoro*, 884 F.3d 287, 291 (5th Cir. 2018)).)

Noting that this Court has "yet to decide" exactly where phone searches fall on the border-search spectrum, the district court found it unnecessary to

decide what, if any, level of suspicion might have been required for the search of Malik's phone. (ROA.535.) This was because the government had surpassed the highest possible threshold, the reasonable-suspicion standard, "for two independent reasons." (ROA.535.) Reasonable suspicion had been established, the district court explained, based on (1) the government's "investigation into an international arms dealer with known ties to the Dallas area," and also (2) the "information discovered during the interview with Mr. Malik's brother—who Mr. Malik was traveling with and hosting in the United States." (ROA.536.)

Having determined that all of Malik's claims were subject to dismissal at summary judgment, the district court entered final judgment. (ROA.493.) On appeal, Malik challenges this result as well as a separate procedural ruling denying a motion to modify the scheduling order (the specifics of which are discussed in the context of the argument section of this brief that responds to that claim).

SUMMARY OF THE ARGUMENT

The district court did not err in granting summary judgment in the government's favor. As a threshold issue, standing principles barred Malik's suit to the extent he was seeking backward-looking equitable relief, such as declarations or injunctions concerning the validity of the border search of his

phone. Without any continuing injury or likelihood of a similar alleged harm in the future, a plaintiff does not have standing to obtain what would effectively amount to an advisory opinion on the government's past actions, and that was the situation in Malik's case. Moreover, given that the government has preserved the data from Malik's phone in its possession only because of this litigation and otherwise would have destroyed that data long ago, even Malik's claim for expungement of the data can be dismissed for lack of standing at this time.

Malik's complaint also failed on the merits. Because the phone was encountered at the border, it was subject to being searched just as any other item or person at the border may be searched. Malik has never identified any binding caselaw to the contrary that would have prohibited the search, or even required particularized suspicion or a warrant to carry it out. Searches at the border are unlike searches in other contexts, and for Fourth Amendment purposes they are generally considered reasonable simply by virtue of the fact that they occur at the border. No further analysis or inquiry is necessary.

That said, CBP did in fact have good reasons for its actions, based on both (1) an ongoing investigation of an international arms dealer and (2) separate information it developed from a contemporaneous border inspection of Malik's brother, who was traveling with Malik at the time. Even assuming

some heightened showing were required, the government would at most need to show that it had reasonable suspicion, and that was present here.

The district court addressed all these matters in a well-reasoned opinion and properly concluded that Malik was not entitled to any relief on his complaint. The district court also did not abuse its discretion in denying Malik's motion to modify the scheduling order, a motion that was filed only after the parties had completed discovery and filed cross-motions for summary judgment. On appeal, Malik fails to show any basis for disturbing the district court's judgment, and this Court should affirm.

ARGUMENT AND AUTHORITIES

1. The district court did not err in granting summary judgment in the government's favor.

Standard of Review

The district court's grant of summary judgment is reviewed de novo. *Mills v. Davis Oil Co.*, 11 F.3d 1298, 1301 (5th Cir. 1994).

Discussion

Although the issues are ordered slightly differently in Malik's brief, the Court should first consider the jurisdictional issue of standing before turning to any merits inquiry. *See Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015). As explained below, the district court correctly determined that the bulk of Malik's complaint was subject to dismissal for lack of standing, where Malik

sought equitable relief relating only to a past alleged violation of his rights but with no continuing or future threatened injury. Additionally, Malik's remaining claim for expungement may also be dismissed on standing grounds given that CBP's electronic border-search policy already provides for the same outcome that Malik requests (destruction of any data in the government's possession), and the data from the phone that has been maintained at the Civil Division of the U.S. Attorney's Office has been kept solely for purposes of this litigation and will be destroyed upon its completion. Finally, to the extent jurisdiction does exist for any portion of the complaint, the district court did not err in rejecting Malik's arguments that the phone search violated his rights.

A. The district court properly determined that Malik lacked standing for his various claims seeking equitable relief relating to the search of his phone.

The doctrine of standing addresses the question of who may properly bring suit in federal court, and "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To establish standing, a plaintiff must meet both constitutional and prudential requirements. *See, e.g.*, *Singh v. RadioShack Corp.*, 882 F.3d 137, 151 (5th Cir. 2018).

The "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. *Defenders of Wildlife,* 504 U.S. at 560. The law of standing is built on separation-of-powers principles and, as such, the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997).

In this case, Malik sought equitable relief—requesting various declarations and injunctive orders—under a premise that CBP acted unlawfully by detaining and searching his phone at the border. (ROA.27–37.) However, even assuming some constitutional or other legal violation did occur, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (internal quotation marks and citation omitted). Instead, to obtain declaratory or injunctive relief based on an alleged past wrong, "a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future." *Id.* (citation omitted).

For example, in *City of Los Angeles v. Lyons*, 461 U.S. 95, 98 (1983), the Supreme Court considered whether a plaintiff who had been subjected to a chokehold by police had standing to seek equitable relief in the form of (i) a declaration that the use of such chokeholds violated the Constitution and (ii) an injunction against their future use. The Court explained that the plaintiff would have standing only if he could show that he "would again be stopped for a traffic or other violation in the reasonably near future" and "that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested regardless of the conduct of the person stopped." *Id.* at 108. Noting that the plaintiff did not claim to have been subjected to a chokehold on any other occasion, the Court found that the "odds" of a repeat occurrence of the allegedly illegal conduct were not "sufficient to make out a federal case for equitable relief." *Id.*

Closely-related prudential standing principles also operate to place limits on plaintiffs' standing for equitable relief. "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest," and 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). Thus, "[e]specially where

governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Id.*

(1) Malik's claims for declaratory relief were properly dismissed for lack of standing.

The district court properly applied these principles in determining that Malik lacked standing on his claims for declaratory relief. As the district court explained, to the extent Malik sought "declarations that [the government's] conduct violated the First and Fourth Amendments" or the Administrative Procedure Act,[9] he was seeking "declaratory relief related only to past events" and had not shown an injury-in-fact in the form of some substantial risk of an injury occurring in the future, and likewise did not establish redressability. (ROA.529.) For example, Malik argued that he could be subjected to liability by the State Bar of Texas or his own clients on account of the fact that his phone was searched by CBP, but the district court found these claims speculative and noted that there was "no evidence to suggest that the State Bar of Texas or Mr. Malik's clients are planning to act because of the border search." (ROA.530.)

[9] These corresponded to Counts I–VIII of the complaint. (*See* ROA.529–531.) Malik does not, however, advance any arguments under the First Amendment or the Administrative Procedure Act in his brief and thus any corresponding claims are forfeited, and he also agrees that Counts IX–XI are moot. (Br. at 18.) The only other claim is Count XII, the expungement claim.

Malik fails to show any error in the district court's standing analysis. Although Malik continues to argue that he is "likely" subject to discipline by the State Bar of Texas and by "2,000 clients who may sue him for breach of fiduciary duty," he cites no record evidence in support of these claims, and they remain wholly speculative. (Br. at 30.) Indeed, as of the time this brief is being filed, it has been over two years since Malik's phone was detained by CBP (in January 2021), yet Malik identifies no adverse disciplinary or other legal proceeding that has occurred—or even any credible threat of such.

Malik also did not show any concrete threat of imminent future injury in the form of some high certainty of another phone search. Malik had traveled internationally on a frequent basis before January 2021 (multiple trips a year), but never had his phone searched other than on the single occasion at issue in this case. (ROA.1287.) And as of when he sat for a deposition in this case, Malik had traveled internationally at least three more times after January 2021, and his phone was never searched during any of those trips, either. (ROA.1300.) Malik's brief also references additional even-more-recent interactions with CBP (such as one in Miami), but nowhere contends that Malik has been subject to another phone search on these occasions.

Additionally, insofar as Malik asserts that he was the victim of some past injury, he also fails to show standing. His arguments based on an alleged

injury to his reputation or the public at large are unsubstantiated and speculative. (*See* Br. at 30–32.) Even more attenuated are Malik's attempts to establish standing based on allegations that he has not been "reinstat[ed] in CBP's Global Entry program" and had a "derogatory entry" recorded about him in a government database, that "the chances of future immigration by [his] brother" have been diminished, and that his U.S. citizen mother now fears returning to the United States. (Br. at 31.) As an initial matter, the record does not support these claims. For example, there is no record evidence that Malik has even applied for Global Entry reinstatement, and neither Malik's brother nor mother provided any testimony or other evidence in the case. And regardless, none of these matters, even if assumed to constitute an actionable injury to Malik, would be redressed by a declaration from the district court that the search of Malik's phone was improper.

To sum up, the district court did not err in concluding that Malik lacked standing for his various claims for declaratory relief.

(2) Malik's claim for the injunctive relief of expungement can also be dismissed for lack of standing at this time.

As recounted above, the district court did find standing for one of Malik's claims—his expungement claim. (ROA.532.) In its filings in the district court, the government had urged that standing was absent for even this aspect of Malik's complaint, after explaining that the investigating CBP officer

who reviewed the filtered data from Malik's phone had not found anything that he believed was necessary for CBP to retain. (ROA.1066, 1718–20.) Accordingly, under normal circumstances in the absence of litigation, all of the data from the phone would have been destroyed by CBP consistent with the agency's electronic border-search directive. (ROA.1066–67, 1072–73.) But given the document-preservation obligations arising from Malik's decision to initiate litigation, along with Malik's written request for a "litigation hold" (ROA.57) as well as a formal discovery request demanding production of a copy of the data from the phone (ROA.358), CBP instead sent all remaining data[10] to the Civil Division of the U.S. Attorney's Office for preservation pending the litigation. (ROA.1174, 1719–20.)

From that point forward, the data has been maintained within the Civil Division of the U.S. Attorney's Office only because of litigation-related discovery obligations, and the government has expressed its intention to destroy all the data, consistent with CBP's own electronic border-search directive, upon conclusion of the litigation. (ROA.1066, 1719–20.) Under these circumstances, the government argued to the district court, a plaintiff's request for the expungement of data that the government would already

[10] The phone itself was returned directly to Malik. (ROA.1145.)

otherwise destroy but for the existence of the plaintiff's own litigation is not sufficient to confer standing. (*See* ROA.1719–20 (citing *Abidor v. Napolitano*, 990 F. Supp. 2d 260, 276 (E.D.N.Y. 2013) (rejecting a similar plaintiff's attempt to establish standing based on the fact that the government had retained materials from electronic devices given that a lawsuit had been filed, where "the Department of Justice attorney conceded at oral argument that the materials 'would have been destroyed but for the fact that cases had been filed,' and that they were being retained as potentially relevant to those cases")).)

The district court acknowledged the government's explanation that the data from the phone would be destroyed but for the existence of the litigation. (ROA.533.) But the district court nonetheless found that Malik's alleged injury in the form of the government's continued possession of data was not fully redressable by the planned destruction of the data (such that redress could potentially be obtained in court) because CBP's electronic border-search directive contemplates that the agency may retain data if it finds probable cause to do so. (ROA.533 n.6.) The district court explained that because CBP had the ability under the directive to "retain certain information upon a finding of probable cause at its own discretion," there remained an ongoing injury that could only be redressed in court. (ROA.533 n.6.)

The government understands this rationale in the abstract case: if CBP

decides to seize data from a phone based on a finding that probable cause exists to do so, then CBP's electronic border-search directive does not require destruction of that data, and thus a plaintiff would not receive from the directive the relief that he might be requesting from a court (such as "expungement" of the data). To be clear, though, that is not what occurred here. CBP's investigating officer reviewed limited data from Malik's phone but did not find any reason to retain anything—that is why no data was kept by CBP and why the government stated in the district court that it was ready to destroy the remaining data in its possession within the Civil Division of the U.S. Attorney's Office. The government reiterates that commitment here and, assuming that this Court agrees that there is no basis for reversing the district court's judgment on any other claims so as to require further proceedings below, the government will destroy the remaining data in its possession and will be happy to provide an appropriate certification to Malik that all data in the government's possession has been destroyed and that no data was transferred to any other governmental or nongovernmental entity or person. Under these circumstances, it is respectfully submitted that Malik does not have standing for any expungement claim and that dismissal of that claim would be appropriate on this ground. *See Abidor*, 990 F. Supp. 2d at 275 (finding that a plaintiff lacked standing in similar circumstances given the

government's explanation that data from the plaintiff's phone had been retained only for litigation purposes and would otherwise be destroyed).

B. The district court properly determined that the search of Malik's phone was lawful.

To the extent jurisdiction exists for any portion of Malik's complaint, Malik still fails to show any entitlement to relief on appeal. As discussed below, the record reveals no error in the district court's legal analysis or its determinations that CBP's actions were supported by reasonable suspicion and did not violate Malik's rights.

(1) Searching Malik's phone was a permissible exercise of the government's border-search authority.

With respect to the scope of the government's authority for border searches, courts have repeatedly held that the government's interest in searching persons and items is at its "zenith" at the border. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). As a result, although searches must be reasonable, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Therefore, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* (citations omitted). "[S]earches made at the border, pursuant to the

longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Flores-Montano*, 541 U.S. at 152–53 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)). As the Supreme Court has explained, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border," in part because "the expectation of privacy [is] less at the border than in the interior." *Montoya de Hernandez*, 473 U.S. at 539, 540. Simply put, "a port of entry is not a traveler's home." *Ramsey*, 431 U.S. at 618 (quotation marks and citation omitted). International travelers, even U.S. citizens, are asking to enter or exit our country when they present at a border. *See Montoya de Hernandez*, 473 U.S. at 539–40. Part of this process is—and has always been—submitting to inspections by government officials. *See, e.g.*, *Ramsey*, 431 U.S. at 618 (explaining that "[c]ustoms officials characteristically inspect luggage and their power to do so is . . . an old practice" (quotation marks and citation omitted)).

Given these legal principles, CBP did not need any reason or justification to search Malik's phone, and therefore it did not violate the Constitution or any other source of law by doing so. There is no dispute that the phone was encountered at an international border. (ROA.17.) As such,

the phone was subject to being searched just as any other item or person at the border may be searched, and Malik has identified no binding caselaw—and the government is aware of none—that would have prohibited the CBP officers at DFW Airport from reviewing things like call logs, text messages, and contacts on the phone. *Cf. United States v. Molina-Isidoro*, 884 F.3d 287, 290 (5th Cir. 2018) (upholding the denial of a defendant's motion to suppress evidence obtained during an electronic border search of a cell phone, with an explanation that the government "reasonably relied on the longstanding and expansive authority of the government to search persons and their effects at the border"); *Anibowei v. Wolf*, No. 3:16-CV-3495-D, 2020 WL 208818, at *3–*4 (N.D. Tex. Jan. 14, 2020) (denying a preliminary injunction and partial summary judgment sought by a U.S. citizen plaintiff—who like Malik was a lawyer—whose cell phone was searched upon his return from international travel), *appeal pending*, No. 20-10059 (5th Cir.). For this reason alone, the district court's judgment can be affirmed because Malik cannot show any constitutional or other violation in connection with the search of his phone.

(2) No showing of reasonable suspicion was required.

As the district court referenced, border-search jurisprudence does require reasonable suspicion for certain highly intrusive searches, sometimes referred to as "nonroutine" searches in contrast to so-called "routine" searches.

(ROA.535.) Routine searches may be conducted for any reason or no reason at all, whereas nonroutine searches require reasonable suspicion. *Molina-Isidoro*, 884 F.3d at 291. The district court ultimately did not find it necessary to determine whether the search of Malik's phone represented a routine or nonroutine search, because it found that even assuming reasonable suspicion were required, that standard was met. (ROA.535.) Because the district court's reasonable-suspicion determination was clearly correct and can readily be affirmed on appeal (as discussed in more detail below), this Court could take a similar approach and pretermit the issue of whether any reasonable-suspicion requirement applied.

If the Court does reach this issue, though, it should hold that reasonable suspicion was not necessary. The Supreme Court has required some degree of individualized suspicion for a border search or seizure only once, in the *Montoya de Hernandez* case. There, customs officers who reasonably suspected that a traveler was smuggling drugs in her alimentary canal detained her for sixteen hours to monitor her bowel movements. 473 U.S. at 534–36. The Court upheld these actions, explaining that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents . . . reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Id.* at 541. The

Court expressed "no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches." *Id.* at 541 n.4.

Here, while it is undisputed that Malik's phone was sent to a lab in order to bypass the passcode and that a filter review was then conducted in order to screen out privileged material, these facts do not remove the resulting border search from the ambit of routine searches authorized under Supreme Court precedent, i.e., as a search for which no showing of suspicion is required. In the specific circumstances of this case, where the phone was locked and Malik would not provide the passcode, sending the phone to a lab was necessary and was the software equivalent of using a tool to open a locked briefcase that a traveler refuses to unlock for inspection. The only pieces of data from the phone that were made available by the filter team for a border search at DFW Airport were the phone's chats/messages, call logs, contents, and images/videos. (ROA.1145, 1156, 1174.) And these are the sort of everyday items that are readily accessible on an (unlocked) phone without specialized tools or techniques when operating the phone in the same manner that a user would, such that their search is considered routine under applicable caselaw. *See*, *e.g.*, *United States v. Almadaoji*, 567 F. Supp. 3d 834, 839–40 (S.D. Ohio 2021).

In fact, when Cannon first asked to search Malik's phone, his stated intention at that time was merely to conduct a "basic" search (using the terminology in CBP's electronic border-search directive, which roughly corresponds to a routine search as described in caselaw). (ROA.1124, 1291, 1327.) And the scope of the search he ultimately conducted several months later—after the intervening work by the lab and filter team to place the data in accessible form and screen out privileged items—did not differ in any material way from that kind of search. Cannon did not perform any search of or for things like hidden or password-protected files, deleted material, cached images from websites, or other similar materials that would not be immediately apparent and available on a phone in normal use, (*see* ROA.1145, 1156, 1174), so as to constitute the kind of search that some courts have considered "forensic" (as opposed to "manual") and therefore nonroutine. *See, e.g.*, *United States v. Aigbekaen*, 943 F.3d 713, 718 n.2 (4th Cir. 2019). Several courts have recognized that a software-assisted search of an electronic device still qualifies as a "manual" search (rather than "forensic") where, as here, specialized software or tools were used for an operational reason but the search itself was limited to information that would have otherwise been accessible to a user examining the electronic device in his or her own hands. *See, e.g.*, *United States v. Lopez*, No. 13-CR-2092, 2016 WL 7370030, at *4 (S.D. Cal. Dec. 20, 2016)

(use of Cellebrite device); *United States v. Smasal*, No. 15-CR-85, 2015 WL 4622246, at *4, *8 (D. Minn. June 19, 2015) (use of Linux Bootdisc tool). In both substance and form, then, the border search of Malik's phone that ultimately occurred was in the nature of a routine search, such that no showing of reasonable suspicion (or anything else) was required.[11]

(3) Even assuming reasonable suspicion were required, the district court correctly concluded that this low threshold was satisfied.

Under this Court's precedent, the highest level of suspicion possibly required for any nonroutine border search would be reasonable suspicion. As explained in *Molina-Isidoro*, "routine border searches may be conducted without any suspicion," and "[s]o-called 'nonroutine' searches need only reasonable suspicion, not the higher threshold of probable cause." *Molina-Isidoro*, 884 F.3d at 291. Thus, even if it were assumed that some heightened level of suspicion were required before CBP could perform a border search of Malik's phone, that standard would at most be reasonable suspicion.

Reasonable suspicion is a "low threshold." *United States v. Castillo*, 804

[11] Similarly, once Malik asserted that privileged material was on the phone, it was reasonable for CBP to conduct a filter review for the purpose of providing only a limited subset of data determined to be non-privileged to the searching officer, and this process did not thereby transform the search into a nonroutine one. *Cf. United States v. Jarman*, 847 F.3d 259, 266 (5th Cir. 2017) (explaining, in the context of a non-border search of electronic data seized from an attorney, that "[c]ourts have recognized that, in such circumstances, it is appropriate to screen privileged information").

F.3d 361, 367 (5th Cir. 2015) (citing *United States v. Sokolow*, 409 U.S. 1, 7 (1989)). All that is required is "some minimal level of objective justification that consists of more than inchoate or unparticularized suspicion or hunch." *United States v. Smith*, 273 F.3d 629, 633–34 (5th Cir. 2001) (internal quotation marks and citation omitted). This standard is "considerably easier for the government to establish than probable cause." *United States v. Tellez*, 11 F.3d 530, 532 (5th Cir. 1993); *see also, e.g.*, *United States v. Mackey*, 734 F. App'x 227, 231–32 (5th Cir. 2018) (finding reasonable suspicion that two drivers were traveling with a third, in whose vehicle undocumented aliens were found, where all three drivers arrived nearly contemporaneously with each other at the border, no vehicles arrived between them, and all three vehicles were sedans); *United States v. Roberts*, 274 F.3d 1007, 1015–16 (5th Cir. 2001) (finding reasonable suspicion to search luggage where agents were notified that a person would likely be traveling with child pornography).

The district court correctly determined that the reasonable-suspicion standard was easily surpassed here, and "for two independent reasons." (ROA.535.) The first was the facts arising from the government's ongoing "investigation into an international arms dealer with known ties to the Dallas area." (ROA.536.) As discussed previously, in the course of investigating this arms dealer, CBP became aware that multiple business entities associated with

the arms dealer's name were linked to the address of Malik's office and also that Malik's mother was associated with some of those businesses. (*See* pp. 4–7, *supra*; *see also* ROA.1126–27, 1149.) These facts gave rise to "more than inchoate or unparticularized suspicion or hunch" of some possible connection between Malik and the arms dealer, and thus alone justified searching Malik's phone.[12] *See Smith*, 273 F.3d at 634 (internal quotation marks and citation omitted).

But the possible connection to international arms dealing was not the only relevant fact known to CBP. As the district court noted, there was a second independent basis for the search arising from "information discovered during the Government's interview with Mr. Malik's brother—who Mr. Malik was traveling with and hosting in the United States." (ROA.536.) At the time Malik arrived at DFW Airport, he was traveling with his noncitizen brother. (ROA.1127, 1287, 1300.) And in the course of interviewing the brother and searching his phone, CBP discovered several concerning items on the brother's phone, including items showing possible affiliation with the Pakistani military and/or ISI (which is a foreign intelligence service), images of dead bodies, and

[12] One of CBP's primary responsibilities, of course, is enforcing the import and export laws of the United States, which include numerous provisions restricting and governing international arms trafficking. *See, e.g.*, 22 U.S.C. § 2778 (control of arms exports and imports); 19 C.F.R. § 161.2(a)(1) (noting laws enforced by CBP relating to arms).

materials relating to a cleric potentially associated with radical elements. (ROA.1128; *see also* ROA.1149, 1152.) In addition, there were discrepancies in the information provided in Malik's prior passport applications regarding such things as his parents' names and the place of his own birth. (ROA.1127.) All of these facts provided additional, reasonable grounds for CBP to want to search Malik's phone, particularly given that Malik was traveling with his brother and would be hosting him while in the United States. The materials discovered on the brother's phone raised obvious national-security concerns, including with respect to the possibility that the brother might be intending to operate or act on behalf of a foreign intelligence service while in the United States, potentially with Malik's assistance (whether knowingly or not).[13] (*See* ROA.1149 (CBP report about Malik's inspection, referencing the need to "determine [] degree of affiliation with [the arms dealer under investigation] and with any foreign intelligence representatives from the ISI of Pakistan or other intelligence entities").)

Malik, for his part, fails to show any error in the district court's determination that CBP had reasonable suspicion for the phone search:

[13] Another primary duty of CBP is regulating the entry of foreigners into the country, and the presence of a possible foreign intelligence agent at the U.S. border seeking entry obviously implicates that responsibility and the criminal laws. *See, e.g.*, 18 U.S.C. § 951 (making it unlawful to act in the United States as an agent of a foreign government without prior notification to the Attorney General).

He first suggests, at various places in his brief, that CBP had already determined that the subject of its arms-dealing investigation was a client of Malik's law firm—with an implication that the district court should have therefore found that the phone search was performed solely to gather attorney-client information. (*E.g.*, Br. at 5, 16, 21.) But the record does not support these claims; in fact, it shows just the opposite. As explained by CBP Officer Cannon during his deposition, CBP "wanted to talk to Mr. Malik . . . to determine if he knew . . . the arms dealer" whom CBP was investigating, based on the publicly-available information showing that businesses associated with the arms dealer's name were linked to Malik's office address and that Malik's mother was associated with some of these businesses. (ROA.1331.) There is no evidence that CBP had already concluded that the arms dealer (or anyone else) was a client of Malik's law firm, much less that CBP targeted Malik for this reason as part of some impermissible attempt to intrude on the attorney-client privilege. (ROA.1286.)

To the contrary, when Malik first made reference to the attorney-client privilege in his interview with Cannon, Cannon's response made clear that he was not already operating under an assumption that the arms dealer CBP was investigating was Malik's client. (ROA.1325.) Cannon instead attempted to ascertain whether Malik was meaning to indicate that he had a client by the

arms dealer's name, stating, "I assume that means he's your client if you're saying it's attorney-client privilege"—which is not consistent with the notion that CBP had already concluded that there was some attorney-client relationship. (ROA.1325.) Malik also had at least one non-law-firm business (a software company). (ROA.1285) In addition, Malik's mother—who is not contended to be a lawyer—was associated in public filings with some of the companies that the arms dealer's name was linked to. (ROA.1127.) These considerations made it just as likely that any possible connection between Malik and the arms dealer was not necessarily associated with Malik's work as an attorney, but rather with other non-lawyer business interests of his and/or family ties.

Malik also argues that CBP's only reason for the search was in connection with its investigation of the arms dealer, and that the separate information developed about Malik's brother at the time he and Malik arrived together at DFW Airport was irrelevant. (Br. at 5 n.1, 22.) But in support of this argument, Malik relied on deposition testimony from a CBP supervisor who was not on site at DFW Airport at the time of Malik's and the brother's arrival, and was only briefly consulted over the phone. (ROA.1374–75.) Malik argued that this supervisor's testimony showed that the information developed from Malik's brother was irrelevant to the decision to search Malik's

phone. (ROA.1374–75.) However, the full context of the relevant deposition passage shows that the supervisor was being asked questions about the earlier decision by CBP (by Cannon, specifically) to place the 1-day lookout on Malik, which occurred prior to Malik's arrival at DFW Airport and prior to the development of any information from the brother. (*See* ROA.1473 (set-up question to the supervisor, asking "Was any of that a basis for the lookout or anything that went out for him?").) The information about what was on Malik's brother's phone was of course unknown to CBP at the time the lookout was created, and thus did not play any role in that, but once that information was developed, it plainly did provide (additional) reasonable suspicion for searching Malik's phone.

Regardless, even if it were assumed that the off-site supervisor personally did not view as determinative the information about Malik's brother, that would not matter. "[A]n officer's subjective motivations are irrelevant" to determining reasonable suspicion, *United States v. Lopez-Moreno*, 420 F.3d 420, 432 (5th Cir. 2005), and the supervisor in question was not on the scene at DFW Airport at the time of Malik's inspection and was not the CBP officer who actually detained the phone for a search. That was a different supervisor—Supervisory CBP Officer Aaron Sullivan—and Sullivan was aware of the information that had been developed from Malik's brother.

(ROA.1128.) As the district court explained, "the 'totality of the circumstances' of the information known by the Government *at the time of the search* . . . [was] more than sufficient to give rise to reasonable, particularized suspicion." (ROA.536.)

* * * * *

To sum up, the district court correctly identified and applied the relevant precedents when assessing the lawfulness of CBP's search of Malik's phone, and Malik shows no basis for disturbing the grant of summary judgment in the government's favor.

C. Malik's other contrary arguments are unavailing.

In addition to contesting the existence of reasonable suspicion, Malik offers several other arguments for reversing the district court's judgment—but as explained below, none succeeds.

(1) The district court adequately explained itself and its decision is not subject to vacatur as "unreviewable."

Malik argues that the district court's decision is "unreviewable," as another district court's decision was found to be in a 1986 decision of this Court known as *Isquith*. (Br. at 19–26 (citing *Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186 (5th Cir. 1988)).) But there is no parallel between *Isquith* and the district court's decision here.

In *Isquith*, the plaintiffs had filed a wide-ranging securities fraud action alleging that over forty different securities disclosures made by a power company across a fifteen-year period failed to properly inform investors of risks associated with the company's projected future business operations including the planned construction of new nuclear power plants costing hundreds of millions of dollars. *Isquith*, 847 F.2d at 209, 211. The district court granted summary judgment against all of the plaintiffs' claims in a four-page order relying on a cursory conclusion that no reasonable investor could have found the disclosures misleading when viewed "as a whole." *Id.* at 210. On appeal, though, this Court noted that the district court never actually had the "whole" of any of the relevant disclosures before it, because the defendants had placed only selected excerpts from certain disclosures into the record. *Id*. Expressing confusion about how the *Isquith* district court could possibly have reached any conclusion about the adequacy of the disclosures "as a whole" without actually seeing them (and thus questioning how appellate review could occur), this Court stated that it would not attempt to review the entirety of the disclosures in the first instance, but rather would remand for "further development." *Id.* at 211.

The district court's ruling in this case is in no way similar to the decision found insufficient in *Isquith*. Malik first argues that the district court "failed to

explain what reasonable suspicion standard it applied," (Br. at 21), but the record belies this claim. The district court correctly explained, citing precedents of this Court, that "[r]easonable suspicion is a 'low threshold'" that requires only "'some minimal level of objective justification that consists of more than inchoate or unparticularlized suspicion or hunch.'" (ROA.535 (quoting *Castillo*, 804 F.3d at 367, and *Smith*, 273 F.3d at 633–34).) The district court then went on to identify exactly what considerations it viewed as giving rise to reasonable suspicion in Malik's case, identifying "two independent reasons": (1) the possible connection with the arms dealer with ties to Dallas whom CBP was investigating, and (2) the information developed from Malik's brother at the time he arrived at DFW Airport with Malik. (ROA.536.) Unlike the situation in *Isquith*, this Court can easily understand and review the district court's determination in this regard, and also unlike in *Isquith* (where the full securities disclosures at issue were not even in the record), Malik does not identify any specific document or information that he claims was not in front of the district court but that would have been necessary to its decision.

Malik further faults the district court for stating in a footnote that to the extent Malik was challenging the length of time that the search took or CBP's handling of attorney-client privilege issues, the district court found that the

government's actions were reasonable. (Br. at 21.) But again, the record readily discloses the basis for the district court's decision and its rationale. The facts of how long it took for CBP to access the data on Malik's phone and complete a filter review, as well as of the composition of the filter team itself, were undisputed. (ROA.1174.) And the reasoning of the district court's conclusion was made clear by the multiple cases it cited (some with explanatory parentheticals added) in support of its explanation that CBP's actions were reasonable. (ROA.536 n.8.)

Notably, one of these cases that the district court identified, *Jarman*, involved a challenge to the government's use of a filter team to review data obtained from a lawyer's electronic devices. (*See* ROA.536 n.8 (citing *United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017)).) This Court upheld the government's actions in *Jarman*—even though the filter process took eight months (far longer than in Malik's case)—and noted that the process was "designed to protect [the lawyer's] clients' privileged information." *Jarman*, 847 F.3d at 266. By citing *Jarman*, the district court made clear its rationale for finding CBP's actions reasonable in Malik's case: the government may use filter teams to facilitate the review of potentially privileged data, and this Court's precedent recognizes that this process can take time.

As explained elsewhere in this brief, CBP was not able to immediately review the data on Malik's phone for two separate reasons, because the phone locked and because Malik had asserted that privileged material was on the phone. In light of these circumstances, CBP sent the phone to a lab to gain access to the phone's contents, and then used a filter review process. (*See* pp. 10–13, *supra*.) These procedures were in line with the requirements of CBP's electronic border-search directive, (ROA.1113–16), and Malik identifies no precedent showing them to have been unreasonable or otherwise in violation of his rights. Malik instead asserts, without citation to any authority or record evidence, that the use of CBP personnel for the filter team reflected a "biased and unethical composition." (Br. at 23.) But filter teams (also sometimes referred to as "taint teams") are customarily composed of other government employees who (as occurred here) are kept screened from the investigating officials. *See, e.g.*, *Jarman*, 847 F.3d at 263 (noting that the filter team in that case consisted of a DOJ attorney and an FBI computer expert).

Malik also briefly asserts that there were "two-hours of confidential information automatically downloaded to" his phone after it had been detained by CBP. (Br. at 22.) Malik does not cite anything in the record for this assertion, but he appears to be referring to the timing of when the phone was powered off on the night of January 3, 2021, at approximately 9:45 p.m.

(ROA.1123.) It is undisputed that Malik's phone remained connected to the network until it was powered off at that time, but Malik never identified any specific substantive "confidential" content (e.g., a text message or email) that he claims was downloaded onto the phone during this time, nor has he ever cited any authority showing that the timing of when CBP powered off the phone was legally improper. This undeveloped claim does not support any relief on appeal. *See, e.g.*, *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 601 (5th Cir. 2016) (no right to relief when the appellant fails to "offer any supporting argument or citation to authority").

* * * * *

In the end, Malik identifies no error or basis for reversal with his arguments about the reasonableness of CBP's actions. And contrary to his claim that the district court's decision is somehow "unreviewable," there is no impediment to this Court's ability to review—and affirm—that decision at this time.

(2) Malik misunderstands the nature of CBP's electronic border-search directive.

Malik also argues (Br. at 33–35) that a border search can only be authorized by "federal regulation," and that CBP's electronic-border search directive does not constitute a regulation, thus rendering the search of his phone unlawful. But this argument misapprehends the nature of the directive,

which is not the *source* of CBP's authority to conduct border searches of electronic devices. CBP possessed that authority already, long before the directive was promulgated—as the directive itself notes. (*See* ROA.1111 (discussing the "plenary authority of the Federal Government to conduct searches and inspections of persons and merchandise crossing our nation's borders")). Confirmatory of this is the fact that the government regularly conducted electronic border searches prior to issuance of the directive in 2018. *See, e.g.*, *United States v. McAuley*, 563 F. Supp. 2d 672 (W.D. Tex. 2008). In short, the directive did not somehow create CBP's electronic border-search authority so as to necessitate that it be promulgated as a "regulation" in the way that Malik suggests.

(3) No warrant was required.

Another argument advanced by Malik is that CBP was required to obtain a warrant (or have probable cause) to search his phone. (Br. at 36–39.) But "no decision of the Supreme Court or of the Fifth Circuit imposes such requirements in the context of border searches." *Anibowei*, 2020 WL 208818, at *3. And in *Molina-Isidoro*, this Court considered whether a warrant must be obtained for electronic border searches (particularly in light of the Supreme

Court's relatively recent decision in *Riley*[14]), but declined to impose such a requirement and found it "telling that no post-*Riley* decision . . . has required a warrant for a border search of an electronic device." *See Molina-Isidoro*, 884 F.3d at 292. Indeed, Malik effectively concedes that existing precedent does not support a warrant requirement, by asserting that "Court intervention is required here" to create such a rule. (Br. at 37.) However, Malik offers no sound reasoning or authority in support of this new result, and the Court should decline Malik's invitation to change course from existing precedent in such a drastic manner. Additionally, although Malik briefly asserts in connection with this argument that there was "downloading of confidential information from remote servers," (Br. at 37), he cites no record evidence for this, or any relevant legal authority, and as discussed above, this claim is wholly undeveloped and does not support any relief. (*See* pp. 47–48, *supra*.)

(4) No issues of material fact precluded the entry of summary judgment.

In the final section of his brief, Malik contends that "disputed issues of material fact remain" that precluded summary judgment. (Br. at 53.) But in support of this claim Malik primarily offers only legal arguments, and does not

[14] *See Riley v. California*, 573 U.S. 373 (2014) (requiring a warrant for the (non-border) search of a cell phone incident to arrest).

identify any specific material fact issue that would require remand for a trial. For example, Malik asserts that the district court "incorrectly describes this Court's precedent decision on the Fourth Amendment." (Br. at 54.) That is not a fact issue—and Malik is in any event mistaken because the district court's explanation of the relevant border-search precedents was faithful to this Court's and the Supreme Court's caselaw.

Malik also complains that he was "not allowed input into either the filter team composition or protocol." (Br. at 57.) But no record citation is provided for this assertion and the record evidence actually shows the opposite—an email attached to Malik's own complaint filed in the district court shows that CBP had reached out to Malik to invite him to participate in the filter process by providing information that would facilitate the filter review to screen out potentially privileged information. (ROA.52.) Malik declined to do so. (ROA.1297.) And regardless, Malik's argument about whether he had the opportunity for "input" into the filter team is legally irrelevant, because Malik does not identify any authority showing that absent such unspecified input, the filter team would have been deficient. It was not.

2. The district court did not abuse its discretion in denying Malik's motion to modify the scheduling order.

Standard of Review

The district court's ruling on a motion to modify the scheduling order is reviewed for abuse of discretion. *Reliance Ins. Co. v. La. Land & Expl. Co.*, 110 F.3d 253, 257 (5th Cir. 1997).

Discussion

Malik argues that the district court should have granted his motion to modify the scheduling order after discovery had already closed and the parties had filed cross-motions for summary judgment. (Br. at 46–53; *see also* ROA.439.) The reason Malik gave for this request was a purported need to allow a new, second discovery period of at least 90 days to take discovery on "[i]ssues raised" in a March 2022 letter from U.S. Senator Ron Wyden to the Inspector General of the U.S. Department of Homeland Security (DHS). (ROA.439.)

In the letter, Senator Wyden asserted that a federal agency known as Homeland Security Investigations (HSI)—which is a division within the DHS component U.S. Immigration and Customs Enforcement, and is not a party to this case—had used its "customs summons" authority under 19 U.S.C. § 1509 (essentially a form of administrative subpoena) to obtain data from Western Union and another company about certain wire transfers to or from the

Southwest border states and Mexico. (ROA.949.) This wire-transfer data was stored at an entity known as the Transaction Record Analysis Center (TRAC) that had been created as part of the settlement of earlier money laundering allegations against Western Union, to facilitate law-enforcement access to wire-transfer data. (ROA.949; *see also* Br. at 8 (referring to this database as "nongovernmental servers").) Malik argued that if he had known of the "issues raised by the Wyden letter" earlier, he would have "questioned Defendants as to whether [Malik's] data was scooped-up in a bulk gathering operation," and therefore a modification of the scheduling order was necessary to allow for more discovery. (ROA.442.)

The district court did not abuse its discretion in denying Malik's request. As Malik concedes, the standard employed to review this sort of docket-management determination is exceedingly deferential—there must be "'unusual circumstances showing a clear abuse'" by the district court. (Br. at 47 (quoting *Alabbasi v. Whitley*, No. 21-20070, 2022 WL 101975, at *4 (5th Cir. Jan. 11, 2022)).) No such abuse is shown here, for several reasons.

First, Senator Wyden's letter was of no relevance to the case: there was no mention of wire transfers in Malik's complaint, nor of customs summonses or the storage of wire-transfer data. (ROA.10.) The complaint also nowhere alleged that Malik or his law firm made or received wire transfers of the type

noted in Senator Wyden's letter (e.g., wire transfers of over $500 to or from Mexico), nor did it detail any interactions whatsoever between Malik (or his law firm) and HSI. (ROA.10.) Instead, the factual basis of the case was the discrete January 2021 interaction Malik had at DFW Airport with CBP—a separate agency from HSI within DHS—that resulted in the detention and border search of Malik's phone, and Malik never identified any evidence showing that data from border searches has been obtained using customs summonses or stored with the wire-transfer data apparently housed at TRAC. Thus, there was no valid reason to modify the scheduling order based on an irrelevant letter involving a different federal agency's use of customs summonses to obtain wire-transfer data.

Second, although Malik sought to modify the scheduling order to conduct discovery about the Wyden letter, he never sought leave to file an amended complaint to raise any actual claims about HSI's collection of wire-transfer data. Without such a pleading on file, Malik's proposed new discovery failed to satisfy the most basic requirement of the federal rules, that the discovery be "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Malik had conceded in his motion that the wire-transfer matter was "a completely new issue." (ROA.448.) There was thus no basis to take discovery on something that was

not encompassed by the existing pleadings or even any proposed amendment.

Third, the requested new period of discovery would have led to substantial delays in the resolution of the case. The parties had already completed discovery and filed cross-motions for summary judgment when Malik moved to modify the scheduling order. (ROA.5, 118.) Malik's newly raised concerns about HSI's use of customs summonses in connection with wire-transfer data, if allowed to form the basis for a new discovery period, would have represented "essentially a new lawsuit with new claims against the Defendants, and would require Defendants to start over with regard to discovery and other procedural matters." *See Todd v. Grayson Cty., Tex.*, No. 4:13-CV-574, 2014 WL 3385188, at *2 (E.D. Tex. July 10, 2014).

This Court considers four factors to determine if good cause exists to modify a scheduling order to allow additional discovery: "(1) the explanation for the failure to complete discovery on time; (2) the importance of the modification; (3) potential prejudice in allowing the modification; and (4) the availability of a continuance to cure such prejudice." *Abboud v. Agentra, LLC*, No. 3:19-CV-120-X, 2020 WL 5526557, at *1 (N.D. Tex. Sept. 14, 2020) (citing *Reliance*, 110 F.3d at 257). In addition, a bedrock rule of civil procedure is that any discovery must be relevant to some party's claim or defense in the case. Fed. R. Civ. P. 26(b)(1). Relevance is determined by what is alleged in

the pleadings, *see* Fed. R. Civ. P. 7, and where nothing in Malik's complaint related to customs summonses or wire transfers, there was no basis for taking discovery on this matter or justification for a modification of the scheduling order. The government, having already completed discovery and moved for summary judgment, would also have been prejudiced by any further delay, and the district court was not required to disrupt its own busy docket by granting a continuance. For all these reasons, Malik fails to show any basis for reversing the district court's ruling on his motion to modify the scheduling order.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8600
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov

Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2023, this document was served on appellants by transmission to their counsel of record through the Court's electronic filing system, and

I further certify that (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

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/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney